

# NCP Mediation Manual

including the relevant texts from the OECD Guidelines as of February 2012

Prepared by

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## **NCP Manual**

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# OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context

Abstract updated version 2011

"The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. The *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The *Guidelines* are part of the *OECD Declaration on International Investment and Multinational Enterprises* the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives. The *Guidelines* provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. However, the countries adhering to the *Guidelines* make a binding commitment to implement them in accordance with the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises*. Furthermore, matters covered by the *Guidelines* may also be the subject of national law and international commitments.

## I. National Contact Points

1. Adhering countries shall set up National Contact Points to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances, taking account of the attached procedural guidance. The business community, worker organisations, other non-governmental organisations and other interested parties shall be informed of the availability of such facilities.
2. National Contact Points in different countries shall co-operate if such need arises, on any matter related to the *Guidelines* relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.
3. National Contact Points shall meet regularly to share experiences and report to the Investment Committee.
4. Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.

# Procedural Guidance

## I. National Contact Points

The role of National Contact Points (NCPs) is to further the effectiveness of the *Guidelines*. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

### A. Institutional Arrangements

Consistent with the objective of functional equivalence and furthering the effectiveness of the *Guidelines*, adhering countries have flexibility in organizing their NCPs, seeking the active support of social partners, including the business community, worker organizations, other non-governmental organizations, and other interested parties.

Accordingly, the National Contact Points:

1. Will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines* and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.
2. Can use different forms of organisation to meet this objective. An NCP can consist of senior representatives from one or more Ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included.
3. Will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the *Guidelines*.

### B. Information and Promotion

The National Contact Point will:

1. Make the *Guidelines* known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about the *Guidelines*, as appropriate.

2. Raise awareness of the *Guidelines* and their implementation procedures, including through co-operation, as appropriate, with the business community, worker organisations, other non-governmental organisations, and the interested public.
3. Respond to enquiries about the *Guidelines* from:
  - a. Other National Contact Points;
  - b. The business community, worker organisations, other non-governmental organisations and the public; and
  - c. Governments of non-adhering countries.

### **C. Implementation in Specific Instances**

The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the *Guidelines* in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*. The NCP will offer a forum for discussion and assist the business community, worker organizations, other non-governmental organizations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
  - a. Seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts;
  - b. Consult the NCP in the other country or countries concerned;
  - c. Seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;
  - d. Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.
3. At the conclusion of the procedures and after consultation with the parties involved, make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing:

- a. A statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision.
- b. A report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto.
- c. A statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the *Guidelines* as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

The NCP will notify the results of its specific instance procedures to the Committee in a timely manner.

4. In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law.
5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

#### **D. Reporting**

1. Each NCP will report annually to the Committee.
2. Reports should contain information on the nature and results of the activities of the NCP, including implementation activities in specific instances.

## Commentaries on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

1. The Council Decision represents the commitment of adhering countries to further the implementation of the recommendations contained in the text of the *Guidelines*. Procedural guidance for both NCPs and the Investment Committee is attached to the Council Decision.
2. The Council Decision sets out key adhering country responsibilities for the *Guidelines* with respect to NCPs, summarised as follows:
  - a. Setting up NCPs (which will take account of the procedural guidance attached to the Decision), and informing interested parties of the availability of *Guidelines*-related facilities.
  - b. Making available necessary human and financial resources.
  - c. Enabling NCPs in different countries to co-operate with each other as necessary.
  - d. Enabling NCPs to meet regularly and report to the Committee.
3. The Council Decision also establishes the Committee's responsibilities for the *Guidelines*, including:
  - a. Organizing exchanges of views on matters relating to the *Guidelines*.
  - b. Issuing clarifications as necessary.
  - c. Holding exchanges of views on the activities of NCPs.
  - d. Reporting to the OECD Council on the *Guidelines*.
4. The Investment Committee is the OECD body responsible for overseeing the functioning of the *Guidelines*. This responsibility applies not only to the *Guidelines*, but also to all elements of the Declaration (National Treatment Instrument, and the instruments on International Investment Incentives and Disincentives, and Conflicting Requirements). The Committee seeks to ensure that each element in the Declaration is respected and understood, and that they all complement and operate in harmony with each other.
5. Reflecting the increasing relevance of responsible business conduct to countries outside the OECD, the Decision provides for engagement and co-operation with non-adhering countries on matters covered by the *Guidelines*. This provision allows the Committee to arrange special meetings with interested non-adhering countries to promote understanding of the standards and principles contained in the *Guidelines* and of their implementation procedures. Subject to relevant OECD procedures, the Committee may also associate them with special activities or projects on responsible business conduct, including by inviting them to its meetings and to the Corporate Responsibility Roundtables.
6. In its pursuit of a proactive agenda, the Committee will co-operate with NCPs and seek opportunities to collaborate with the advisory bodies, OECD Watch, and other

international partners. Further guidance for NCPs in this respect is provided in paragraph 18.

## I. Commentary on the Procedural Guidance for NCPs

7. National Contact Points have an important role in enhancing the profile and effectiveness of the *Guidelines*. While it is enterprises that are responsible for observing the *Guidelines* in their day-to-day behaviour, governments can contribute to improving the effectiveness of the implementation procedures. To this end, they have agreed that better guidance for the conduct and activities of NCPs is warranted, including through regular meetings and Committee oversight.
8. Many of the functions in the Procedural Guidance of the Decision are not new, but reflect experience and recommendations developed over the years. By making them explicit the expected functioning of the implementation mechanisms of the *Guidelines* is made more transparent. All functions are now outlined in four parts of the Procedural Guidance pertaining to NCPs: institutional arrangements, information and promotion, implementation in specific instances, and reporting.
9. These four parts are preceded by an introductory paragraph that sets out the basic purpose of NCPs, together with core criteria to promote the concept of “functional equivalence”. Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner. These criteria will guide NCPs in carrying out their activities and will also assist the Committee in discussing the conduct of NCPs.

### Core Criteria for Functional Equivalence in the Activities of NCPs

- a. Visibility. In conformity with the Decision, adhering governments agree to nominate NCPs, and also to inform the business community, worker organizations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the Guidelines. Governments are expected to publish information about their NCPs and to take an active role in promoting the Guidelines, which could include hosting seminars and meetings on the instrument. These events could be arranged in co-operation with business, labor, NGOs, and other interested parties, though not necessarily with all groups on each occasion.
- b. Accessibility. Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labor, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.
- c. Transparency. Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public.



Thus, as a general principle, the activities of the NCP will be transparent. Nonetheless when the NCP offers its “good offices” in implementing the *Guidelines* in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*.

- d. Accountability. A more active role with respect to enhancing the profile of the *Guidelines* – and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate – will also put the activities of NCPs in the public eye. Nationally, parliaments could have a role to play. Annual reports and regular meetings of NCPs will provide an opportunity to share experiences and encourage “best practices” with respect to NCPs. The Committee will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

### **Institutional Arrangements**

10. NCP leadership should be such that it retains the confidence of social partners and other stakeholders, and fosters the public profile of the *Guidelines*.
11. Regardless of the structure Governments have chosen for their NCP, they can also establish multi-stakeholder advisory or oversight bodies to assist NCPs in their tasks.
12. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, worker organisations, other non-governmental organisations, and other interested parties.

