

State of Remedy

2021

Understanding OECD Guidelines complaints through the lens of remedy

The year 2021 marked another discouraging year in terms of remedy for complaints by communities and civil society under the OECD Guidelines for Multinational Enterprises (Guidelines). Only 2 of the 22 cases concluded in 2021 by National Contact Points (NCPs) reached full agreement. As in previous years, half of the cases filed were rejected at the initial assessment stage, demonstrating an astounding lack of accessibility of the NCP system. The Korean NCP stands out as a particularly poor performer, accounting for the rejection of 8 cases and failing at its core mission and duty to help resolve issues raised in NCP complaints. In 2021, OECD Watch also filed the second ever substantiated submission against the Canadian NCP for failing in its duty to provide effective access to remedy. With a couple of exceptions and bright spots, we must conclude that the OECD NCP system as a whole does not constitute an effective pathway to remedy for those adversely impacted by corporate misconduct.

This factsheet sets out the key numbers for these complaints, highlights and lowlights, conclusions and recommendations to improve remedy outcomes for complainants. These recommendations focus on revision of the Guidelines to ensure the relevance and effectiveness of these standards and NCPs in the future.

Key numbers for 2021

- **22 complaints** filed by civil society and communities were concluded
- **11 cases (50%)** were rejected at the initial assessment phase, of which:
 - **8** were rejected by the Korean NCP
- Only **7 cases (32%)** passed the initial assessment phase. 6 of these 7 cases proceeded with mediation, of which:
 - **2 (9%)** reached full agreement, both involving commitments by the companies to improve human rights policies and due diligence
 - **2 (9%)** were not fully resolved
 - **3 (13%)** concluded with the NCP making a determination that the company had not acted in accordance with the Guidelines
 - **0 cases** resulted directly in an improved situation on the ground or other tangible form of remedy
- **1 case** was withdrawn at the request of the complainants because an agreement was reached outside the NCP process
- **1 case** was closed after over 12 years of inaction by the company and NCP

Remedy highlights

Full agreements facilitated by NCPs

Both cases that reached full agreement in 2021 involved commitments by companies to adopt human rights policies and/or human rights due diligence (HRDD) processes in accordance with the Guidelines.

Society for Threatened Peoples Switzerland vs. BKW Group concerned the company's investment in a Norwegian wind energy project threatening the land rights and human rights of indigenous Sami people.¹ Mediation facilitated by the Swiss NCP led to an agreement between the parties, covering the development of BKW's HRDD processes, the implementation of the principle of free, prior and informed consent (FPIC) throughout the lifecycle of its projects, and the reflection of BKW's human rights standards in its contracts with business partners, including a contractual option to terminate a business relationship in case of continued non-compliance by business partners. The company also agreed to make its complaints mechanism accessible to all groups affected by its projects and to provide for and/or cooperate in appropriate remediation of its adverse impacts.

In **Bahrain Institute for Rights and Democracy vs. HPG**, the parties reached an agreement following external mediation facilitated by the UK NCP.² This case alleged that HPG was linked to human rights abuses committed by the Bahraini government due to its organisation and/or sponsorship of the Royal Windsor Horse Show in the UK. In the agreement, HPG committed to adopting a human rights policy reflecting the standards in the Guidelines and reaffirmed its commitment to respect internationally recognised human rights.

In **Australian bushfire victims and Friends of the Earth Australia vs. ANZ Bank**, the Australian NCP highlighted the unclear expectations in the Guidelines concerning climate change.³ This case alleged failures by ANZ to comply with the Guidelines through its lending and investment practices, including ANZ's inadequate disclosure on its indirect greenhouse gas emissions and insufficient HRDD conducted by the Bank on its climate-related risks. This is the second NCP complaint concerning a bank's climate impacts (the first being **Dutch NGOs vs. ING Bank**).⁴

Determinations of non-compliance with the Guidelines

Three NCP cases concluded with determinations of non-compliance by companies with the Guidelines.

