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## Columbia FDI Perspectives

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### **High time for government action to make the OECD Guidelines a force for sustainable FDI\***

by

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In the *Perspective* dated February 26, 2018, Roel Nieuwenkamp argued that the [OECD Guidelines for Multinational Enterprises](#)' system of National Contact Points (NCPs)—an international grievance and remedy mechanism elaborated upon in the Procedural Guidance attached to the Guidelines—can help ensure that FDI is responsible and contributes to sustainable development. He correctly observed that further government efforts are needed for NCPs to achieve their potential. He did not reveal how far we are from that goal.

The OECD reports that, from 2011 to 2016, half of the complaints accepted by NCPs that reached closure did so on the basis of agreement between the parties. However, this statistic excludes more than 75% of the cases filed during that period that were either not accepted by NCPs or had not closed, as NCPs let them continue for years beyond the recommended timeframes.<sup>1</sup> Critically, many rejections were unjustified. Indeed, OECD Watch recently filed the first-ever complaint with the OECD against the Australian NCP for improperly rejecting a case.<sup>2</sup> Even among the 48% of cases NCPs accepted during that period, companies prevented resolution in over half simply by refusing to mediate. Thus, fewer than 20% of the cases submitted to NCPs during that period reached agreement or another positive outcome.<sup>3</sup>

Non-judicial grievance mechanisms such as the NCPs are a vital component of the remedy system. Non-judicial grievance mechanisms embrace challenges inaccessible to courts.<sup>4</sup> NCPs are not equipped to handle some cases, such as those involving grave human rights violations for which an international binding framework is necessary. Yet, NCPs can and should facilitate access to remedy—including damages, injunctions and cessation of harm—for numerous other human rights and environmental abuses. Unfortunately, OECD Watch's analysis since 2000 shows that, without serious reforms, most NCPs will remain inadequate mechanisms for facilitating access to remedy for victims of corporate misconduct.

The most critical shortcomings concern accessibility. Low visibility prevents victims from knowing that NCPs exist, or how to use them.<sup>5</sup> High burdens of proof—such as a “proven” standard applied by the Mexican NCP—exclude complainants.<sup>6</sup> NCPs like the Irish, Australian and Brazilian have violated timelines for processing cases by letting them stagnate years past the three-month indicative limit for completing initial assessments. In other NCPs, language requirements, paired with reluctance to fund translation services, bar indigent complainants.

Second, poor organizational structures and transparency practices at many NCPs discourage impartial decision-making. NCPs housed in one government agency—sometimes tasked with investment promotion—or operated by a single person suffer risk of (perceived) bias or incapacity. In contrast, 77% of cases having a remedy-related outcome were achieved by the few NCPs composed either of a panel of independent experts, a multipartite organization with participants from non-governmental stakeholders, or an entity overseen by a steering board.<sup>7</sup> Further, some NCPs’ transparency rules appear to favor companies. Several NCPs, including the Finnish, have based final statements on material only available to companies. Meanwhile, civil society complainants and businesses agree that, when NCPs permit campaigns about complaints, companies are encouraged to mediate.

Third, governments must ensure NCPs adopt safety protocols. Community members and human rights defenders increasingly report harassment for filing NCP complaints.

Additionally, more NCPs must issue determinations of non-compliance with the Guidelines, and more governments must apply consequences for non-participation in the process, as a means to promote adherence with the Guidelines. Companies have reported that the threat of a determination encourages them to reach their own solution through mediation. OECD Watch found that 71% of cases filed by NGOs and communities since 2000 were facilitated by NCPs that make determinations. And while some NCPs, like that of the US, simply reject cases when companies refuse to mediate, others (like the Canadian NCP) assign consequences, e.g., by denying the company trade-promotion benefits. Finally, more NCPs should monitor whether parties implement the recommendations they receive.

These reforms should not only be implemented by individual NCPs, but also embedded in revised Procedural Guidance for the Guidelines. Moreover, developing countries that increasingly undertake outward FDI and consider acceding to the OECD need to meet these best practices if they do. The NCPs of several new OECD adherents and members (Argentina, Colombia, Mexico, Peru) are under-resourced and do not meet their mandate for effectiveness. Cementing these best practices within the Procedural Guidance will ensure a level playing field in access to remedy for all adherent and member states.

Until these reforms are adopted, governments will have failed their obligation under the Guidelines to establish visible, accessible, transparent, and accountable NCPs that facilitate access to remedy for victims of corporate misconduct.

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<sup>1</sup> *OECD Watch Report*, op. cit., p. 13.

<sup>2</sup> OECD Watch, *Human Rights Law Centre and Raid vs. G4S*, Substantiated submission regarding the Australian National Contact Point’s failure to fulfill its responsibilities in a specific instance, 27 November 2017, at [https://www.oecdwatch.org/cases/Case\\_342](https://www.oecdwatch.org/cases/Case_342).

<sup>3</sup> *OECD Watch Report*, op. cit., pp. 13, 19.

<sup>4</sup> OECD Watch, “Introduction to remedy”. Panel at the 6<sup>th</sup> UN Forum on BHR, December 4, 2017.

<sup>5</sup> OECD Watch, “Our campaign demands,” *Annual NCP Reviews* (Amsterdam: OECD Watch, 2017), p. 3.

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<sup>6</sup> *OECD Watch Report*, op. cit., p. 25.

<sup>7</sup> *OECD Watch Report*, op. cit., p. 35.

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