

REPRINT

CD corporate  
disputes

# NATIONAL CONTACT POINTS: A UNIQUE GRIEVANCE MECHANISM FOR RESOLVING RESPONSIBLE BUSINESS CONDUCT DISPUTES

REPRINTED FROM:  
CORPORATE DISPUTES MAGAZINE  
OCT-DEC 2020 ISSUE



[www.corporatedisputesmagazine.com](http://www.corporatedisputesmagazine.com)

Visit the website to request  
a free copy of the full e-magazine

GIBSON DUNN

Published by Financier Worldwide Ltd  
corporatedisputes@financierworldwide.com  
© 2020 Financier Worldwide Ltd. All rights reserved.

PERSPECTIVES

# NATIONAL CONTACT POINTS: A UNIQUE GRIEVANCE MECHANISM FOR RESOLVING RESPONSIBLE BUSINESS CONDUCT DISPUTES

BY **SUSY BULLOCK, ALLAN NEIL AND STEPHANIE COLLINS**

> GIBSON, DUNN & CRUTCHER UK LLP

**N**ational contact points (NCPs) are agencies established and overseen by governments in each of the 49 countries that adhere to the 2011 'Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises' (Guidelines). The Guidelines comprise a set of non-binding principles and standards for responsible business conduct and mandate NCPs to promote the Guidelines and handle 'specific

instances' (complaints) alleging breaches of the Guidelines by multinational enterprises (MNEs).

The mandate to handle specific instances means that the Guidelines are the only government-backed international instrument governing responsible business conduct with a built-in non-judicial grievance mechanism. But what does the NCP specific instance process involve and what trends can be observed? And what are the key considerations for MNEs when deciding if and how

to engage in such a process? We address these important questions below.

### **NCPs: the specific instance process**

The NCP process is a voluntary dispute resolution mechanism centred around mediation. Requests that NCPs should handle a specific instance are typically made by non-governmental organisations (NGOs) and trade unions. However, individuals and communities are also common complainants.

The lead NCP in a specific instance is typically the NCP in the jurisdiction where the harm arises, although complaints are often pursued in the country where the relevant MNE is headquartered. The Guidelines also provide flexibility on choice of NCP, and there may be instances where several NCPs are involved in one complaint. Guiding factors may include the most appropriate language of the mediation and the ease with which the factual enquiry can be conducted. Since 2000, six NCPs – the UK, the US, the Netherlands, Brazil, France and Germany – have received almost half of all requests made; a function perhaps of these considerations as well as the perceived resources of those agencies.

Once a request has been submitted, the specific instance process comprises three stages. First, the NCP conducts an initial assessment to determine

whether the issues raised merit further examination. The ‘OECD Commentary to the Guidelines’ requires NCPs to consider at this stage whether the issues are bona fide and relevant to the implementation of the Guidelines. In assessing these criteria, the Commentary requires the NCP to take into

---

**“The lead NCP in a specific instance is typically the NCP in the jurisdiction where the harm arises, although complaints are often pursued in the country where the relevant MNE is headquartered.”**

---

account six factors, including the identity of the party concerned and its interest in the matter, whether the issue is “material and substantiated” and whether there seems to be a link between the MNE’s activities and the issues raised. The initial assessment is not an in-depth investigation and, as the UK NCP Rules of Procedure state: “acceptance of issues for further consideration does not mean that the NCP has determined at the initial assessment stage that the Guidelines have been breached”. In practice, a significant number of complaints do not progress beyond the initial assessment phase.

If the specific instance merits further examination, the NCP will consult with the parties and offer its “good offices”, including offering, or facilitating access to, consensual and non-adversarial procedures, such as conciliation or mediation. According to OECD figures, between 2011 and 2019, 36 percent of all complaints accepted for further examination resulted in a negotiated agreement.

At the conclusion of the process, the NCP will issue a report if the parties have reached agreement on the issues raised. Absent an agreement, or if a party is unwilling to participate, the NCP will issue a final statement containing non-binding recommendations on the implementation of the Guidelines.

### Trends in specific instances

OECD figures show that NCPs have handled some 500 specific instances since 2000 and some patterns may be observed.

The manufacturing sector has seen the highest number of specific instances, comprising 29 percent of complaints between 2000 and 2019. More recently, financial services MNEs have come into focus, with complainants seemingly testing the boundaries of the Guidelines and their implications for businesses such as financial institutions, which may have a less direct nexus to the alleged harm. As Barbara Bijelic, legal expert, responsible business conduct at the OECD, notes: “prior to 2015 there were very few such cases, yet for the past five years



(financial services) have been the leading or second leading sector in terms of instances filed”.

As to the substance of complaints, between 2011 and 2020 the majority (some 57 percent) have concerned business and human rights issues. This may be because a new human rights chapter was incorporated into the Guidelines in 2011, drawing on the ‘United Nations Guiding Principles on Business and Human Rights’ and its ‘Protect, Respect and Remedy’ framework. Among other



things, this revision introduced the expectation that MNEs should act responsibly and respond to adverse impacts, not only in the context of their own business operations but also across supply chains and their other business relationships.