In **West Virginians for Sustainable Development vs. Rockwool**, the Danish NCP determined that the company had not carried out risk-based HRDD in accordance with the Guidelines.⁵ The complaint alleged failures by Rockwool to identify societal, environmental, and health risks related to the construction of a mineral wool factory in West Virginia, US. The Danish NCP's determination of non-compliance with the Guidelines followed Rockwool's refusal to participate in mediation and the NCP's subsequent investigation of the case. This determination is significant for a company with operations in the US.

In **I-Buycott vs. Starbucks Coffee France**, the French NCP determined that Starbucks had only partially complied with the Disclosure chapter of the Guidelines and had failed to provide consumers with adequate information as recommended in the Consumer Interests chapter.⁶ This case concerned, among other things, the adequacy and transparency of information published by Starbucks on its organisation, tax operations, and intra-group transfer prices.

In Lawyers for Palestinian Human Rights vs. J.C. Bamford Ltd, the UK NCP determined that the company had breached Principles 4 and 5 of the Human Rights chapter, respectively requiring companies to have policy commitments to respect human rights and to carry out HRDD. The NCP also recommended for JCB to remedy these breaches by adopting a human rights policy and conducting HRDD to assess and address its human rights impacts. Unfortunately, this NCP complaint contains both remedy highlights and lowlights (discussed below).

Recognition of banks' responsibilities for their passive investments

Society for Threatened Peoples Switzerland vs. UBS Group marks the first time that an NCP has recognised the responsibility that banks may have for their passive investments through index funds.⁷ In this case, the complainants argued that there was a direct link between UBS's financial products and services and Hikvision, a Chinese technology company that has played a key role in the mass surveillance of the Uyghurs and other Turkic minorities in Xinjiang, China. In its initial assessment, the Swiss NCP concluded that a business relationship between the companies and a direct link between UBS's products and services and the alleged human rights violations could not be excluded.

In a concerning misinterpretation of the Guidelines' expansive definition of "business relationships", the Swiss NCP decided that no business relationship existed between UBS and Hikvision in relation to UBS's role as custodian for Hikvision shares on behalf of its clients. Following the NCP's decision, the Centre for Research on Multinational Enterprises (SOMO) and BankTrack **sought and received confirmation** from the UN's Office of the High Commissioner for Human Rights that, to the contrary, a business relationship does exist in this case and that banks do have responsibilities regarding the impacts of companies for which they hold shares on behalf of clients.⁸

Remedy lowlights

Misinterpretation of "direct linkage" and "business relationships", high standard of proof

In Lawyers for Palestinian Human Rights vs. J.C. Bamford Ltd, the UK NCP incorrectly interpreted the concepts of "direct linkage" and "business relationships" in the Guidelines.⁹ This case concerned the use of JCB's construction machinery in the demolition of Palestinian property and construction of Israeli settlements in the occupied West Bank. The NCP concluded that the complexity of JCB's supply chain and the nature of the company's business in Israel meant that it did not have any leverage beyond the first tier of its business relationships, and therefore no responsibility to address impacts. This decision does not accord with the OECD Guidelines nor **OECD Due Diligence Guidance for Responsible Business Conduct** (Due Diligence Guidance), which provide that 'direct linkage' is not defined by direct contractual relationships but occurs through a series of business relationships (both upstream and downstream in a company's supply chain).¹⁰

In its final statement, the NCP also applied an overly high standard of proof by requiring "conclusive" evidence of the linkage between JCB and the Israel-based company using its equipment to commit human

rights and land rights violations. Though highly plausible and likely, the company's refusal to be transparent about its contract or the relationship meant that it was impossible for the complainants to provide such conclusive proof. HRDD as conceived in the Due Diligence Guidance is about companies 'knowing and showing' that they are conducting adequate HRDD. This makes it incumbent on companies to provide sufficient evidence to show that they are not linked to an impact, rather than placing the burden on communities or civil society (who often lack access to crucial information) to prove it.

