

Performance of National Contact Points and the implementation of the OECD Guidelines in the 2012-2013 implementation cycle

OECD Watch submission to the 2013 Annual Meeting of the National Contact Points

1. Introduction

OECD Watch welcomes the opportunity to make a submission to the 14th Annual Meeting of National Contact Points 2013. Each year in preparation for the Annual Meeting of National Contact Points (NCPs) in June, OECD Watch reviews, evaluates, and analyses the functioning of NCPs and their effectiveness in implementing the OECD Guidelines and enhancing responsible business conduct. This evaluation is based on a thorough survey among OECD Watch's 90 member organisations and a number of other civil society organizations from around the globe who have engaged with NCPs and used the Guidelines in an effort to improve corporate practices.¹ This review summarises and analyses the experiences reported by those organisations and has as its aim to highlight key issues for achieving effective implementation of the Guidelines and ensuring that they genuinely and substantially contribute to improving corporate behaviour. Based on the analysis, the review provides concrete recommendations for improving NCP performance and overall implementation of the Guidelines. This year's submission addresses the following points:

- ◉ NCP performance
 - NCP structures and stakeholders
 - NCP Performance in handling specific instances, including 1) predictability, 2) timeliness, 3) equitability, 4) accessibility, 5) compatibility with the Guidelines and 6) NCP cooperation
 - Initial assessments, including 1) increasing acceptance of cases related to due diligence and business relationships, 2) rejection of cases in which successful mediation is unlikely, and 3) level of proof required for accepting cases
- ◉ Priorities for the 2013-2014 Implementation Cycle of the Guidelines
 - NCPs that have not done so should start restructuring processes to ensure impartiality
 - Importance of following up agreements and final statements
 - Continued and increasing attention to human rights and meaningful stakeholder engagement in the extractive sector
 - Continued and increasing attention to the role of the financial sector
 - NCPs should be problem solvers not just facilitators of mediation

This year's review is also partly based on special reports and analysis published separately by individual OECD Watch members. These documents, which are included as annexes to this submission, contain a number of annexes consisting of special reports from individual OECD Watch members containing expanded analysis of NCP functioning and OECD Guidelines implementation in various specific instances. These can be viewed and downloaded on the [OECD Watch website](#) or downloaded directly by clicking on the following hyperlinks:

- ◉ Annex 1: [Accountability Counsel's analysis of the Dutch NCP's rejection of the Shell Sakhalin case](#)
- ◉ Annex 2: [ECCHR's analysis of the impact of the Uzbek cotton trader cases "Forced Labor of Children and Adults in Uzbekistan: How Effective is the OECD Complaint Mechanism?"](#)
- ◉ Annex 3: [ForUM follow-up study on "Mainstream / Cermaq's progress in contributing to sustainable salmon aquaculture in Chile"](#)

¹ This year, OECD Watch received responses and input from 42 members and other civil society organisations.

- Annex 4: [Amnesty International UK's Briefing for the UK NCP on Human Rights Implementation of the OECD Guidelines](#)
- Annex 5: [Nidera, CEDHA, SOMO, Oxfam Novib and INCASUR's report "One year after the Agreement"](#)

2. NCP performance

○ **NCP structures and stakeholders**

A number of NCPs were restructured or were in the process of being restructured during the 2012-2013 implementation period. OECD Watch received mixed reports on the outcomes of these restructuring processes, many of which include the establishment of a stakeholder advisory board or oversight body.

