



**British Institute of
International and
Comparative Law**

'The UK National Contact Point on Business and Human Rights: Pointing in the Right Direction'

Event Report

Date: Wednesday 9 March 2016

Venue: Norton Rose Fulbright LLP, London

Convened by the British Institute of International and Comparative Law

Speakers:

- **Robin Brooks**, Norton Rose Fulbright LLP
- **Rachel Chambers**, University of Sussex
- **Kathryn Dovey**, OECD
- **Tricia Feeney**, RAID
- **Peter Frankental**, Amnesty International
- **Dan Leader**, Leigh Day
- **Lord Jonathan Mance**, UK Supreme Court
- **Robert McCorquodale**, British Institute of International and Comparative Law



The event was organized to discuss the performance of the UK National Contact Point, especially in the light of a recent report released by Amnesty International on *Obstacle Course: How the UK's National Contact Point Handles Human Rights Complaints under the OECD Guidelines for Multinational Enterprises* ('the Report'). This summary draws on the speeches delivered by the panellists, as well as on the subsequent roundtable discussions to present the main points and themes. The meeting was conducted under Chatham House Rules.

Main Session

After a discussion of the rationale behind the meeting by the Convenor, the meeting began with a brief introduction of the Report's findings by the Chairperson, who was involved in steering the development of the National Contact Point (NCP) in his previous role as a member of the All Party Parliamentary Group (APPG) on the Great Lakes Region.¹ The APPG recommended improvements to the NCP, resulting in new procedures being introduced in 2008. The Chair expressed regrets that the APPG was no longer involved in appointments to the Steering Board of the NCP, though he was pleased that the Report welcomed the changes the APPG had recommended. He also thought that it was positive that there is increased use of the NCP.

Amnesty International's Report on the UK NCP

The overall analysis of the Report is that the UK NCP has not performed well since 2011, which, paradoxically, is when the OECD guidelines were amended to address human rights more comprehensively. The most important findings and recommendations are of a structural nature: the need for independence from the government in assessing and examining cases and a fuller review procedure to address substantive as well as procedural issues; concerns about under-resourcing; lack of human rights expertise; and concerns that the NCP is too close to the interests of the government to assess cases objectively. Another concern related to the effectiveness of the Steering Board, as the Report calls for changes to ensure independence, greater expertise and increased capacity, with the NCP acting in a secretarial capacity.

A main issue examined in the Report is the NCP's approach to complaints. The key issues raised were:

- a) whether the NCP's mandate could be better achieved by an improved process - e.g. with more consistency and predictability regarding the evidence that is required to establish links between corporate conduct and the human rights violations in question;

¹ The APPG on the Great Lakes Region was a joint working group looking at all sides of the problem and including actors from the NGO community as well as from the extractive and other industries, such as the ICCM; NGOs such as Amnesty International, Human Rights Watch, RAID, Global Witness, Leigh Day, Barristers Chambers. It had an Independent Adviser and was co-ordinated by Steven Carter.



b) whether it is possible to avoid an over-legalistic approach to solving the cases; and
c) whether the NCP should start looking at future impacts of projects, and adopt a more proactive approach to reflect the preventive aspects of the human rights framework and the OECD Guidelines.

These are all core aspects of the NCP's role, in addition to facilitating collaboration and mediation between the parties to the complaint and helping complainants who may not know what is required.

Another issue raised in the Report is the proper scope of procedural review. The NCP should give guidance as to what the OECD Guidelines mean and whether the complaint falls within them. The NCP should also not be afraid to reach conclusions regarding breaches of the Guidelines where appropriate.

A final issue related to the question of consequences. What practical consequences can reinforce NCP findings? Naming and shaming is one possibility but the question is whether it is enough. Another idea proposed in the Report is the withholding of publicly funded benefits provided by governments, such as export credits.