Numerous, fundamental errors by the Korean NCP

The Korean NCP continues to be one of the NCP system's worst performers. In its initial assessment, the Korean NCP rejected complaints filed by Korean Civil Society in Solidarity with Rohingya, Korean Transnational Corporation Watch and Justice for Myanmar against six Myanmar-based companies ([POSCO International](#), [POSCO C&C](#), [Inno Group](#), [Pan-Pacific](#), [Hotel Lotte](#), and [Daesun Shipbuilding & Engineering Co. Ltd](#)).¹¹ The NCP's decision contained numerous errors, including the imposition of an unreasonably high standard of proof at an early stage of NCP proceedings, and its failure to examine the HRDD conducted by the six companies, but rather its reliance on companies' assurances that they had taken steps to address the issues raised in the complaint.

Complaint closed due to excessive timeframe

In [FOCO & Friends of the Earth Argentina vs. Shell Capsa](#), the Argentine NCP closed a complaint that had been open for over 12 years.¹² The case concerned the company's allegedly irresponsible activities at its oil refinery. Shell Capsa had consistently refused to participate in mediation offered by the NCP and there had been no agreement between the parties. Needless to say, the timeframe for closure of this complaint was beyond excessive and one of the longest that OECD Watch has ever seen. This is an egregious breach of the Guidelines' provision on indicative timeframe and rivals [Protest Toyota Campaign vs. Toyota](#), which the Japanese NCP took 15 years to close.¹³

In September 2021, OECD Watch (supported by MiningWatch Canada) filed the second ever [substantiated submission](#) to the OECD Investment Committee regarding the Canadian NCP's failure to fulfil its procedural responsibilities with regard to its handling of [Bruno Manser Fonds vs. Sakto Group](#).¹⁴ This is the first substantiated submission to be filed since 2019, when the OECD revised the procedures for this crucial mechanism for holding adhering countries and NCPs accountable when they fail to meet their obligations under the OECD Guidelines Procedural Guidance. The review of the substantiated submission is ongoing.

Conclusion & Recommendations

Our analysis of community and civil society-led complaints concluded in 2021 demonstrates that NCPs have largely failed to facilitate effective remedy outcomes for complainants. These complaints demonstrate many of the problems that OECD Watch has observed and documented year after year in NCP processes and decisions. The origin of these problems lies in the lack of political will on behalf of governments, but also in the text of the Guidelines itself, including inadequate guidance and instructions for NCPs in the Procedural Guidance. The result is a lack of predictability and effectiveness across the NCP system and major governance gaps. The Guidelines must be updated to ensure these gaps are filled and for the Guidelines to remain a leading international standard for responsible business conduct.

Recommendations to NCPs

OECD Watch makes the following recommendations to NCPs based on our analysis of cases concluded in 2021:

Standard of proof

- **Initial assessment phase:** NCPs' initial assessments should not place an overly high burden of proof on the complainants' allegations. The [OECD's Guide for National Contacts Points on the Initial Assessment of Specific Instances](#) states that the initial assessment "should not be unnecessarily onerous" and that some NCPs have "framed this standard as one of plausibility".¹⁵ The OECD also states that the evidentiary requirements for initial assessments "need not be analogous to those required in legal proceedings" due to the voluntary nature of participation in NCP mediation by the parties.
- **Final statement phase:** NCPs should have regard to the nature of HRDD in their final statements. 'Conclusive' proof by complainants of their allegations should not be required by NCPs in order to make determinations as to whether a company has complied with the Guidelines. This is because HRDD as set out in the Guidelines and Due Diligence Guidance is about companies 'knowing and showing' that they are conducting adequate HRDD. Accordingly, rather than placing the burden on communities and civil society organisations who often lack access to crucial information to prove linkage to an impact, companies should provide adequate evidence to show that they are not in fact linked. This is in effect a reversal of the burden of proof from what is applied in most civil and criminal courts.
- **Scope of "direct linkage" and "business relationships":** NCPs should have regard to the broad definitions of "direct linkage" and "business relationships" in the Due Diligence Guidance. Importantly, 'direct linkage' is not defined by direct contractual relationships but rather occurs through a series of business relationships in a company's supply chain (both upstream and downstream). The complexity of companies' businesses does not negate their responsibility to conduct adequate risk-based HRDD on their own operations, supply chains, and other business relationships.
- **Role:** The Guidelines state that the role of NCPs is to assist in the resolution of issues between the parties. Alleged non-compliance with the Guidelines in terms of inadequate HRDD is not 'resolved' by forward-looking steps taken by a company to prevent these problems in the future. Assisting to resolve the issues raised in complaints should involve NCPs examining the adequacy of past HRDD conducted by companies and seeking to facilitate remedy for any harms arising from such non-compliance.
- **Timeframes:** NCPs should ensure that they follow the indicative timeframes for specific instances set out in the Guidelines. NCPs should seek to conclude their initial assessment within three months and generally conclude procedures within 12 months from receipt of the complaint.