- *The Danish NCP* has been strengthened and restructured into a new Mediation and Complaints Mechanism. OECD Watch welcomes the move, which involved the Danish Parliament passing legislation in June 2012 to create the independent body with five members from different stakeholder backgrounds. The new body's mandate includes undertaking investigation of potential Guidelines breaches on its own initiative and making a determination regarding breaches of the Guidelines in specific instances. Complaints can also be filed against public authorities and investors not acting in accordance with the OECD Guidelines.
- *The Spanish NCP* is in the process of restructuring, including establishing an advisory board with unions and NGOs. The NCP itself will be a multi-departmental body hosted by the Ministry of Industry, Tourism and Trade. The advisory board will consist of two members each from the business community, labour unions, and NGOs. The two NGO members that have been invited are the Observatorio de la Responsabilidad Social Corporativa and Transparency International Spain. The advisory board will not have voting rights in NCP decision-making.
- *The Australian NCP* has made some welcome improvements to its structure. In particular this includes the establishment of an Oversight Committee. The Oversight Committee will be chaired by the NCP and will include representatives of other government departments, as well as the Export Finance and Insurance Corporation, the Australian Trade Commission (Austrade) and AusAID. While this move represents progress towards a more transparent and accountable NCP structure, it is disappointing that recommendations to include representatives from civil society with specific expertise were not heeded. A welcome aspect of the Oversight Committee is its capacity to review specific instance processes. Parties who feel that they have not been treated fairly by the NCP may request a review.
- *The Austrian NCP* has been restructured and its Terms of Reference includes a number of promising elements, including a willingness to accept cases in which there is any sort of link to Austria, an indicative six-week initial assessment phase, a commitment not to reject cases simply because of the existence of parallel proceedings, fact-finding through embassies, and the creation of a Steering Board with the participation of five different government departments and balanced stakeholder representation (two from labour, three industry, one NGO and one international law/mediation expert). The Steering Board will be informed about and provide advice on the NCP's handling of specific instances. Despite these positive elements, Austrian civil society organisations are disappointed that the Austrian NCP's Steering Board has not been given the mandate to review cases in which one of the parties feels that the NCP did not follow the correct procedures in handling the case. This is a key feature of the UK NCP's Steering Board and one that has been taken up by the Australian NCP (see above).

- *The Swiss NCP* has set up a multi-stakeholder advisory board, but Swiss civil society organisations are disappointed that the restructuring did not go as far as reforms by NCPs in other countries. Despite recommendations from civil society, the reforms did little to make the NCP more independent, nor was the advisory board given any sort of supervisory/oversight role. The NGO and union members of the advisory board are participating under the understanding that they may withdraw their participation if their concerns are not taken seriously or if they feel their participation is simply being used to legitimise the NCP.
- The *UK NCP* is considering introducing changes to its procedures, which some civil society organisations fear may lead to a backtracking on some of the procedural gains from the major consultation of 2008. The proposed changes will be presented to the Steering Board for discussion before they are put into effect. There are concerns that the UK NCP is less willing to reach determinations and that since 2011, there has been downward pressure on the UK NCP to align its procedures with other NCPs rather than the UK encouraging others to improve. Nevertheless, the general assessment of the NCP is that it continues to function well, and that it is one of the more accessible and transparent NCPs. A review of the Steering Board – including its composition and role – is currently being undertaken. The mandates of all the existing external members expire in September 2013.
- *The Argentine NCP* has informally announced that the NCP has adopted a tripartite format, but no formal information has been disclosed. Argentine civil society organisations are concerned about the high frequency of turnover among NCP personnel, which has significantly diminished the NCP's effectiveness in fulfilling its duties and responsibilities, including handling specific instances.
- *The US NCP's* Stakeholder Advisory Board has begun functioning, and the NCP has improved communication and consultation with a broader stakeholder group. However, the NCP continues to demand an excessively high degree of confidentiality and silence from parties in specific instances it is handling.
- *The French NCP* has updated its operating procedures in order to better take into account the principles of visibility, accessibility, transparency and accountability. However, the reforms failed to take into account many of the recommendations for improvement made by civil society organisations and of the Commission Nationale Consultative des Droits de l'homme (CNCDH), the French national human rights institution.

◉ **NCP performance in handling specific instances**

Despite a number of successfully handled cases, the 2012-2013 implementation cycle saw a persistent lack of functional equivalence among NCPs, with many NCPs followed inconsistent and unpredictable procedures in their handling of cases – resulting in disappointing outcomes. The lack of functional equivalence among NCPs leads to a contravention of the core criteria laid out in the Procedural Guidance that NCPs' handling of specific instances be predictable.

- **Predictability** of the specific instance process stands out as a key concern in many case experiences in the 2012-3 implementation period. For example, in the case against George Forrest International concerning the unlawful demolition of houses by Compagnie Minière Sud Katanga in the DRC, the NCP handle the case according to the normal specific instance procedure, but did offer to facilitate mediation between the parties. However, there were no agreed terms of reference for the mediation, and the complainants felt that the Belgian NCP and the company had limited the scope of the issues and the remedial action to be discussed. The mediation broke down after the company made clear that it would only be willing to offer

some limited measures through its charitable foundation, but not to look at any type of compensation for the victims of the demolitions.