General policies also accounted for a significant number of complaints (43 percent over the same period). The 'General Policies' chapter of the Guidelines requires MNEs, *inter alia*, to take into account established policies in the countries

in which they operate, contribute to achieving sustainable development and to respect the internationally recognised human rights of those affected by their activities. Complaints relating to employment and industrial relations and the environment were also significant (40 and 21 percent, respectively).

### Key considerations for MNEs

There are several key considerations for MNEs faced with a specific instance complaint.

*Remedies.* So far as dispute resolution is concerned – particularly in a business and human rights context – counsel for MNEs may be more familiar with court proceedings, where claimant-groups may focus on damages awards and are often supported by law firms operating on a 'no win no fee' basis. By contrast, specific instance complainants are typically seeking a constructive dialogue regarding the MNE's conduct and are often focused on securing a material change to corporate behaviour or policy, such as a change to the MNE's human rights due diligence processes.

For example, in *Building and Wood Workers' International (BWI) v Fédération Internationale de Football Association (FIFA)* (concluded in 2017), BWI complained before the Swiss NCP that FIFA had failed to adhere to the Guidelines by appointing Qatar as host of the 2022 FIFA World Cup despite widely-documented allegations of abuse of migrant workers' human rights in the country. By way of

remedy, the complainant asked, *inter alia*, that FIFA enhance its internal human rights policies and due diligence processes (and commit to carrying out human rights impact assessments). It also requested that FIFA engage with the Qatari government in order to accelerate labour and human-rights related reforms.

Following an Australian NCP outcome in 2020, remedy in the form of financial redress could, however, become more prevalent in complainants' requests. In a complaint brought against ANZ by two NGOs – Equitable Cambodia and Inclusive Development International (IDI) – on behalf of 681 Cambodian families, it was alleged that ANZ had contributed to adverse human rights impacts by partially financing the development of a sugar plantation and the construction of a refinery by Phnom Penh Sugar Co. Ltd. The complainants required, among other remedies, that ANZ repay profits earned from the loan to the affected families.

While the parties did not, initially, reach an agreement, the NCP made a series of recommendations in 2018 – including that ANZ strengthen its due diligence mechanisms. The NCP did not, however, make any recommendations on compensation, noting: “[a]s a non-judicial mechanism [...] [it] does not consider its role extends to making specific recommendations about financial redress”. Nonetheless, following a further NCP-facilitated dialogue between the parties in 2020, a settlement was reached whereby ANZ agreed to

contribute gross profit earned from the loan to those impacted.

This outcome was lauded by IDI as a “landmark settlement” and an “important precedent for the banking industry”. Indeed, according to IDI, the ANZ agreement was only the third time that the complaints process before any NCP has resulted in a concrete financial remedy. The ANZ dispute makes clear that while compensation is not something an NCP can order, compensation can ultimately flow from the NCP process.

*The NCP process and parallel litigation.* In the event of parallel proceedings, the Commentary provides that NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and if engagement would create serious prejudice for either party in other proceedings.

As to the first point, the NCP process may provide forms of remedy unavailable in parallel proceedings. For example, NCPs use the Guidelines as a framework for discussion, and since the Guidelines are not tied to any particular domestic law, the process may provide an opportunity for the parties to discuss issues not open for consideration in legal proceedings.

As to the second point, “serious prejudice” is not defined. Conceivably, final statements made by NCPs could be used in ongoing litigation, for example where an NCP issues a statement that an MNE’s internal due diligence processes have not been

followed. Some NCPs, including the UK NCP, have issued procedural guidance on parallel proceedings which provides examples of situations in which “serious prejudice” could arise. This includes: “[a] finding by the NCP on a specific instance will be accepted by a foreign court as a deciding factor in an important issue before it”. In these circumstances, a party may apply to suspend part or all of the NCP process.

*Confidentiality.* The Commentary stresses the importance of striking a balance between transparency and confidentiality. It recognises that the NCP will take appropriate steps to protect sensitive business information provided during the good offices stage, but also states that the results of the specific instance procedure should be publicly available. In practice, it may be worth an MNE seeking a confidentiality agreement at the outset in order to address the position governing any materials, information or commentary provided during the process, particularly if there is a broader risk of litigation.

## Conclusion

For many MNEs, the NCP process offers the possibility for constructive dialogue and an opportunity to negotiate meaningful, long-term solutions to responsible business conduct-related disputes. The impact of coronavirus (COVID-19) on business operations and supply chains globally, a greater focus on effective human rights due

diligence and concerns regarding climate change and environmental, social and governance (ESG) issues all mean that NCPs may be increasingly called on to help in a range of disputes. Knowledge of the Guidelines and the NCP-specific instance process is likely, therefore, to become increasingly important for both legal counsel and sustainability teams. 



**Susy Bullock**

Partner

Gibson, Dunn & Crutcher UK LLP

T: +44 (0)20 7071 4283

E: sbullock@gibsondunn.com



**Allan Neil**

Partner

Gibson, Dunn & Crutcher UK LLP

T: +44 (0)20 7071 4296

E: aneil@gibsondunn.com



**Stephanie Collins**

Associate Attorney

Gibson, Dunn & Crutcher UK LLP

T: +44 (0)20 7071 4216

E: scollins@gibsondunn.com