### **Information and Promotion**

13. The NCP functions associated with information and promotion are fundamentally important to enhancing the profile of the *Guidelines*.
14. NCPs are required to make the *Guidelines* better known and available online and by other appropriate means, including in national languages. English and French language versions will be available from the OECD, and website links to the *Guidelines* website are encouraged. As appropriate, NCPs will also provide prospective investors, both inward and outward, with information about the *Guidelines*.
15. NCPs should provide information on the procedures that parties should follow when raising or responding to a specific instance. It should include advice on the information that is necessary to raise a specific instance, the requirements for parties participating in specific instances, including confidentiality, and the processes and indicative timeframes that will be followed by the NCP.

16. In their efforts to raise awareness of the Guidelines, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, the business community, worker organisations, other non-governmental organisations, and other interested parties. Such organisations have a strong stake in the promotion of the Guidelines and their institutional networks provide opportunities for promotion that, if used for this purpose, will greatly enhance the efforts of NCPs in this regard.
17. Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: i) other NCPs (reflecting a provision in the Decision); ii) the business community, worker organisations, other non-governmental organisations and the public; and iii) governments of non-adhering countries.

### **Proactive Agenda**

18. In accordance with the Investment Committee's proactive agenda, NCPs should maintain regular contact, including meetings, with social partners and other stakeholders in order to:
  - a. consider new developments and emerging practices concerning responsible business conduct;
  - b. support the positive contributions enterprises can make to economic, social and environmental progress;
  - c. participate where appropriate in collaborative initiatives to identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries.

### **Peer Learning**

19. In addition to contributing to the Committee's work to enhance the effectiveness of the *Guidelines*, NCPs will engage in joint peer learning activities. In particular, they are encouraged to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations. Such peer learning can be carried out through meetings at the OECD or through direct co-operation between NCPs.

### **Implementation in Specific Instances**

20. When issues arise relating to implementation of the *Guidelines* in specific instances, the NCP is expected to help resolve them. This section of the Procedural Guidance provides guidance to NCPs on how to handle specific instances.
21. The effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved in the procedures. Good faith behaviour in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the *Guidelines*.

## Guiding Principles for Specific Instances

22. Consistent with the core criteria for functional equivalence in their activities NCPs should deal with specific instances in a manner that is:
  - a. Impartial. NCPs should ensure impartiality in the resolution of specific instances.
  - b. Predictable. NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.
  - c. Equitable. NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure.
  - d. Compatible with the Guidelines. NCPs should operate in accordance with the principles and standards contained in the *Guidelines*.

## Coordination between NCPs in Specific Instances

23. Generally, issues will be dealt with by the NCP of the country in which the issues have arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues. The NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.
24. When issues arise from an enterprise's activity that takes place in several adhering countries or from the activity of a group of enterprises organised as consortium, joint venture or other similar form, based in different adhering countries, the NCPs involved should consult with a view to agreeing on which NCP will take the lead in assisting the parties. The NCPs can seek assistance from the Chair of the Investment Committee in arriving at such agreement. The lead NCP should consult with the other NCPs, which should provide appropriate assistance when requested by the lead NCP. If the parties fail to reach an agreement, the lead NCP should make a final decision in consultation with the other NCPs.

## Initial Assessment

25. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account:
  - a. the identity of the party concerned and its interest in the matter;
  - b. whether the issue is material and substantiated;

- c. whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
  - d. the relevance of applicable law and procedures, including court rulings;
  - e. how similar issues have been, or are being, treated in other domestic or international proceedings;
  - f. whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.
26. When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted. Parties should also assist NCPs in their consideration of these matters by providing relevant information on the parallel proceedings.
27. Following its initial assessment, the NCP will respond to the parties concerned. If the NCP decides that the issue does not merit further consideration, it will inform the parties of the reasons for its decision.

### **Providing Assistance to the Parties**

28. Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer "good offices" in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph C-2a) through C-2d). This could include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts. Consultations with NCPs in other countries, or seeking guidance on issues related to the interpretation of the *Guidelines* may also help to resolve the issue.
29. As part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned and their commitment to participate in good faith during the procedure.
30. When offering their good offices, NCPs may take steps to protect the identity of the parties involved where there are strong reasons to believe that the disclosure of this information would be detrimental to one or more of the parties. This could include circumstances where there may be a need to withhold the identity of a party or parties from the enterprise involved.

## Conclusion of the Procedures

31. NCPs are expected to always make the results of a specific instance publicly available in accordance with paragraphs C-3 and C-4 of the Procedural Guidance.
32. When the NCP, after having carried out its initial assessment, decides that the issues raised in the specific instance do not merit further consideration, it will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.
33. The NCP may also make publicly available its decision that the issues raised merit further examination and its offer of good offices to the parties involved.
34. If the parties involved reach agreement on the issues raised, the parties should address in their agreement how and to what extent the content of the agreement is to be made publicly available. The NCP, in consultation with the parties, will make publicly available a report with the results of the proceedings. The parties may also agree to seek the assistance of the NCP in following-up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP.
35. If the parties involved fail to reach agreement on the issues raised or if the NCP finds that one or more of the parties to the specific instance is unwilling to engage or to participate in good faith, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the *Guidelines*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for. The statement should identify the parties concerned, the issues involved, the date on which the issues were raised with the NCP, any recommendations by the NCP, and any observations the NCP deems appropriate to include on the reasons why the proceedings did not produce an agreement.
36. The NCP should provide an opportunity for the parties to comment on a draft statement. However, the statement is that of the NCP and it is within the NCP's discretion to decide whether to change the draft statement in response to comments from the parties. If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow up with the parties on their response to these recommendations. If the NCP deems it appropriate to follow-up on its recommendations, the timeframe for doing so should be addressed in the statement of the NCP.
37. Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant to the administration of government programs and policies. In order to foster policy coherence, NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programs. This provision does not change the voluntary nature of the *Guidelines*.

## Transparency and Confidentiality

38. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 9 in “Core Criteria” section, above). However, paragraph C-4 of the Procedural Guidance recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while paragraph C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent.

## Issues Arising in Non-Adhering Countries

39. As noted in paragraph 2 of the “Concepts and Principles” chapter, enterprises are encouraged to observe the *Guidelines* wherever they operate, taking into account the particular circumstances of each host country.
- a. In the event *Guidelines*-related issues arise in a non-adhering country, home NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the enterprise in the home country, and, as appropriate, embassies and government officials in the non-adhering country.
  - b. Conflicts with host country laws, regulations, rules and policies may make effective implementation of the *Guidelines* in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.
  - c. The parties involved will have to be advised of the limitations inherent in implementing the *Guidelines* in non-adhering countries. Issues relating to the *Guidelines* in non-adhering countries could also be discussed at NCP annual meetings with a view to building expertise in handling issues arising in non-adhering countries.