Recommendations to the OECD

- OECD Watch strongly encourages the OECD to continue its stocktaking exercise with a view to potentially updating the Guidelines. The [OECD's stocktaking report](#) highlighted the opportunities that exist in the Guidelines for enhancing the standards for businesses as well as strengthening the NCP system.¹⁶ In OECD Watch's view, the Guidelines are neither up-to-date nor complete, and the minimum expectations for NCPs are too vague. The Guidelines should be updated to ensure their continued relevance and the effectiveness of NCPs.
- OECD Watch has made several [submissions to the OECD Secretariat for its stocktaking on gaps in the Guidelines](#).¹⁷ We highlight the following recommendations for the potential update of the Guidelines:
 - Update the Procedural Guidance to improve the minimum expectations for NCPs.
 - Update the General Policies chapter to clarify the steps and scope of HRDD.
 - Update the Environment chapter to clarify expectations for businesses in relation to their (direct and indirect) contributions to climate change and other environmental impacts.
 - Update the Disclosure chapter to ensure transparency on information provided by companies on their HRDD.

Key elements in community and civil society-led complaints concluded in 2021

	CASE	LEAD NCP	ISSUE	STATUS	SECTOR(S)	KEYWORD(S)	VICTIM GROUP(S)	YEAR FILED	OUTCOME
1	Society for Threatened Peoples Switzerland vs. BKW Group	Switzerland	Human rights impacts of investment in energy projects on Sami territory, Norway	Agreement	Energy, Financial	Due Diligence, Human Rights	Indigenous	2020	Agreement reached through mediation process
2	Society for Threatened Peoples Switzerland vs. UBS Group	Switzerland	Financial ties to human rights abuses associated with surveillance of Uyghurs in Xinjiang, China	No resolution	Financial, Security & Defense, Technology & Telecoms	Digitalisation, Due diligence, Human rights	Communities, Indigenous	2020	Complainants ended mediation process; some actions agreed by parties
3	BIRD vs. HPG	United Kingdom	Links to Bahraini government's alleged human rights violations	Agreement	Other	Due diligence, Human rights	Communities, Human rights defenders	2018	Agreement reached through mediation process
4	SOUL and Ngā Kaitiaki o Ihumātao Trust vs. Fletchers Building Limited	New Zealand	Human rights impacts of housing development plans in New Zealand	Withdrawn	Other	Human rights, Land rights	Indigenous	2018	Complainants requested NCP pause the case; agreement reached outside of NCP procedure
5	WeCAN vs. Arrow International	New Zealand	Human rights impacts of damaged homes after earthquakes in New Zealand	No resolution	Other	Due diligence, Human rights	Communities	2014	NCP offered its good offices to the parties; commitments made by company; NCP closed case
6	UK Lawyers for Israel vs. PricewaterhouseCoopers Global Network (PwC) 2	United Kingdom	Human rights impacts of audit services in Palestine	No resolution	Financial	Disclosure, Human Rights	Public	2019	Mediation not offered due to failure to reach agreement in previous complaint; NCP determined no breaches
7	Australian bush fire victims and Friends of the Earth Australia vs. ANZ Bank	Australia	Impacts of lending and investment practices on climate change	No resolution	Financial	Climate change, Consumer interests, Disclosure, Due diligence, Environment, Supply chain	Public	2020	No agreement was reached after external mediation process; NCP determined no breaches
8	I-Buycott vs. Starbucks Coffee France	France	Taxation and financial issues in France	No resolution	Agriculture & Food	Consumer interests, Disclosure, Taxation	Public	2019	Mediation did not result in agreement; NCP made some determinations of non-compliance
9	Lawyers for Palestinian Human Rights vs. J.C. Bamford Ltd	United Kingdom	Human rights and land rights violations of demolitions and construction in occupied West Bank	No resolution	Infrastructure, Other	Due diligence, Human rights, Land rights	Communities	2019	Company refused mediation; NCP made some determinations of non-compliance
10	West Virginians for Sustainable Development vs. Rockwool	Denmark	Human rights and environmental concerns of wool mineral factory in West Virginia, US	No resolution	Manufacturing	Due diligence, Environment, Health, Human rights	Public	2019	Company refused mediation; NCP made some determinations of non-compliance
11	FOCO & Friends of the Earth Argentina vs. Shell Capsa	Argentina	Environmental and health impacts of oil refinery in Argentina	Blocked	Oil & Gas	Disclosure, Environment, Health, Human rights	Communities	2008	NCP closed case due to excessive timeframe
12	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. POSCO	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2020	NCP rejected complaint in initial assessment