There is also considerable ambiguity and inconsistency (and thus a lack of predictability) among NCPs and the OECD on the question of whether and when to apply the 2000 versus the 2011 version of the OECD Guidelines. The OECD Investment Committee has said that the 2000 version officially no longer exists, and the 2000 Guidelines are no longer available on the OECD's website, effectively making it impossible for complainants to use them. However, several NCPs, including the UK and the French, have insisted that complainants refer to the 2000 version in raising specific instances about adverse impacts prior to the update. The Dutch NCP rejected the Shell Sakhalin case – which was filed in July 2012 using the updated Guidelines – noting that many of the impacts discussed in the complaint occurred prior to 2011 and faulting the complainants for “fail[ing] to substantiate how the issues raised could find a basis in the 2000 Guidelines.” The NCP insisted it could have rejected the complaint on this point, but then confusingly proceeded to assess the complaint against the 2011 OECD criteria. The NCP never gave the complainants an opportunity to explain either why the ongoing nature of harm makes the 2011 Guidelines applicable or that the abuses detailed in the complaint were equally a violation of the 2000 Guidelines. The Dutch NCP's approach in this case resulted in an opaque and unpredictable process for the complainants.

OECD Watch is of the position that complaints dealing with abuses that occurred prior to the May 2011 update of the OECD Guidelines should simply use the 2011 version of the Guidelines. It should be recognised that a few specific provisions of the 2011 Guidelines were not included in previous versions, making it illogical to accuse a company of having breached them prior to 25 May 2011. Nevertheless, if the company has not remedied a past transgression, it can be considered to be in breach of the new provisions of the 2011 Guidelines. Furthermore, with regard to human rights, the scope of the 2000 Guidelines already covered all international human rights instruments that stem from the International Bill of Rights. The added value of the new human rights chapter in the 2011 Guidelines is largely interpretive, thus making it possible to use the 2011 Guidelines to address adverse human rights impacts that occurred prior to May 2011. The Belgian NCP was thus wrong to suggest that it could not act on the George Forrest / CMSK case because the new Chapter IV was not in force at the time.

- **Timeliness:** Despite the introduction of indicative timelines for different phases of the specific instance procedure, the issue of timeliness in NCPs' handling of complaints continues to be a concern. Initial assessments frequently take far longer than the indicative three-month period. The average initial assessment of the NGO cases handled in 2012-2013 took more than six months, with some cases remaining the initial assessment phase for more than two years. Case in point is the complaint against CRH for its involvement in construction activities in the Occupied Palestine Territories, filed with the Irish and Israeli NCPs in May 2011. The initial assessment has not yet been concluded – 25 months after filing – as the NCPs seem paralysed by the company's refusal to engage in the process.
- **Equitability:** Civil society organisations continue to experience what they perceive as unequal and biased treatment from NCPs handling cases. One of the most prevalent aspects of inequitable treatment is unequal sharing of information during specific instance proceedings. Three cases that were either rejected or concluded in just the past three months suffered from this serious shortcoming. For example, in the case against Finnish consulting company Pöyry for its involvement in adverse human rights and environmental impacts in Lao PDR, the Finnish NCP gave in to the company's demands for an excessive degree of confidentiality and did not allow the complainants to see or rebut the company's response to the allegations. The NCP based part of its final statement on Pöyry's confidential response, which was never

shared with the complainants – a practice that has been deemed unacceptable by other NCPs. Recall that a similar lack of equitability led the UK NCP's Steering Board to overturn its own flawed final statement in the BP BTC case in 2011. Similarly, in the case against George Forrest concerning the unlawful demolition of houses by Compagnie Minière Sud Katanga in the DRC, the Belgian NCP did not share information provided by the company nor did it give the NGOs access to a report that it had requested from the Belgian consul in Lubumbashi. In contrast, all information and documentation provided by the complainants was shared with all parties. Finally, in the case against Shell for environmental and human rights abuses on Sakhalin Island, Russia, the Dutch NCP rejected the complaint at least partly based on information (regarding Shell's influence in the project) that was never shared with complainants nor justified or even discussed – it was simply presented as an unsubstantiated "fact".