NCPs and the Role of the OECD

The first panellist was invited to give an international context to the debate and talk about the NCP system more broadly; the presentation was contextual and did not discuss the performance of the UK NCP or any other individual NCP. In 2015 a new post was created within the OECD Unit on RBC to strengthen support to NCPs particularly in areas pertaining to peer reviews and peer learning.

The OECD Guidelines were established in 1976 and have been updated 5 times since then, most recently in 2011. These latter changes included the introduction of risk-based due diligence and the Human Rights Chapter. The Guidelines cover a range of corporate responsibility issues ranging from the environment, to corruption and bribery, taxation and human rights. 46 countries have adhered to the Guidelines (by adhering to the Declaration on International Investment and Multinational Enterprises, of which the Guidelines are part) and are therefore required to establish NCPs, whose role is set out in the Procedural Guidance to the Guidelines, including the requirement for NCPs to meet the core criteria of visibility, accessibility, transparency and accountability. The Procedural Guidance is not, however, prescriptive about how adhering governments should structure their NCPs. The Guidance sets out the dual mandate of NCPs, which is to promote the Guidelines at the national level and contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances.



There has not been any in-depth review of the structure of NCPs, but there is evidence of a range of institutional arrangements in place. Many NCPs have advisory bodies to support their work; some are independent, with a secretariat in a government department but with representatives of business associations, trade unions and NGOs working together; while others are made up of one or multiple government ministries or departments. The UK has an oversight body in the form of a Steering Board and is one of six NCPs with such a mechanism.

Regarding 'specific instances', there have been over 350 cases brought to NCPs between 2000 and 2015 across the range of issues covered by the Guidelines. Half of these were handled by 6 NCPs, some of which are making their initial assessments public although they are not required to do so. Others are designing ways to help complainants to bring complaints by, for example, providing guidance or online forms to fill in. The OECD Guidelines refer to using mediation and conciliation to resolve issues between enterprises and complainants, and some NCPs have used professional mediators. In terms of follow-up there are different practices; some NCPs do follow-up whenever it is requested, others do so on their own initiative.

Over the years there have been calls for improvement by institutional stakeholders. Thus the Trade Union Advisory Committee to the OECD (TUAC), OECD Watch, representing CSOs, and the Business and Industry Advisory Committee (BIAC) representing the business community have all called for improvements and raised issues including the structure of NCPs, lack of accessibility and delays. In 2015, G7 Leaders committed to strengthen access to remedy (including through the NCPs) and G7 countries committed to lead by example. Also in 2015, the Ministerial Council statement called on the OECD to continue its efforts to further strengthen the performance of NCPs.

In 2015 the OECD Working Party on Responsible Business Conduct (WPRBC) adopted an Action Plan to strengthen NCPs. This Action Plan covers 3 activities: 1) peer reviews and capacity building; 2) peer learning; and 3) tools development to assist NCPs. As regards peer reviews of NCP, which are voluntary, 4 have been undertaken between 2009 and 2015, (The Netherlands, Japan, Norway and Denmark), and the peer review of Belgium's NCP is ongoing). The WPRBC has agreed on a peer review methodology and template, based on OECD good practice for peer reviews. The reviews involve setting up a team of peer reviewers of 2-3 NCPs and the OECD Secretariat, a site visit to interview the members of the NCPs and relevant government officials and other key stakeholders - including parties involved in specific instances and producing a report with specific recommendations. The Action Plan also provides for capacity building support from the Secretariat.



Analysis of the UK NCP's Handling of Complaints under the OECD Guidelines

The second panellist discussed specific shortcomings inherent in the NCP's case handling of complaints under the OECD Guidelines. 2008 was a landmark with the revision of the OECD Guidelines and creation of the NCP Steering Board. The APPG for the Great Lakes Region and UN Panel of Experts were instrumental to this progress and several other actors/events have since contributed to the NCP's development. The panellist cited organisations like RAID, which have been keeping the NCP and others on their toes. Mention was made of the Democratic Republic of Congo cases, which are a reminder that while the NCP procedure may be non-judicial, the human rights violations at the heart of these complaints are serious.