## Indicative Timeframe

40. The specific instance procedure comprises three different stages:
1. Initial assessment and decision whether to offer good offices to assist the parties: NCPs should seek to conclude an initial assessment within three months, although additional time might be needed in order to collect information necessary for an informed decision.
  2. Assistance to the parties in their efforts to resolve the issues raised: If an NCP decides to offer its good offices, it should strive to facilitate the resolution of the issues in a timely manner. Recognising that progress through good offices, including mediation and conciliation, ultimately depends upon the parties involved, the NCP should, after consultation with the parties, establish a reasonable timeframe for the discussion between the parties to resolve the issues raised. If they fail to reach an agreement within this timeframe, the NCP should consult with the parties on the value of continuing its assistance to the parties; if the NCP comes to the conclusion that the continuation of the procedure is not likely to be productive, it should conclude the process and proceed to prepare a statement.
  3. Conclusion of the procedures: The NCP should issue its statement or report within three months after the conclusion of the procedure.
41. As a general principle, NCPs should strive to conclude the procedure within 12 months from receipt of the specific instance. It is recognised that this timeframe may need to be extended if circumstances warrant it, such as when the issues arose in a non-adhering country.

## Reporting to the Investment Committee

42. Reporting would be an important responsibility of NCPs that would also help to build up a knowledge base and core competencies in furthering the effectiveness of the *Guidelines*. In this light, NCPs will report to the Investment Committee in order to include in the Annual Report on the OECD *Guidelines* information on all specific instances that have been initiated by parties, including those that are in the process of an initial assessment, those for which offers of good offices have been extended and discussions are in progress, and those in which the NCP has decided not to extend an offer of good offices after an initial assessment. In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in paragraph C-4."

# Suggestions for the Implementation of the OECD Guidelines in Specific Instances

## Introduction

The OECD Guidelines are a code of conduct for multinational companies endorsed by 44 countries in 2012. As UN Special Representative and Harvard University Professor John Ruggie has pointed out, this makes them the “most widely applicable set of government-endorsed standards related to corporate responsibility and human rights.”<sup>1</sup> In fact, some point to their wide acceptance as evidence that the Guidelines have status as customary international norm, with which all companies would do well to comply. For the 44 countries there is the obligation to implement the guidelines and do everything possible to make sure that they are known, understood and accepted by the companies in their country. The establishment of National Contact Points is important for that specific purpose. The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines.

"Governments adhering to the *Guidelines* will implement them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the *Guidelines* in a changing world."<sup>2</sup>

The National Contact Points (NCPs) have responsibility for contributing to the resolution of issues that arise in relation to the implementation of the Guidelines in specific instances. This, and related roles and responsibilities of NCPs, are defined in the Guidelines. Each NCP is granted the flexibility it needs to carry out this mandate, based on the circumstances that apply in its national context.

NCPs face challenges in carrying out this mandate, however.

The recent update of the Guidelines as decided by Ministers and Heads of State of the adhering countries in May 2011 improved the possibilities for NCPs to contribute and even take the lead in a problem-solving process.

Since 2010, greater attention has been paid to ways in which NCPs can use informal problem-solving methods. This Manual outlines how such techniques and strategies, particularly mediation, can be used instead of, or in conjunction with, a formal response to specific instances.

This manual is meant to help NCPs in performing a task that is often quite challenging: setting up a problem-solving process to create a situation in which companies and other stakeholders effectively adhere to the Guidelines. The strategies and steps described are not meant to be a blueprint that should be used in all circumstances. Nonetheless, following the descriptions can help to avoid

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<sup>1</sup> Ruggie, J.: 2008, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc A/HRC/8/5 (7 April 2008).

<sup>2</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 18.  
<http://dx.doi.org/10.1787/9789264115415-en>



common process-related mistakes. NCPs should be aware that their roles vary to some extent in each of the 44 states that adhere to the Guidelines. Each NCP needs to create clarity about its role, in collaboration with government and other stakeholders in each state. Similarly, each NCP needs to be able to assess its capacity and legitimacy to be able to help solve each specific instance. NCPs should be sensitive to questions about the credibility of their actions and of the organizational circumstances they have to work in.

## **Towards a Broader Concept of the NCP Role**

Recent meetings of the NCPs have focused on what informal problem-solving roles they can play, and on how they might enhance their informal problem-solving capabilities. After all, it is one thing to promote the use of informal problem solving in a general way; it is quite another to supply mediation and conciliation services in specific instances. Recent efforts of a few NCPs provide a good starting point to learn more about how the NCPs' problem-solving role might be strengthened, particularly through mediation. In many ways, a commitment to informal problem solving reflects nothing more than a desire on the part of NCPs to better meet the good practice standards already prescribed in the OECD Guidelines.

## **Why Mediation?**

Problem solving through mediation can yield more positive results than a formal findings process. The latter might not prompt constructive action by the corporation. Moreover, the findings process focuses narrowly on producing findings that the NCP can substantiate; it does not seek to improve relationships among the affected parties in an effort to head-off future disagreements.

Mediation is a process of negotiation managed by a neutral party (selected jointly by the relevant stakeholders). The differences between mediation and the related process of conciliation are discussed in Part IV of this Manual.

Some advantages of mediation include:

- Mediation encourages voluntary compliance with the Implementation Procedures of the OECD Guidelines. The current Guidelines (and the Commentary that goes with them) recommend that NCPs “*offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand...*”<sup>3</sup> Mediation aims to produce commitments to take action, reflecting the shared and complementary interests of the stakeholders.
- Mediation can address a wider range of issues and, when helpful, engage additional stakeholders, since mediation only proceeds with the concurrence of all the relevant stakeholders. Thus, mediation can help parties address a range of related issues that may go

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<sup>3</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 84.  
<http://dx.doi.org/10.1787/9789264115415-en>

beyond the problems enumerated in a specific instance. For example, the Australian NCP, in cooperation with the Swiss and UK NCPs, used an independent facilitator to address land title claims against Cerrejon Coal, a subsidiary of BHP Billiton, in the town of Tabaco, Colombia. In addition to resolving the specific actions in Tobaco, the mediation also addressed the handling of similar occurrences in the future, including the facilitation of resettlement agreements and the appointment of an on-site Social Responsibility Manager to oversee the resettlement process for five nearby communities.<sup>4</sup> In this way, the mediation process allowed the parties to reach a voluntary settlement that resolved the issues in the original specific instance and also addressed possible future challenges.