- **Accessibility:** A troubling trend is emerging of companies forcing community representatives and advisors to remove themselves from the NCP process and, in some cases, of NCPs themselves not recognizing the important role these advisors can play. For example, in the complaint filed against Barrick Gold for human rights abuses at its Porgera Mine in Papua New Guinea, complainant MiningWatch Canada and advisors ERI and RAID had to withdraw from the NCP mediation process, at Barrick's insistence, in order to assure continuation of the process for local complainants. Similarly, in the complaint against Shell for misleading disclosure on oil spills in Nigeria, one of the complainants, Milieudefensie, had to step back from the mediation under pressure from Shell in order to facilitate the process. Finally, in the complaint against Shell for adverse human rights and environmental impacts of the Sakhalin II oil and gas project in Russia, the Dutch NCP refused the complainants' request that the NCP speak with their advisor, Accountability Counsel, regarding concerns with the draft initial assessment.

This trend undermines the accessibility of NCPs for local communities, who may rely on advisors to assist them in correcting the power imbalances that exist between corporations and communities. Ignoring the imbalance by excluding advisors can sabotage dialogue and lead to unfair results. Disproportionate education levels, language capacity and negotiation experience often allow corporations to steer a mediation process in their favour. Communities often feel intimidated by the process and at times feel more comfortable having their advisors present, available to consult with or even available to speak on their behalf during a mediation, particularly on technical matters. Although community advisors cannot entirely correct the power imbalances, their advocacy on behalf of communities can provide crucial leverage against this power imbalance, at times even allowing communities to be at the table who would otherwise feel unable to participate. NCPs should, therefore, resist company efforts to limit participation of these advisors and should, at the very least, work with such advisors when requested to do so by complainants.

- **Compatibility with the Guidelines:** Chapter I of the OECD Guidelines clearly states that all enterprises – large and small, multinational and domestic – are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant. Nevertheless, in an environmental case against TetraBOOST, a UK-based producer and distributor of an additive for leaded gasoline, the UK NCP rejected the complaint, arguing that TetraBOOST is a small company without much influence in the global market. The NCP contended that because TetraBOOST's core (and only) business involves the distribution of the controversial additive, asking the company to change its behaviour would mean that the company would cease to exist, and thus the complaint is not eligible. OECD Watch believes that the fact that a multinational enterprise is small should not exempt it from adhering to the Guidelines, nor should a company whose core business violates the Guidelines be exempted simply because observing the Guidelines would result in the company going out of business.

- **NCP Cooperation:** Differences in the interpretation of the Guidelines and lack of cooperation between NCPs have undermined the achievement of functional equivalence. The case against Korean steel company POSCO and two of its investors, that was filed simultaneously with the Dutch, Norwegian and Korean NCP provides a case in point. The rejection by the Korean NCP, whilst the Norwegian and Dutch NCPs have found the complaint merited further examination, constitutes a severe lack of functional equivalence, a key principle for the implementation of the OECD Guidelines by OECD adhering governments. The different outcomes of the initial assessments of the three NCPs seem to be caused by different interpretations of the issues to be taken into account to determine whether the issue is *bona fide* and relevant to the implementation of the Guidelines, and a bias of the Korean NCP towards the arguments put forth by POSCO.

According to paragraph 24 of the *Commentary on the Implementation Procedures of the OECD Guidelines* when issues relate to enterprises based in different adhering countries, the NCPs should consult with a view to agreeing on which NCP will take the lead in assisting the parties. In reality however, this has proven to be a challenging provision to implement, due to the lack of functional equivalence. In the case of POSCO for example, the Korean NCP issued its initial assessment after more than 8 months, and more than half a year after the Norwegian NCP's initial assessment. The contradicting initial assessments are based on the same presentation of facts regarding alleged breaches of the Guidelines by POSCO and the responsibility of investors to seek to prevent adverse impacts through their business relationships. With an indicative timeline of three months, the process would have been stalled if the Dutch and Norwegian NCPs had waited for the Korean NCP's initial assessment.