There was discussion of the findings of the Report, which looked at 25 complaints brought before the UK NCP since 2011. The complaints reflect the broad spectrum of human rights abuses that have taken place and include cases alleging torture and breaches of the right to life. The UK has had the most complaints – 63 in total – and is viewed by its peers as the leading NCP. Indeed, there have been some positive outcomes, such as in *WWF vs. SOCO*, a case that involved the impact of mining on a world heritage site. In that case, the mining operation ceased and the company involved agreed not to renew its license or undertake mining operations on or near World Heritage sites again. The Report, however, revealed that complainants have consistently said that they do not feel their complaints have been handled fairly and properly; a fact that prompted Amnesty International to investigate.

The Report looked at such issues as compatibility with the Guidelines, predictability, equitability and impartiality, future impacts and accessibility. These provided the framework for the investigation. In terms of numbers, there have been 63 complaints since 2011, 42 since 2008 and 25 human rights related complaints since 2011. Complaints peaked in 2013 and fell in 2014. There is no known complaint submitted in 2015 although there may two or three in the pipeline. Of these, 60% of complaints have been rejected at the Initial Assessment stage, so no further examination or mediation took place. 6 complaints were partly accepted, 3 went to other NCPs and 1 was fully accepted and concluded.

The Telecoms sector was the sector that was subject to the most complaints; 9 in total, 4 of which related to one single company. Next was the extractive sector, followed by the security and finance sectors. The most commonly cited Chapter of the Guidelines is that on human rights (25 citations), with 20 citations from the General Policies Chapter (Chapters 4 and 2 respectively). Of the cases involving extractives, 4 were partly accepted and 2 went to other NCPs. Meanwhile, all 9 of the telecoms complaints were rejected at the initial assessment stage. The panellist suggested that one reason for the high rejection rate of cases involving this sector is the politically sensitive nature of this sector, which involves the security services and could potentially implicate the UK government in the alleged violations. This is reason why the Report recommends that all cases are assessed and examined by an independent panel of experts.



Moreover, the speaker argued that there is a lack of predictability and accessibility. In particular, it is difficult to understand what level of evidence is required for a case to be accepted, so either the criteria are not clear or the evidential bar is set too high. There is also a high rate of rejection at the initial stage, which undermines the complainants' access to remedies with regard to the alleged breaches.

Complainants, the speaker argued, expect the NCP to be more sensitive to their objectives and needs and to serve as an effective vehicle for remedy. Indeed, the UK National Action Plan for the UN Guiding Principles on Business and Human Rights lists the NCP mechanism under the section that deals with the Right to Remedy. Further, complainants hope to use the mechanism to improve conditions on the ground. In some cases – for example where a company is withholding water in order to compel communities to relocate – complainants expect intervention. They also expect disclosure of information related to, say, impact assessment and due diligence in order to understand the impact of projects and take steps to defend their rights. Lastly, they want to raise the profile of their cases internationally, which can be considered to be a legitimate objective.

Five additional critical issues were discussed with regard to the UK NCP's case handling approach. First is the high evidentiary threshold, particularly in relation to telecoms cases where complainants were expected to provide documents that were not already publicly available. An example was given of the tendency, by the NCP, to discount leaked information provided by former intelligence officers (such as the Snowden leak of US intelligence documents); information that it was impossible to obtain from authorised sources. The speaker contended that there is no reason why leaked documents should be discounted, especially when the authenticity of the documents had not been challenged or the revelations contained in them not rebutted.