- NCP offices were created to contribute to the solution of problems that arise in connection with implementation of the Guidelines. While formal findings processes provide a means of assigning responsibility, conciliation and mediation can help parties develop mutually satisfactory solutions to problems. For example, the UK NCP provided mediation for a Unilever PLC case in Pakistan, which focused on possible violations of employment and industrial relation policies. Through mediation, Unilever and the complainant, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF), made specific commitments to resolve the issues. Unilever, which had previously relied heavily on contract workers, agreed to create more permanent positions in its factories. Unilever also agreed to pay lump sum payments to each employee for wrongful treatment, in return for their promise to end current and future legal action. The parties agreed to jointly monitor the implementation of the agreement.<sup>5</sup>

## Incentives for Mediation

The published Commentary on the Implementation Procedures of the OECD Guidelines provides that conciliation and mediation procedures should “...be used only upon agreement of the parties concerned.”<sup>6</sup> Thus, the NCP cannot mandate that those bringing a specific instance or the MNE against which a specific instance has been brought must participate in mediation. There are several ways, however, that NCPs can make mediation attractive to the relevant parties:

1. Show how mediation can enhance corporate image. Companies have a vested interest in protecting their reputation as responsible corporate citizens. Negative publicity surrounding claims of social and environmental violations can be harmful.

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<sup>4</sup> Australian National Contact Point (2009), “BHP-Billiton-Cerrejon Coal Specific Instance”, OECD, [www.oecd.org/dataoecd/4/35/43175359.pdf](http://www.oecd.org/dataoecd/4/35/43175359.pdf)

<sup>5</sup> UK National Contact Point (2009), “Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations against Unilever plc on Pakistan's Rahim Yar Khan factory,” OECD, [www.oecd.org/dataoecd/0/14/44478663.pdf](http://www.oecd.org/dataoecd/0/14/44478663.pdf)

<sup>6</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 84. <http://dx.doi.org/10.1787/9789264115415-en>

2. NCPs can put their governmental authority to good use. NCPs can often call on business, trade, or investment ministries and other governmental agencies to lend a hand in mediations. In fact, in the context of voluntary agreements, generated in a transparent way, it may be possible for government to offer various kinds of support to help implement an agreement. In this way, whereas a formal findings process usually pits regulatory authorities against industry, mediation puts them on the same side of the “problem-solving table.”
3. Final Statements can applaud mediation success. NCPs are obligated to make the results of the procedures publicly available following the handling of a specific instance. According to the Procedural Guidance “...when the parties have reached agreement on the issues... Information on the content of the agreement will only be included insofar as the parties involved agree thereto”. “...When no agreement is reached or when a party is unwilling to participate in the procedures ... The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached”.<sup>7</sup>

Although a Final Statement is not a legal instrument, it is a powerful tool because it reflects the NCP’s views on the implementation of the Guidelines, the way the process was handled, and (optionally) why agreement could or could not be reached. A Final Statement can benefit both a company and notifiers of a specific instance by applauding their participation in the mediation process, and encouraging more effective communication between the parties in the future.

In short, mediation provides NCPs with an opportunity to create tailored methods of improving implementation of the Guidelines. This is an opportunity that is often unavailable through other processes.

## Getting Started: How to use this Manual

The aim of this Manual is to provide clarity on whether, when and how NCPs can use mediation and other informal problem-solving methods to resolve claims in specific instances. The Manual draws heavily on the *OECD Guidelines*; the accompanying Commentary on the Implementation Procedures; the work of John Ruggie, Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises; and the knowledge of NCPs that have experience with informal problem solving. The information is framed in terms of commonly accepted best practices and prevailing mediation standards.

This Manual is divided into five parts:

1. Initial assessment. This section discusses how to make an initial assessment of whether the issues raised merit further examination. It also provides guidance to NCPs in applying a broader problem-solving perspective to the claims filed or about to be filed in a specific instance.

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<sup>7</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 73.  
<http://dx.doi.org/10.1787/9789264115415-en>

2. Pre-mediation assessment meetings. This section explains how an NCP office can meet with key parties to determine whether to pursue mediation and/or conciliation. It discusses the importance of impartiality, and how to establish credibility and legitimacy in difficult situations.
3. Conducting a stakeholder assessment. This section discusses the importance of a full-fledged assessment, including the involvement, on a confidential basis, of all relevant stakeholders in designing a possible problem-solving strategy. It also suggests how the results of the assessment should be analyzed to determine the appropriateness of engaging in mediation.
4. Mediation. This section reviews the steps in the mediation process. It summarizes best practices and highlights the relevant lessons learned in related mediation situations. It also provides information regarding the pros and cons of using internal versus outside mediators.
5. Wrapping Up. This section discusses the most appropriate ways of describing the mediation process in a Final Statement, depending on whether or not the mediation was successful.

### Target Audience for this Manual

- NCP Offices. This Manual is designed for NCP offices and staff, to help them implement informal problem solving, particularly mediation, within the process of handling specific instances pursuant to the OECD Guidelines.
- OECD Signatories. This Manual seeks to inform national officials about the NCP process, particularly with regard to how NCPs can use informal problem solving to resolve outstanding conflicts between their citizens and multinational enterprises operating within their borders.

### Defining Key Terms

The OECD guidelines encourage NCPs to employ “consensual and non-adversarial procedures.”<sup>8</sup> This Manual recognizes that different countries and contexts define these procedures - such as mediation and conciliation – differently. For clarification, definitions of key terms for the purposes of this Manual are listed below.

- Problem Solving: a quality improvement approach that involves identifying the causes of a problem and proposing potential, often creative, solutions agreeable to multiple parties or individuals.<sup>9</sup> *This Manual defines problem solving in general terms to refer to processes such as mediation and conciliation.*

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<sup>8</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 84.  
<http://dx.doi.org/10.1787/9789264115415-en>

<sup>9</sup> Google Dictionary (2009). “Problem-Solving”, Google, [www.google.com.tw/dictionary?hl=en&q=problem-solving&sl=en&tl=en](http://www.google.com.tw/dictionary?hl=en&q=problem-solving&sl=en&tl=en)

- Mediation: a voluntary and guided process in which a skilled mediator helps the parties to negotiate the settlement of a dispute. The process is not binding unless or until the parties reach agreement.<sup>10</sup> *In this Manual, unless otherwise noted, the term mediation is understood to include facilitative processes in which a mediator works with parties to find solutions to underlying concerns.*
- Facilitation: facilitation refers to the process of designing and running a successful multi-party process, including the creation of goals, ground rules and agendas, and the management of meetings to promote constructive face-to-face dialogue and resolution of issues. A facilitator is someone who helps a group of people understand their common objectives and assists them to plan to achieve them without taking a particular position during the process or discussion. *In this Manual, facilitation is understood as a tool of problem solving that is part of almost all mediation efforts.*
- Conciliation: a non-binding dispute resolution procedure in which a conciliator “plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties.”<sup>11</sup> *In this Manual, conciliation is understood to be one of the tools of problem solving.*
- Negotiation: Negotiation is a form of direct dialogue and exchange among stakeholders, intended to resolve disputes, produce agreement on a course of action, and craft outcomes that satisfy multiple interests. Negotiators attempt to settle their differences on their own using techniques ranging from coercion and confrontation to compromise and value creation.<sup>13</sup> *In this Manual, negotiation is understood as one of the tools of informal problem solving. Negotiation is distinguished from mediation in that it refers to direct resolution of differences without the assistance of an intermediary.*

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<sup>10</sup> Chartered Institute of Arbitrators (n.d.). “Jargon Buster”, [www.ciarb.org/information-and-resources/jargon-buster/](http://www.ciarb.org/information-and-resources/jargon-buster/) and Merriam-Webster, Inc. (2011). “Definition of Mediation”, Merriam-Webster, [www.merriam-webster.com/dictionary/mediation](http://www.merriam-webster.com/dictionary/mediation)

<sup>11</sup> Alessandra Sgubini, Mara Prieditis & Andrea Marighetto “Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective” <http://www.mediate.com/articles/sgubinia2.cfm>

<sup>13</sup> Ibid.