• **Initial assessments**

- **Increasing number of cases related to due diligence and business relationships:** OECD Watch is encouraged by the development that increasingly NCPs are accepting cases related to due diligence and the enterprise's responsibility throughout its supply chain and other business relationships. The US NCP accepted its first supply chain case, which involves Cambodian sugar purchased by a subsidiary of American Sugar Refining Inc. The Finnish NCP, in the case concerning Pöyry Group's involvement in social and environmental impacts of a dam in Laos, confirmed that consultant and business service companies such as Pöyry are covered by the Guidelines and have a responsibility to conduct due diligence to avoid being linked to adverse impacts caused by their clients. In the landmark cases against Dutch and Norwegian pension funds concerning their minority shareholdings in Korean steel company POSCO, the Dutch and Norwegian NCPs confirmed that minority shareholders have a responsibility to seek to prevent or mitigate an adverse impact caused by the companies in which they invest. These cases show that the responsibility to respect throughout business relationships extends beyond the 'traditional' manufacturing supply chain, but includes a wide range of business relationships throughout corporate value chains.

On the other hand, a less positive outcome was reported in the cases against UK banks involved in the Shell Sakhalin II case, which were rejected by the UK NCP. The facts of this case demonstrate a significant difficulty faced by NGOs and communities in holding financial institutions accountable. Complainants were not able to untangle the complicated financial relationship prior to filing the complaint, even when relying on assistance from experts in financial research. Due to the lack of transparency surrounding multinational lending agreement, it may be difficult, if not impossible, for affected communities to the type of evidence that the UK NCP's Initial Assessment suggests is necessary, particularly in the case of corporate loans (as opposed to project loans). This is particularly troubling given the practice of many financial institutions of avoiding project loans when financing companies

involved in particularly controversial practices, including mountain top removal and exploitation of tar sands.

- **Rejection of cases in which successful mediation is unlikely:** On the other hand, a troublesome trend that OECD Watch has observed over the past year is the rejection by NCPs of cases in which successful mediation is unlikely. As a result, it appears that NCPs are primarily looking for relatively “easy” cases that can be solved through mediation and dialogue. In Australia for example, the NCP rejected a case involving the Australian Mining Company, MRC, for alleged breaches of the Guidelines regarding their exploration activities in the Eastern Cape Region of South Africa. Despite the merits of the case, neither party was willing to participate in mediation, which was quoted as one of the reasons for rejecting the case.

OECD Watch holds the position that cases that are unlikely to be easily resolved through mediation shouldn't be rejected at the initial assessment phase. In many conflicts between workers, communities and companies, the level of distrust between the parties has grown over the course of the worsening conflict before they are brought to the NCP. In some cases, complainants state from the beginning that they do not want to mediate with the company. This is often the case in the extractives industry, where local communities for example are opposing the development of mining operations, as they expect permanent loss of their livelihoods. In such cases it is perfectly legitimate to refuse mediation as a tool to resolve the problem, and request an independent assessment and examination from the NCP of the facts and circumstances and issue its findings and recommendations. Even though such cases might not be resolved through mediation, a robust NCP statement with reasoned recommendations may have still positive effect on the case.

Thus, if companies or complainants aren't willing to mediate or if mediation is likely to be hard/unsuccessful, a case should still be accepted, if the issue is material and substantiated. If mediation fails, then the failure can be dealt with in a final statement, which can call out the parties for being unwilling to negotiate. NCPs are currently often unable or unwilling to employ tools at their disposal to encourage companies to engage.

- **Unreasonably high level of proof required for accepting cases:** Another worrying trend is that NCPs appear to be requiring an unreasonably high level of proof of corporate misdeeds before even accepting cases. In the Centerra Gold Oyu Tolgoi case in Mongolia, the Canadian NCP rejected the complaint because the complainants could not definitively prove that the water contamination was the result of Centerra's activities, even though the complainants did provide a significant amount of documentation and evidence to that effect. NCPs must realise that it is often nearly impossible to prove that type of causality, even in a court case with the benefits of discovery, scientific experts, etc. The company now uses this ruling as a determination of fact, clearing them of all wrong doing. But when the Canadian NCP allows something to go to mediation – as in the Barrick Gold Porgera PNG case – the NCP does not provide a statement about the degree to which issues were material or substantiated. Instead, the NCP goes out of its way to say that allowing a case to go to mediation is not a determination of fact. Another 2012 case in which the NCP set an unreasonably high bar for simply accepting the case was the Shell Sakhalin case. In rejecting the case, the Dutch NCP suggested that allegations of human rights violations must first be litigated in domestic or international court before being brought to the NCP.