The second critical issue discussed were inconsistencies in handling cases where the links between the human rights violation and the company's activities was tenuous but the circumstantial evidence was strong. Mention was made of the complaint from Privacy International against Gamma concerning the IT Company's export of 'malware' products to Bahrain that allowed the Bahraini government to intercept communications and target political dissidents. In this case, the complaint passed the initial assessment stage. In *Reprieve vs. BT* in contrast, the complaint against BT regarding the installation of fibre-optic cables that were alleged to have facilitated drone strikes in Yemen was rejected at the initial assessment stage, despite there being strong circumstantial evidence of a link between the company and the violation in question.

Third is the propensity to downplay future impacts, which the NCP believes to be outside its remit and expertise. Thus in the complaint from IAP and WDM against GCM involving the Phulbari coal mine project in Bangladesh, the NCP decided to focus on the company's Human Rights Due Diligence rather than to consider the project's future impacts. The speaker thought that there would be some projects that are likely to have such adverse impacts that human rights

abuses could not be avoided or mitigated. Indeed, several UN Special Rapporteurs had requested that the mining project should not go ahead because of the inevitable adverse human rights impacts, and on this basis, it was implausible for the NCP to suggest that it could not second-guess future impacts.

The fourth matter concerned the role of the Steering Board. In this regard, this panellist pointed out that while the NCP does not always implement its recommendations, the Steering Board seems reluctant to take necessary steps to ensure that its recommendations are followed through. Nor does it take steps to ensure that the NCP does not misinterpret the Guidelines. This is why the Report argues that an independent Steering Board is needed with external appointees who are not civil servants. The speaker also thought that the Steering Board should be able to request a review where it felt that the OECD Procedural Guidelines had been misapplied.

Lastly is the issue of impartiality. The Report found that the NCP treats information provided by companies differently to information provided by complainants. Indeed, while the NCP expects complainants to disclose the identity of their sources and use publicly available information to support their cases, it does not challenge the confidentiality of company documents and allows information to be submitted by companies in confidence so the complainant does not see them. There is too much deference to companies and much emphasis placed on general CSR reports, policies and documents without assessing whether or how companies' activities may affect human rights in the particular contexts of the complaint.

The UK NCP's Case Handling at the Initial Assessment Stage

The third presentation focused on the NCP's case handling at the initial assessment stage – i.e. the preliminary sift which considers eligibility, which the speaker said is one aspect that is emblematic of the wider problem with the NCP's application of the OECD Guidelines. The OECD Procedural Guidance states that at the initial assessment stage, NCPs should consider if the case raises issues relevant to the OECD Guidelines and whether the case is bona fide and relevant taking into account 6 assessment criteria including a) whether the issue raised is material and substantiated; and b) whether there is a link between the business activity and the human violation. This latter criterion sets a lower threshold than the first, requiring prima facie evidence of a link between the alleged human rights violation and the actions of the company. In summary, the purpose of the initial assessment stage is to weed out frivolous complaints.

The concern was that a high proportion of complaints are rejected at this stage, due in part to the highly demanding 'sift' test, in part due to the (in)adequacy of sources, and in part due to the issue of cause/contribution to human rights impacts. In relation to the **'sift' test**, the panellist highlighted the high standard of evidence required, which made it extremely difficult for complainants to show how the company had contributed to the human rights impacts. To

illustrate this point, the case of *Privacy International v. Gamma* involving the sale of ‘malware’ products to Bahrain, was considered. During its initial assessment of this case, the NCP merged the two criteria mentioned above, such that the complainant was required to substantiate the link between the activities of the company and the abuse that followed at this initial stage. The NCP considered press reports, concluding that these did not substantiate the link, as the sources of the reports were not available to any party.

In the *Reprieve v. BT* case involving drone strikes, again, the NCP did not look at whether there seemed to be a link between the actions of the company and the human rights impacts, but instead at whether the complainant had substantiated the link. In this case, there was no substantiated link between BT’s activities and the adverse human rights impact since the complainant could not provide direct evidence of it. Such efforts were hampered by the fact that the company did not disclose documents that might have assisted in this regard. Meanwhile, the NCP concluded that BT was obliged to conduct what it referred to as ‘general due diligence’, which having looked at its due diligence reports, the NCP concluded it had done so.