## Part One: Initial Assessment

### 1.1 Initial Assessment: A Two-Step Approach

The OECD Guidelines require NCPs to do an initial assessment of whether the issues raised merit further examination, and the Commentaries suggest several specific criteria to consider in making this determination. The following section presents a two-step approach to applying the criteria by determining 1) whether the issue merits further examination, and 2) how to undertake further examination. This approach makes it possible for the NCP to address the concerns raised in the specific instance, even if the submitted document initially doesn't fully meet the threshold criteria specified in the Commentary.

### 1.2 Initial Assessment: Determining whether the issue merits further consideration:

In making an assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the Commentary on the Implementation Procedures advises NCPs to take into account:

- The identity of the party concerned and its interest in the matter;
- Whether the issue is material and substantiated;
- Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
- The relevance of applicable law and procedures, including court rulings;
- How similar issues have been, or are being, treated in other domestic or international proceedings;
- Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

This manual suggests that an NCP should focus on just three of these criteria while in the first stage of an initial determination about whether to proceed further with a complaint. The three criteria are:

1. Does the complaint involve a company for which the NCP has an oversight role?
2. Does the party raising the issue appear to have a legitimate interest in the matter? and
3. Would consideration of the specific issue contribute to the purposes and effectiveness of the *Guidelines*?

At this early stage, we recommend that the NCP hold off on determining whether or not the complaint is substantiated. Making a finding either way at this stage is likely to undermine the NCP's

perceived impartiality and ability to offer good offices with either the company or the party raising the issue. This and the remaining criteria will be considered in the second step of the initial screening process described below.

### **1.3 Initial Assessment: Determining how to Conduct Further Examination, if Merited:**

Once the determination to proceed further has been made, a more in-depth assessment should be applied to the admissibility criteria noted above. This in-depth assessment should be approached from a problem solving perspective. The problem-solving approach is more generous than a formal findings process. It seeks to identify as many opportunities as possible for NCPs to implement the spirit of the Guidelines. It seeks to determine whether the issues raised in the specific instance are “*bona fide* and relevant to the implementation of the Guidelines.”<sup>14</sup> This section provides guidance on how to interpret the admissibility criteria noted above in a way that furthers the problem-solving role of the NCP.

### **1.4 Assessment: A Problem-Solving Perspective**

The following questions, which are based on the Commentary’s criteria noted in the previous section, can help NCPs determine whether a problem-solving approach in general, and mediation in particular, might be used to address the concerns raised in the specific instance.

#### 1. Is the problem-solving approach likely to engage the parties and respond to their interests?

Paragraph 14 of the published Commentary advises NCPs to consider “the identity of the party concerned and its interest in the matter.”<sup>15</sup> In a formal findings process, the identity of the party and whether the concerns it has raised can be addressed in the NCP’s Final Statement weigh heavily in determining whether the specific instance is admissible. This analysis may create problems for stakeholders whose identity or interests may not be considered “strong enough” to merit NCP action.

Because the problem-solving approach is more inclusive, it encourages NCPs to interpret this criterion in a more flexible manner. For example, one issue NCPs often face is addressing concerns of stakeholder groups that are unorganized or disorganized. In a formal findings process, if the person or organization bringing the claim is not effective in clarifying whom it represents, this may create a barrier to admissibility. The problem-solving approach, however, gives less weight to the formal credentials of the person or group filing a specific instance and more weight to whether there may in fact be a significantly affected group.

One of the primary advantages of the problem-solving approach is the prospect of resolving the specific instance through facilitated dialogue. Thus, what is important is whether the stakeholder filing the specific instance is capable of engaging in a meaningful way with the NCP and the

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<sup>14</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 83.  
<http://dx.doi.org/10.1787/9789264115415-en>

<sup>15</sup> *Ibid.*

multinational corporation in question. Additional criteria that may help determine whether a specific instance can and should be pursued in a problem-solving manner include:

- Willingness of the parties to engage in dialogue
- Fear of retaliation that might prevent open dialogue
- Opportunities to improve implementation of the OECD *Guidelines*

## 2. Is the specific instance well enough substantiated to benefit from a problem-solving approach?

A problem-solving approach to initial assessment may enable NCPs to respond constructively to more issues than would a formal findings approach to assessment. The formal findings approach can be much quicker to dismiss potentially admissible specific instances than the problem-solving approach. For example, the dismissal of an employee because of inadequate work performance, or the closing of a company plant due to lack of financial viability, would probably be dismissed as insubstantial by almost any NCP applying only a formal findings approach. The problem-solving approach might not be so quick to screen these out, however – instead of asking whether a specific Guideline has been breached, the NCP might try to determine whether there was a discriminatory pattern of firings in the first case, and whether the company had a moral, and not just a legal, obligation to help the workers and the community adversely affected by the plant shutdown in the second case. The NCP would try to determine whether a problem-solving approach might promote implementation of the *spirit* of the *Guidelines*, even if the initial framing of issues in a specific instance did not explicitly meet the threshold for a formal findings process.

The problem-solving approach can also help NCPs address specific instances that are not initially well substantiated for reasons that are not necessarily related to the legitimacy of the claim. For example, poor, vulnerable stakeholder groups may find it difficult to obtain the necessary evidence to substantiate their claims. In other cases, some parties may fear that providing such evidence could leave them vulnerable to retaliation from their employer or the community. In such instances, an NCP might make an effort to seek advice from relevant sources, such as industry or media reports. This would require the NCP to go beyond the standard desk review of the information provided by the complainant. Several NCPs already do this. For example, the Peer Review Report of the work of the Dutch NCP suggests that one important source of information is the embassy in the country of incident.<sup>16</sup> Embassies are in a good position to be familiar with a company whose headquarters or ownership is based in their own country, as well as the company's reputation and even the dispute in question. The embassy may be able to provide useful background information beyond what the complainant provides, which can be of assistance in completing the initial screening.

Some useful questions NCPs might consider include:

- Does there seem to be a link between the enterprise's activities and the issue raised in the specific instance?

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<sup>16</sup> For more information on the Peer Review of the Dutch NCP, see "Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team 2010," OECD, Paris, [www.oecdguidelines.nl/wp-content/uploads/final\\_report\\_without\\_annexes.pdf](http://www.oecdguidelines.nl/wp-content/uploads/final_report_without_annexes.pdf)



- Does this specific instance suggest potentially valid concerns about adherence to the *Guidelines*, even if it isn't substantiated in the usual way?
- Can this specific instance be substantiated through additional fact-finding?
- Are there other credible sources of substantiation available?