3. Priorities for the 2013-2014 implementation cycle of the Guidelines

Ensuring proper NCP performance and functional equivalence must be the priority for 2013-2014. Given the abovementioned trends and observations related to NCP performance and the

implementation of the Guidelines, the following issues should be prioritised in the upcoming implementation cycle.

◉ ***NCPs that have not done so should start restructuring processes to ensure impartiality***

Two years after the 2011 update, there are still a large number of NCPs that are single-ministry NCPs without any form of stakeholder involvement in steering or advisory roles, without oversight or any other multi-departmental involvement. NCPs can institutionalise their NCPs in different ways, as long as the core criteria for functional equivalence are met. However, these core criteria are all too often not met, in particular by those NCPs that have not been restructured to enable them to operate in an impartial manner. As a result, many of the shortcomings experienced by civil society organisations seeking access to remedy and a resolution of their case prior to the 2011 update still persist. Without the political will to transform the NCP into a credible, independent body with the necessary means and authority to make a difference, the OECD Guidelines' potential will remain unfulfilled.

◉ ***Importance of following up on agreements and final statements***

Follow-up reports on three recent successfully-concluded OECD Guidelines cases reveals how important it is for NCPs to actively monitor the implementation and impact of agreements reached and recommendations made in NCP final statements. One case in which a follow-up investigation confirmed that the company was upholding the commitments it made as part of an OECD Guidelines procedure was the case against Nidera concerning human rights violations of temporary workers at the company's corn seed processing operations in Argentina. As part of the agreement – facilitated by the Dutch NCP – Nidera strengthened its human rights policy, formalised human rights due diligence procedures for temporary rural workers, and allowed the complainants to monitor its Argentine corn seed operations through field visits during two consecutive detasseling seasons. The complainants visited fields and campsites, interviewed workers, and photographically documented working and environmental conditions. In their report, the complainants confirmed that Nidera had complied with all of the conditions of the agreement. Workers' health and safety conditions were satisfactory, and workers themselves reported their contentment with the improved conditions. Additionally, Nidera complied with its commitment to implement an operational-level grievance mechanism and produced its first-ever corporate responsibility report in line with the GRI G3.1 Guidelines.

Despite this encouraging outcome, follow-up reports in two other successfully-concluded cases revealed a less positive picture of the implementation of commitments by the companies and the impact of the cases on local stakeholders. One such case is the 2009 complaint against the Norwegian fish farming and feed producer Cermaq. The NCP successfully mediated between the parties, and the case resulted in a 2011 agreement in which Cermaq admitted having taken insufficient account of the precautionary principle and committed to making changes to its policies and procedures to prevent fish disease in Chile and throughout the company's global operations. Approximately one year after the agreement was reached, the complainants commissioned a study to analyse the impact of the case and agreement on local communities and the environment in Chile. The study recognises that Cermaq has stated its ambition to become a leader in corporate responsibility in its sector, but concludes that Cermaq failed to change its operations in Chile accordingly. The study finds that little has been done to improve the conditions of workers, specifically women and subcontracted workers, at production facilities. Moreover, the study maintains that Cermaq has done little to improve communication with trade unions, nor has it convincingly addressed disputes with indigenous communities. There is little evidence that Cermaq conducted a thorough environmental risk assessment before expanding its operations to other areas. Two years after signing the joint statement, much remains to be done before the company can call itself a leader in corporate responsibility.

In addition, a follow-up evaluation of the 2010 Uzbek child labour cotton trading cases concluded that the submission of the cases had encouraged traders to take some steps to pressure the Uzbek government to end forced labour. However, after the cases were concluded and the media coverage decreased, the companies' commitment tailed off significantly. Despite increased respect for the ban on child labour, the 2012 cotton harvest remained marked by continued state-sponsored forced labour of children and adults. If the companies had taken a strong public position against the practice, this may have put sufficient pressure on the regime to improve the situation. The companies, however, refused to do so. The report concludes that the cessation of business relationships with the Uzbek cotton industry remains the only adequate measure to apply further pressure on the Uzbek government and ensure that European companies do not contribute to human rights violations in Uzbekistan. Interestingly, the Guidelines cases do appear to have triggered several positive responses from several leading investment banks, which are now monitoring the Uzbek forced labour situation.