A third case mentioned in the discussion on the ‘sift’ test is *SEW and Stroitel v. Banks*. The complaint was about the business relationships that several UK banks had forged with a Russian oil and gas company whose activities were alleged to have caused adverse human rights impacts pertaining to communities’ right to health, food insecurity as well as environmental destruction. In assessing the case against Bank C, the NCP looked at the measures the Bank had in place to meet the Equator Principles. In a sense, the NCP was evaluating the Bank’s defence rather than making an initial assessment of the plausibility of the case. That is, it went beyond simply looking at the sift test of determining whether there was a link between the actions of the Bank and the human rights impacts.

With regard to the **adequacy of sources** included in the evidence, the speaker noted that the *WWF v. SOCO* case represented a good outcome. Yet even in that case the NCP rejected the allegation that the company had failed to engage with stakeholders on the basis that the evidence did not substantiate the allegation. Unnamed sources were not enough and it was incumbent on the complainants to name their sources. This does not only impose a high evidentiary burden that is particularly onerous where there are safety risks to informers. The speaker thought that a better approach would have been for the NCP to make more enquiries about the reliability of sources at the examination or mediation stage rather than reject a case on the basis of undisclosed sources at the initial assessment stage.

As regards the subject of **causing and contributing** to human rights abuses, the speaker pointed out that a company’s link to a complaint can be established by demonstrating whether it caused the impact directly or by virtue of having a business relationship with the perpetrator. However, the NCP appears less ready to accept the latter instance, as demonstrated by the fact that 5 out of 6 complaints were rejected on this ground. One such complaint is that made by *Lawyers for Palestinian Human Rights v. G4S*. The case concerns the supply of security equipment (e.g. metal detectors for use in prisons) to Israel by G4S; equipment that allegedly contributed to

severe human rights abuses in Israel, including torture. The NCP rejected the allegation of causing or contributing to human rights impacts at the initial assessment stage on the grounds that the claim that the equipment was used to commit human right violations, and that servicing this equipment made a substantial contribution to those violations, was not substantiated.

In summary, the initial assessment stage is being used by the NCP to restrict the scope of complaints rather than to weed out frivolous complaints. In this regard, the speaker recommended that the NCP reduce the high evidential standards and makes clear findings of cause and contribution where appropriate and when the evidence supports them. Moreover, she called on the NCP to pay due regard to the OECD Procedural Guidelines.

The main session concluded with a note from one participant who, while appreciative of the comments made by previous contributors and of AI for their Report, also wished to express his regrets at the absence of government representatives from the NCP Steering Board or BIS. The NCP is a mechanism available to civil society to seek redress for breaches of the OECD Guidelines, he concluded, and it must be seen to be working. In response, the Chair sought to reassure the audience that strong and consistent efforts had been made to get BIS to come and they were aware of the event. It was also noted that the participants present at the Roundtable included many from the corporate sector and law firms who represented corporations, as well as those from civil society.

ROUNDTABLE DISCUSSIONS

The Convenor of the meeting introduced the roundtable discussions, whose purpose was to share concerns and experiences regarding the issues identified in the previous session. Participants were instructed to discuss questions relating to structural issues, substantive aspects and access to justice, then feedback their thoughts to the rest of the group at the end of the session. Specifically, the questions were as follows:

1. What changes, if any, to the current structures of the UK NCP should be made to improve them for all those involved?
2. Are the current procedures of the UK NCP appropriate in terms of effective decision-making and coherence with the OECD Guidelines?
3. To what extent should it be possible to review the substantive decisions of the UK NCP?
4. Does the UK NCP provide effective access to justice for complainants? If not, what changes are needed to make the mechanism more accessible and rights-compatible?
5. Should there be more direct consequences for companies found in breach of the OECD Guidelines?