### 3. Are applicable laws of the country involved likely to prevent problem solving?

NCPs are encouraged to pay attention to all of the applicable laws of the country in which an incident occurs. The *Guidelines* suggest that it is important not to conflict or interfere with the administration of national laws. The Business and Industry Advisory Committee (BIAC), which represents the international business community before OECD policymakers, has interpreted this to mean that NCPs should only get involved after all of a country's legal and administrative avenues have been exhausted by a potential complainant.

Specific instances triggered by a breach of local or national laws should not automatically be ruled inadmissible. There seems to be a growing understanding that a specific instance can be viewed as an opportunity to engage in problem solving by influencing local business practices. If NCPs do so, however, they must proceed with great care.

## **1.5 Parallel Proceedings**

One issue that many NCPs face is what is known as parallel proceedings. Parallel proceedings are legal proceedings in progress at the same time as a specific instance, which address the same or closely related allegations.<sup>17</sup> Companies might argue that parallel proceedings are a reason not to engage in an NCP-procedure.

The updated (2011) *Guidelines* provide the following guidance (p. 83):

*“When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted. Parties should also assist NCPs in their consideration of these matters by providing relevant information on the parallel proceedings.”*

A problem-solving approach seeks opportunities to realize the intent of the *Guidelines*, despite ongoing court proceedings. OECD Watch supports this idea, noting: “there are very few circumstances in which NCP procedures would ever need to be dropped to avoid prejudicing criminal proceedings. All too often...this has been used merely as a pretext for not accepting

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<sup>17</sup> APPROACH OF THE UK NCP TO SPECIFIC INSTANCES IN WHICH THERE ARE PARALLEL PROCEEDINGS, September 2009

cases.”<sup>18</sup> Along similar lines, the UK NCP has produced guidelines on dealing with parallel proceedings that explicitly state: “The fact that parallel proceedings exist will not of itself cause a suspension of its investigation and/or its determination of any dispute.”<sup>19</sup> Instead, the UK NCP suspends a specific instance only when necessary to prevent serious prejudice against a party in a parallel proceeding, and even then only after the parties “give serious consideration to the benefits of conciliation/mediation....”<sup>20</sup>

## 1.6 Non-Adhering Countries

Another issue frequently faced by NCPs is what to do when specific instances are brought in countries that do not adhere to the Guidelines. Not all NCPs reject these specific instances automatically. Instead, some NCPs determine whether problem solving can be useful in a non-adhering host country. The Commentary notes that “While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities” in non-adhering countries.<sup>21</sup>

### 4. Has problem solving been used before in similar domestic or international situations?

NCP offices around the world are a valuable source of information for determining whether prior, similar cases have benefitted from problem-solving efforts. In fact, the Commentary encourages such collaboration among NCPs. Other valuable sources of information about informal problem solving in international investment cases include:

- World Bank Compliance Advisor/Ombudsman: This grievance mechanism is used in the context of projects financed by the International Finance Corporation and Multilateral Investment Guarantee Agency of the World Bank. Its problem-solving efforts are overseen by an independent ombudsman function, which offers problem-solving services in response to specific instances about the social and environmental impacts of IFC and MIGA projects. Its work is well documented. See: <http://www.cao-ombudsman.org/>.
- National Human Rights Institutions (NHRIs): The problem-solving efforts of NHRIs may be instructive for NCPs, to the extent they are applicable. For example, in Ghana, India, and Kenya, the grievance mechanisms of human rights institutions report their findings directly to the government or multinational enterprises. See:

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<sup>18</sup> The OECD Watch report *Model National Contact Point* (2007) is available online at [oecdwatch.org/publications-en/Publication\\_2223/at\\_download/fullfile](http://oecdwatch.org/publications-en/Publication_2223/at_download/fullfile)

<sup>19</sup> This policy was developed by the UK Department for Business Innovation and Skills (2011) and is available online: “Approach Of The UK National Contact Point To Specific Instances In Which There Are Parallel Proceedings”, [www.bis.gov.uk/assets/biscore/business-sectors/docs/a/11-652-approach-national-contact-point-parallel-proceedings](http://www.bis.gov.uk/assets/biscore/business-sectors/docs/a/11-652-approach-national-contact-point-parallel-proceedings)

<sup>20</sup> Ibid.

<sup>21</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 86. <http://dx.doi.org/10.1787/9789264115415-en>

- <http://209.41.181.19/chraj/index.asp> (Ghana);
  - <http://nhrc.nic.in/> (India);
  - <http://www.knchr.org/> (Kenya).
- United Nations Human Rights Council: The UNHRC established a grievance procedure in 2007, and its approach to problem solving may prove helpful to NCP offices with similarly situated claims. See: <http://www2.ohchr.org/english/bodies/hrcouncil/>.

#### 5. Is there an opportunity for an NCP to use its problem-solving capabilities to contribute to the implementation of the spirit of the OECD *Guidelines*?

Finally, the Commentary directs NCPs to consider whether accepting a specific instance for review will contribute to achieving the overall intent and effectiveness of the OECD *Guidelines*. Some general issues to consider are:

- Will problem-solving help to promote corporate responsibility among multinational enterprises?
- Will problem-solving help to raise practice standards in this area?
- Can a particular problem-solving effort set a precedent for other countries to follow?
- Will problem solving in one situation contribute to a better global understanding of an issue?

### **1.7 Confidentiality in the Initial Assessment Phase**

An important consideration during initial assessment is whether and which information gathered at this point in the problem-solving process will be kept confidential.

The primary benefits of confidentiality at this stage are to encourage initial communication and sharing of information between complainants and the NCP, and between the MNE in question and the NCP. Those benefits must be weighed against the value of transparency on the part of NCPs, both with regard to stating that a specific instance has been received and to stating the reasons why a specific instance has or has not been found appropriate for examination. This question is up to each NCP. However it is resolved, the NCP should ensure that its approach to this issue is complete, clear, and consistent.

## Part Two: Pre-Mediation Meetings

*“The NCP shall offer a forum for discussion and assist the...parties in dealing with the issues raised...”*

*- OECD Guidelines, Section II(C), Implementation in Specific Instances*

### 2.1 Explaining Informal Problem-Solving to the Potential Participants

Pre-mediation meetings occur after the initial assessment, but before a decision to conduct a formal findings process or mediate a claim is made. According to the *Guidelines*, an NCP is expected to help the parties identify and clarify issues, identify necessary participants, determine whether some type of neutral assistance would be useful, and if so, select a mutually acceptable intermediary. All of this work is independent of any final finding of the claim that the *Guidelines* have been violated. In other words, when the initial assessment indicates that an NCP might play a useful problem-solving role, the NCP carries out a preliminary set of one-on-one meetings to determine whether mediation might be appropriate.

It should be noted that while this section distinguishes Pre-mediation roles from subsequent findings processes and problem-solving roles, this does not preclude the NCP from taking on these additional roles as needed. Information regarding possible NCP roles in mediation is provided in subsequent sections of this Manual.