More information and the full follow-up reports on all three of these cases can be found on the [OECD Watch website](#).

○ ***Continued and increasing attention to meaningful stakeholder engagement and human rights in the extractive sector***

Analysis of the [OECD Watch case database](#) reveals that the extractive sector, particularly issues related to stakeholder engagement in the extractive sector, remains a key focus of OECD Guidelines cases, and should thus be a priority for 2013-2014. As of June 2013, 85 (53%) of the 161 OECD Guidelines cases filed by communities and NGOs relate to the extractive sectors (including oil, gas, metals and other minerals, coal, and timber). All 13 of the extractives cases filed since the 2011 update dealt with human rights issues, and ten of the 13 cases addressed companies' lack of 'meaningful stakeholder engagement' in extractives projects. Six out of the thirteen cases addressed forced evictions and resettlement. Another interesting development is that in 2012 alone, five cases were filed against financial sector companies involved in extractives projects. Worryingly, eight of the 13 extractives cases filed under the 2011 Guidelines have been rejected. Only one of the 13 cases – the case against the Dutch pension fund APG/APB for its involvement in the POSCO project in India – was resolved successfully.

○ ***Continued and increasing attention to the role of the financial sector***

The financial sector is an important *driver of change* for responsible business conduct, and it is likely that an increasing number of cases will address the responsibility of the financial sector for adverse impacts through clients, shareholdings and other business relationships. The acceptance by the Dutch and Norwegian NCPs of the cases against Dutch pension fund ABP and its asset manager APG and the Norges Bank Investment Management (NBIM) managing the Norwegian Government Pension Fund Global set an important precedent for the application of the OECD Guidelines for the financial sector. OECD Watch supports the Proactive agenda on due diligence in the financial sector, and expects this initiative to result in a better understanding of the scope of responsibility of the financial sector for different types of financial relationships. Helpful clarification has been provided by the Office of the High Commissioner for Human Rights (OHCHR) on the issue of the application of the UN Guiding Principles on Business and Human Rights to minority shareholdings. It is the view of the OHCHR that the Guiding Principles apply to institutional investors holding minority shareholdings and that minority shareholdings constitute a business relationship. In other words, the UN Guiding Principles and the OECD Guidelines expect financial institutions to seek to prevent or mitigate adverse impacts that are directly linked to their operations through minority shareholdings, even if they have

not contributed to those impacts. The question therefore should no longer be whether minority shareholdings are covered under the OECD Guidelines, but about the *degree of leverage* that comes with different forms of (minority) shareholdings and other forms of financial relationships, and thus what steps can be expected from financial institutions.

 ***NCPs should be problem solvers not just facilitators of mediation***

OECD Watch calls on all NCPs to take leadership in acting as ‘problem solvers’ and use all tools available to the best of their capabilities. NCPs can contribute to ameliorating problems even if mediation fails, or if either one of the parties is not willing to enter into a mediation process. A statement by NCPs or a fact-finding mission can significantly contribute to compliance with the Guidelines in a particular case. Well-reasoned NCP statements and clear recommendations can also contribute to a broader and better understanding amongst enterprises across specific sectors and regions on what is expected from them in particular circumstances. Rejecting a case because parties are not willing to negotiate is therefore a lost opportunity to increase compliance with the Guidelines.

The mandate of the new Danish NCP provides a good example of an approach that takes into account the option of resolving cases without mediation. Mediation between parties can take place if both parties agree on it. However, if either party does not accept mediation, the institution has the mandate to investigate the facts of the case and issue a statement about whether the OECD Guidelines have been breached. The NCP also has the mandate to make recommendations to the parties involved to ensure compliance with the Guidelines. In case of serious violations the complaint and grievance mechanism has the mandate to skip mediation and go straight to investigation and subsequently issue a statement on the case.

OECD Watch is an international network of 90 civil society organisations promoting corporate accountability around the globe. OECD Watch members are united in their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their impacts around the globe. Visit our website at www.oecdwatch.org or contact us at the address below.

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