The summary below reflects a range of views and no one comment can be attributed to all participants.



1. What changes, if any, to the current structures of the UK NCP should be made to improve them for all those involved?

It was noted that awareness of non-judicial mechanisms, such as the NCP, was low and so what should be done (including by the government) is to raise their profile throughout government initiatives and programmes of work. There was a lack of guidance by the NCP on what standard of behaviour should be expected from business. In that context, it was noted that the OECD has created due diligence guidance to business on specific sectors which companies can refer to as it provides detail on how to implement the recommendations of the OECD Guidelines. At present, guidance is available on responsible agricultural supply chains, meaningful stakeholder engagement in the extractive sector and responsible mineral supply chains. Guidance documents on responsible supply chains in the garment and footwear sectors and the financial sector are under development.

It was recognised that the issues faced by the NCP were often complex issues of public international and human rights law and participants considered that the NCP lacks the necessary expertise and resources to deal with these effectively. Some participants endorsed the idea of a panel of experts – an approach that other NCPs have employed – and thought that there may be more innovative ways of funding the NCP, for example through the private sector. Others found it difficult to envisage the NCP undertaking investigations in difficult places like the Democratic Republic of Congo.

Another set of participants identified lack of independence as a serious challenge and called on the UK NCP to learn from the experience of countries with independent NCPs. The suggestion was also made that such NCPs could act as mentors in this regard. There is also the possibility of having pro bono work from law firms and using other NCPs assistance on a particular complaint because of their experience in a particular field.

Concerns were raised about the Steering Board and the fact that it only had the power to undertake procedural reviews. It was thought that there should be increased multi-stakeholder representation on the Steering Board to facilitate reviews and avoid delays. A suggestion was made that shorter tenures could increase representation. Moreover, it was suggested that there should be a separate appeal body that could deal with issues of substance, though it was recognised that this may not be necessary if there was more confidence in the initial decision-making process. It was equally deemed to be important for the NCP to draft decisions with due regard for their precedential value and for peer learning.

Participants thought that there was a need for clarification on staff roles (who did what); a review of the management structure (where do staff go for advice – the relevant ministries/civil servants or OECD); and greater expertise. A few participants were concerned that an independent NCP may diminish the weight of decisions, potentially leading to them not being regarded as sanctions by the government.

2. Are the current procedures of the UK NCP appropriate in terms of effective decision-making and coherence with the OECD Guidelines?

There was agreement that the NCP was valuable and should be supported and improved, but there were also questions over whether it could ever be as rigorous, consistent and predictable as stakeholders would like it to be, given the complexity of the cases and the need to avoid being overly legalistic. Some believed that while it is undeniable that lack of rigour could negatively affect stakeholder confidence, even an imperfect system was helpful. In this sense, it was felt that there was a need to strengthen the predictability and flexibility of the NCP. Others felt that an overly litigious process creates an adversarial approach, especially as some NGOs might be inclined to use adverse NCP decisions against companies in subsequent litigation. There was a suggestion that business lacked confidence in the NCP process.

A secondary matter is the tension between increasing accessibility and efficiency of the NCP on the one hand, and allowing it to run smoothly on the other. Some participants stressed that it is crucial to avoid perfection becoming the enemy of the good.

3. To what extent should it be possible to review the substantive decisions of the UK NCP?

A major concern with regard to substantive aspects of the NCP handling of human rights complaints was the test being applied at the initial assessment stage. Participants considered that the NCP applies too high a threshold in elevating the question of whether the claim is substantiated over the bona fide test. The point was made that the judicial review test - that allows claimants to proceed with a case on the basis of the arguability of their claim - was the right kind of test to apply, though it was recognised that it may be dangerous to adopt a legalistic approach to these tests.