### 2.2 To Be Convincing About the Merits of Informal Problem-Solving, an NCP Must be:

Credible: Concerns regarding the credibility of an NCP can influence parties’ willingness to engage in problem-solving activities or to comply with formal findings processes if informal problem solving doesn’t produce resolution. The following options are available in situations when a party questions the credibility of an NCP:

- Clarify the role of the NCP. Explain to the parties that an NCP doesn’t dictate the content of informal problem solving, but rather organizes conversations or exchanges of messages along the lines agreed to by the parties.
- Co-convening informal problem solving. Involving an additional NCP is possible, and might reduce a party’s concerns about the credibility, impartiality, or bias of an NCP-led informal problem-solving process. An NCP should consider engaging another NCP that is indirectly connected to a case. For example, if the corporation in the NCP’s country is a subsidiary of a parent company with headquarters in another OECD country, an NCP might meet with the NCP of the country in which the parent company is located to talk with them about the merits of informal problem solving. In addition, engaging NCP offices that have handled similar cases or are familiar with the region in which a claim has been raised may lend greater credibility to the proposed problem-solving effort. In some instances, two or three NCP offices might work together to help explain the merits of informal problem solving. The Commentary advises that the NCP of the incident country should take the lead if NCPs work together.

Neutral: The parties must believe that the mediator, or manager of the informal problem-solving process, will be impartial and fair. To establish neutrality, NCPs should take steps to eliminate conflicts of interest. For example, NCPs may want to follow the example of the Dutch NCP: any NCP member whose involvement raises even the *appearance* of a conflict of interest, is not involved in the handling of a particular specific instance.<sup>22</sup> The issue here is not whether NCPs themselves may have the capacity and skill to perform these tasks. The question is whether the parties accept the NCP (or a particular individual in the NCP function) as a mediator.

It is also possible for an NCP to select, with the agreement of the parties, a professional mediator who is not part of any regular NCP staff. Later on in this Manual, we address the question of how to select such an external or outside mediator.

A Process Manager: An NCP must be ready to manage the various stages in a problem-solving process if the Pre-mediation Meetings lead to that next step. During a full Assessment and subsequent mediation, the neutral's duties include, but are not limited to: identifying the appropriate parties; suggesting possible ground rules for the convening meetings, as well as for subsequent mediation if it follows; preparing, distributing, and safekeeping relevant documents, including summaries of all convening meetings; ensuring adherence to agreed upon protocols; and maintaining whatever confidentiality was promised.

A Supervisor: The NCP should be able to supervise any problem-solving efforts that follow the convening stage, whether they serve as a neutral or the parties chose an independent mediator. They must work to ensure that the parties act in good faith. Examples of breaches of good faith include exploiting parallel proceedings (to block or distort the way informal problem-solving is approached) and threatening retaliation. NCPs must ensure that all parties abide by the rules of confidentiality prescribed in the Commentary.

### **2.3 During Pre-Mediation Meetings, the NCP is *Not*:**

An Evaluative Decision Maker: While the NCP must make process-related decisions, as described above, the NCP does not decide unilaterally whether to proceed with mediation. All of the parties must agree. If the Pre-mediation Meetings lead to a decision to proceed, the next step in the preparation of a full Assessment (see the next section of this Manual).

A Mediator (unless all the parties subsequently agree): The NCP does not take on the role of assessor or mediator unless it is mutually agreed upon by the parties that the NCP should do so. As previously noted, an NCP is not precluded from taking on a mediator role later in the problem-solving process, but as will be discussed in more depth in the Mediation section of this Manual, using an external mediator offers numerous advantages.

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<sup>22</sup> For more details on the Dutch National Contact Point procedures, see Netherlands NCP (2011), *Filing a Complaint*, [www.oecdguidelines.nl/get-started/filing-complaint/](http://www.oecdguidelines.nl/get-started/filing-complaint/)

## 2.4 Seven Essential Pre-Mediation Meeting Responsibilities

### 1. Clarify Process Options: help the parties understand their choices if they move forward.

When describing process options, NCPs should explain how mediation will work if the parties choose to go forward with informal problem solving, as well as the option for the NCP to conduct a formal findings process; use of national legal processes; and any other potentially viable options for addressing the issues in the specific instance. These explanations should include a discussion of the voluntary nature of mediation, the limits of confidentiality in mediation, and the likely outcome if informal problem solving doesn't produce a voluntary settlement. NCPs also have a duty to clarify the limitations of mediation in non-adhering countries. Often, NCPs solicit advice from relevant organizations, local or international experts, and the OECD Investment Committee when they are trying to clarify options.

### 2. Discuss the issues with the parties involved.

In Pre-mediation meetings, the NCP should seek to understand how the parties view the issues. For example, the UK NCP conducts preliminary meetings with all parties. During these meetings, the NCP clarifies the concerns or charges of the complaining party, and obtains a response from the company that has been charged with violating the OECD *Guidelines*.<sup>23</sup>

### 3. Ensure Suitability of Parties: Verify that the parties have the authority to make commitments and agreements.

NCPs should take care to ensure that the parties they meet with during this early stage have the authority to go forward with an informal problem-solving process if that is what everyone decides to do. In this context, authority means the ability to make binding commitments on behalf of the corporation, the complainants, or other stakeholders who may be involved. For example, the UK NCP requires that parties fully disclose whether or not they have this authority.<sup>24</sup> Moreover, NCPs should determine whether other parties, in addition to the original parties to the specific instance, should be contacted. For example, some NCPs have expressed confusion regarding their duty to contact joint venture partners or parent companies that have not been named in the specific instance but may nevertheless be crucial to the success of informal problem-solving.<sup>25</sup> In general, it is better to cast a wide net during these early Pre-mediation Meetings, contacting more parties, not fewer.

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<sup>23</sup> The UK NCP describes the preliminary meeting process during the Initial Assessment in the guidance document “UK National Contact Point’s Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises”, section 3.3.1, [www.bis.gov.uk/files/file53566.pdf](http://www.bis.gov.uk/files/file53566.pdf)

<sup>24</sup> Ibid, section 4.3.2.

<sup>25</sup> For example, the 2009 Dutch NCP Annual Report, noted the challenges in considering joint venture partners as parties to the Specific Instance. See National Contact Point of the Netherlands, “NCP Annual Report 2009”, June 2009, p. 7, [www.oecdguidelines.nl/nieuws/annual-report-2009/](http://www.oecdguidelines.nl/nieuws/annual-report-2009/)

#### 4. Decide whether or not to proceed with a full Stakeholder Assessment and Mediation.

Based on the information gathered during the initial screening and the Pre-mediation Meetings, the NCP – after consulting the parties – must decide whether to recommend moving forward with a full Stakeholder Assessment and Mediation. In some cases the parties may actually resolve the issue during these exploratory meetings. Indeed, Paragraph 16 of the Commentary indicates that a resolution may be achieved through nothing more than seeking the advice of relevant businesses, labor organizations, NGOs, and other NCPs, and conveying that input to the claimant and target company. If convening fails to result in a resolution and the parties are willing, the NCP should proceed with a full stakeholder assessment.