Key elements in community and civil society-led complaints concluded in 2021 (continued)

	CASE	LEAD NCP	ISSUE	STATUS	SECTOR(S)	KEYWORD(S)	VICTIM GROUP(S)	YEAR FILED	OUTCOME
13	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. Inno Group	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2020	NCP rejected complaint in initial assessment
14	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. Pan-Pacific	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2020	NCP rejected complaint in initial assessment
15	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. Hotel Lotte	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2020	NCP rejected complaint in initial assessment
16	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. Daesun Shipbuilding & Engineering	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2020	NCP rejected complaint in initial assessment
17	Korean Civil Society in Solidarity with the Rohingya (KCSSR), Korean Transnational Corporation Watch and Justice for Myanmar vs. POSCO International	Korea	Six companies' business links to human rights violations committed by Myanmar military against Rohingya	Rejected	Garment & Textile, Infrastructure, Manufacturing, Other, Security & Defense	Due diligence, Human rights, Labour rights	Communities	2021	NCP rejected complaint in initial assessment
18	Aminigboko Community vs. Daewoo Engineering & Construction Co., Ltd.	Korea	Impacts of oil and gas project on communities in Nigeria	Rejected	Oil & Gas	Disclosure, Due diligence, Environment, Human rights, Labour rights, Land rights	Communities, Indigenous	2020	NCP rejected complaint in initial assessment
19	Aminigboko Community vs. Daewoo Nigeria Limited	Korea	Impacts of oil and gas project on communities in Nigeria	Rejected	Oil & Gas	Disclosure, Due diligence, Environment, Human rights, Labour rights, Land rights	Communities, Indigenous	2020	NCP rejected complaint in initial assessment
20	Divest Invest Protect, Indigenous Peoples Law and Policy Program, and Women's Earth and Climate Action Network vs. Credit Suisse Group	United States	Environmental and human rights impacts associated with investment in oil pipeline in the US	Rejected	Financial, Infrastructure	Climate change, Due diligence, Environment, Human rights, Supply chain	Communities, Human Rights Defenders, Indigenous, Public, Women	2020	NCP rejected complaint in initial assessment
21	Port Hedland Community Progress Association vs. BHP	Australia	Human rights and environmental impacts of mining activities in Australia	Rejected	Mining	Environment	Communities	2021	NCP rejected complaint in initial assessment
22	Iranian Center for International Criminal Law vs. Mölnlycke Health Care	Sweden	Health impacts of irresponsible disengagement from Iran	Rejected	Other	Due diligence, Health, Human rights	Children	2021	NCP rejected complaint in initial assessment

About OECD Watch

OECD Watch is a global network with more than 130 members in over 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that victims of corporate misconduct have access to remedy, that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.

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Endnotes

- 1 <https://www.oecdwatch.org/complaint/society-for-threatened-peoples-vs-bkw-energie-ag/>
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