Furthermore, there was discussion about whether it ought to be possible to review the NCP's substantive decisions and what would be desirable and feasible in this regard. Some participants felt that the Steering Board could do more with its procedural review, not least given that it had been effective in the past in using its review procedure to make important improvements and follow-up on its decisions. They highlighted the need for more systematic comparative review, wider learning that could give a sense of what the practice of other NCPs is, and possibly lead to more consistent applicability of the Guidelines.

4. Does the UK NCP provide effective access to justice for complainants? If not, what changes are needed to make the mechanism more accessible and rights-compatible?

On the topic of access to justice, it was thought that the NCP process was valuable in changing public perceptions about what amounts to acceptable business practice. However, it was important that it allows for mediation which would be the appropriate place to explore the more complex issues of links between the actions of the company and the human rights impact.



Participants reiterated that one way to ensure that the NCP is used as much as possible is to market its availability and increase confidence in the process in the eyes of both complainants and defendants. They stressed that the NCP needed to be a cross-government initiative rather than simply consist of a couple of civil servants in BIS. What is more, there is the need to ensure that there are serious consequences to business misconduct if the NCP is to proceed as a tool for human rights accountability.

Other participants were concerned about the lack of resources within the NCP and wondered whether it was possible to prioritise cases or even whether there should be an expedited procedure where there was a risk of imminent harm. Indeed, the apparent downplaying of future impacts was a recurrent theme. That is in part because civil litigation for damages is not possible when an impact has not yet occurred, which means that in such cases the NCP provides the only avenue for redress.

The question was raised as to whether mediation could ever be effective where a human rights issue was at stake. Some participants felt that the NCP was not really useful as a tool for access to remedy but that it was only valuable for its mediation process or the fact that it can bring NGOs and business to the table.

6. Should there be more direct consequences for companies found in breach of the OECD Guidelines?

In terms of consequences, participants restated that since the NCP is a non-judicial mechanism, care is needed to ensure that the NCP does not become too legalistic. There was also general support for 'middle ground' remedies, such as disqualification from access to export credits and from bidding for public contracts, as proposed in the Report. A suggestion was that there might be a role for investor communities who could put pressure on companies to comply with the Guidelines. Another suggestion was to adopt a recovery mechanism for costs of investigation where companies are found to be in breach.

A representative from the business sector sought to reassure participants that the business community takes the Guidelines seriously. However, he also pointed out that fear of rejection of cases does not mean that nothing has happened or that nothing is done. Indeed, there are consequences or 'non-visible' outcomes that are not embedded in the process.

CLOSING REMARKS

Two speakers involved in the NCP Steering Board offered comments on the progress that has been achieved so far, as well as potential areas for improvement.

The first speaker argued that while 'hard' law claims are expensive and drawn out, they usually led to real remedies. By comparison, the NCP is quick and cheap but it only rarely leads to a

remedy. There was great hope in 2008 following the 'Mance reforms'. There were signs of progress in this period as demonstrated by a good number of positive cases, two of which focused on the due diligence obligations of companies in 'conflict zones'. These cases, brought against a mining company and an airline company, resulted in detailed guidance and a carefully reasoned decision. One was the *Vedanta* case, which led to a clear finding against the company, with its mining activities eventually being abandoned. Another was the landmark decision by Formula 1 in 2014 to integrate human rights due diligence into its operations in light of the NCP's recommendation. This shows that the NCP can be a powerful tool if its recommendations are properly implemented and confidence in it is high.

The concern is that confidence is ebbing amongst the NGO community. More generally, the first speaker hoped that the launch of the Report would be the beginning of a dialogue that can take place between business, politicians, the NCP and NGOs. This cooperative and collective process accompanied the Mance review had been and remains in everyone's interest.

From the discussions today, he thought that two structural points could be taken away to discuss with the NCP regarding its independence and procedures. With regard to the question of **independence**, the speaker wondered if the NCP can continue to sit within BIS since obviously there was a risk of bias when policing itself, especially in relation to serious human rights allegations. The Dutch model was cited in this regard as one that the UK NCP could possibly emulate. As for the Steering Board, it was noted that it was overstretched. One problem is that all too often conflicts of interest rule members out from participating in reviews, suggesting that there is a need to expand the number of external members.

On **procedures**, the question was whether the review procedure should be limited to procedural defects or whether it should include substantive issues, such as decisions that are alleged to be at variance with a common understanding of the Guidelines. Furthermore, there are those who question whether a review is necessary and whether it needs to be taken out of the hands of the NCP. Meanwhile, complainants are not sure which is likely to be the more successful route. At the moment, the problem with the NCP process is that, in practice, the complainant has to prove their case at the initial assessment stage on the balance of probabilities. This leads to a situation where the initial evidence test can be met more easily by pursuing litigation than by pursuing the soft law mechanism – a situation that is not sustainable. This needs to be tackled for NGOs to retain confidence in the system.

The final point raised was that of **confidentiality** with regard to companies' material. It was noted that for companies to have confidence in the NCP procedure they need to know that the material they share will not be used against them in litigation for example. Yet this needs to be discussed transparently.

The second speaker said that it is important not to lose sight of the fact that the UK NCP has led the way in terms of alternative dispute mechanisms. As such, it is not something that NGOs

want to lose, rather they want to keep it dynamic and providing a leadership role. However, there needs to be more clarity about where it is failing, particularly in the areas of delays which appears to be caused by a lack of resources, as well as the dismissal of complaints at the initial assessment stage without going on to the stage of examination. This was disheartening. In effect, there is a sense that the NCP has overvalued getting 'quick fixes' on what are quite complex cases, and based its approach on the belief that the 'be all and end all' is to reach an agreement.

Presently, it is felt that NGOs are being dissuaded from going through the process, fearing it will take 35 months. While it is important not to lose sight of the timeframe, it is also crucial to make more substantial the follow-up process so that decisions are scrutinised and commitments are met. Some tentative steps had been taken to this effect but it does not amount to monitoring of outcomes. The speaker believed this to be partly an issue of resources and partly about mindsets.

It was equally clear that there is a need for fast-tracking some cases, in particular when it is thought that someone will be displaced imminently or when a company is about to escape accountability. In these instances, the suggestion was that something akin to an injunction might be developed as a preventative measure. The speaker made a reference to recommendations of a 2005 report by the APPG on the Great Lakes Region that are still as relevant today: *'The NCP should leave companies in no doubt as to the acceptability or otherwise of their conduct. It is vital that companies are given guidance as to how to consider and interpret the Guidelines in the complex environments in which they operate'*.²

There was an agreement as to the need for more research on the practice of other successful NCPs. In relation to access to justice, the speaker expressed regrets at the fact that there has been more emphasis on accommodating companies under the Guidelines and less on making the process accessible to communities affected by the adverse effects of globalisation, with the possible exception of the Dutch NCP. Nevertheless, there was hope that the UK NCP could emulate the best practice of other NCPs to the point of becoming fit for purpose.

Chairperson's Closing Remarks

The idea behind the NCP, the Chairperson remarked, was to create a consensual way of resolving disputes without involving litigation. It was to be primarily collaborative and about the mutual benefit of the process to business, financiers, and communities. This collaborative nature can be attributed to the success of the 2008 Review and the Chairperson thought that such as

² All Party Parliamentary Group on the Great Lakes Region, *The OECD Guidelines for Multinational Enterprises and the DRC*, February 2005, p.11.



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approach would also have greater impact on the government, which needs to provide the necessary resources and address the independence issues raised.

It is on this note that the Convenor thanked the Chairperson, all the speakers and participants and closed the meeting.

This Report was co-written by Claire Jervis and Liliane Mouan, volunteer researchers in Business and Human Rights at the British Institute of International and Comparative Law.

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Registered Charity No. 209425
Company Registration No. 615025