#### 5. Offer non-examination means of resolution.

Because mediation is an entirely voluntary process, NCPs must be certain that the parties are ready to consent to informal problem solving. NCPs are cautioned against exerting undue influence on the parties' decision to participate. The UK NCP, for example, explicitly states that it “will not pressure the parties into mediation or any particular outcome.”<sup>26</sup> To gain valid consent, the NCP should summarize the steps in the mediation process, including the confidentiality limits; take time to clarify any outstanding concerns; and seek written agreement to proceed with a full Stakeholder Assessment.

#### 6. Assist parties in mapping out the Stakeholder Assessment and Mediation processes.

The OECD *Guidelines* do not provide a standardized set of next steps, and each NCP follows its own informal problem-solving procedures. Typically, NCPs should work with the parties during Pre-mediation Meetings to develop the Terms of Reference for a full Stakeholder Assessment. This would detail the scope of the issues to be raised during the Stakeholder Assessment, the parties to be contacted, the limits of confidentiality during the Stakeholder Assessment, any expected outcomes of the mediation process, and a tentative timetable. If the parties and the NCP agree that it makes sense to engage a professional mediator who is independent of the NCP, the parties must decide who they want that to be and how the bill for the Assessor's services will be paid.

#### 7. Collaborate: NCPs in different countries should cooperate if the need arises.

Claimants often submit the same notification to several NCPs at once, for example to the NCP of the country where the claimed violation has taken place and to the NCP of the company's home country. With the increased complexity of multinational corporate operations, NCPs have become more aware of the need for closer communication and cooperation in specific instances. Good

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<sup>26</sup> UK NCP (updated 2011), “UK National Contact Point Procedures for Dealing With Complaints Brought Under the Oecd Guidelines for Multinational Enterprises”, [www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-651-uk-ncp-procedures-for-complaints-oecd.pdf](http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-651-uk-ncp-procedures-for-complaints-oecd.pdf)

cooperation practices include soliciting the views of other concerned NCPs at an early stage, as well as sharing the results of Pre-mediation Meetings with them. Further guidance from the Investment Committee on this subject might be forthcoming in the OECD update of the *Guidelines*. As a general matter, discussions at the national level within the NCP's country should be initiated before contacts with other NCPs are undertaken.

### **Case Example: NCP Collaboration**

The *Guidelines* direct NCPs to work together and collaborate. For the most part, NCPs have demonstrated a willingness to do this and to assist each other on cases. In a specific instance that involved environmental and human rights violations against an oil consortium, the Dutch and Irish NCPs engaged in joint discussions with each of the parties. Based on these separate discussions, the NCPs issued a joint summary of findings that concluded that mediation was inadvisable. In 2009, Norway received a specific instance against the Norway fish farming company, Cermaq, alleging violations of human and labor rights. As part of the initial assessment, the Norway NCP forwarded the specific instance to the Canadian and Chilean NCPs for their consideration and input, as these were the countries of incident. (OECD Watch Quarterly Report, February 2010)



## Part Three: Conducting a Stakeholder Assessment

If an NCP and the relevant parties decide to go forward with informal problem solving, the next step is to prepare a Stakeholder Assessment. This involves a series of in-depth interviews with the relevant stakeholders to better understand their perceptions and concerns, and involving all the parties in determining exactly how informal problem solving should be used to move forward.

Preparing the Stakeholder Assessment serves other purposes as well, including gathering additional information, building trust and rapport with the parties, and ensuring that mediation is properly tailored to the parties' needs. The Stakeholder Assessment itself is a short report, prepared by an internal or external NCP staff member or outside mediator, that describes the issues as seen from the stakeholders' various viewpoints and proposes a good way to move forward. The transparency and inclusiveness associated with the Stakeholder Assessment are important sources of credibility for the problem-solving process.

### 3.1 A Good Stakeholder Assessment Shapes the Problem-Solving Process

Below are some of the key products of a good Assessment. These products generally help the parties make well-informed decisions about whether and how to proceed with mediation, and can make the mediation process more representative, efficient and effective.

Define the Issues to be Addressed: Problem-solving aims to produce more inclusive solutions that can take into account a broad range of stakeholder concerns. A Stakeholder Assessment may help clarify legitimate concerns related to the issues mentioned in the notification, and show whether those concerns are shared among a broad range of stakeholders. With this information, the NCP can suggest the scope and process of inquiry into the issues presented in the notification, and can suggest additional stakeholders to bring the table.

Determine the Representativeness of the Stakeholders: A stakeholder is any individual or group that has an interest in the issues raised in the specific instance, that could be affected by decisions taken on those issues, or that could influence the problem-solving process (positively or negatively). The question of stakeholder representation arises immediately when one stakeholder (or group of stakeholders) files a notification with an NCP, and it is not yet clear what other stakeholders may be directly impacted by the issues raised in the specific instance. A Stakeholder Assessment can help to determine a) the extent to which a notifier is appropriately representative of the various groups that may be affected, and b) the identities of other affected stakeholders and the ways they are affected.

Clarify How the Parties May Be Represented: A Stakeholder Assessment can also help determine whether the parties have the capacity to negotiate and make binding commitments on behalf of those they represent. This is particularly important in situations where a mediation agreement calls for organizational or procedural changes. In some cases, the appropriate spokesperson for a group is unclear or nonexistent. This is often the case, for example, with indigenous populations, or with groups of individual business owners. The assessor may need to take extra steps to engage or educate members of a potential group so that they can select an appropriate representative.

Identify Additional Parties: NCPs may also consider including stakeholders, such as national governments, whose authority or expertise may influence the resolution of an informal problem-solving effort, along with vulnerable or marginalized populations that could be disproportionately affected by the outcome.

Clarify Procedural Challenges: NCPs often face procedural dilemmas and issues for which there are few established precedents. A Stakeholder Assessment can help NCPs manage this challenge by helping ascertain whether the issues that need to be addressed in a problem-solving process have already been addressed in prior informal problem-solving processes elsewhere in the world, and if so to what extent. This is particularly true of:

- Parallel Proceedings: See above. A Stakeholder Assessment can help NCPs understand more about the implications of parallel proceedings in specific instances, and design the mediation so that it does not conflict with ongoing court proceedings.
- NCP Coordination: According to the *Guidelines*, “The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues.”<sup>27</sup> As noted earlier, more than one NCP may be involved in the handling of specific instances. While NCPs do typically collaborate, for example by sharing information and issuing joint final drafts, questions about whether to co-mediate and jointly monitor the implementation of agreements need to be addressed in each situation. A Stakeholder Assessment is a good time to answer these questions.

Determine Suitability of Problem-solving and Propose Process Design: Since the Stakeholder Assessment is usually built on confidential interviews, it can identify areas of stakeholder agreement as well as strongly conflicting views. By clarifying areas of potential agreement and disagreement, a Stakeholder Assessment can and should be used to determine the likelihood that problem-solving can lead to resolution. Unlike Pre-mediation Meetings that are mostly aimed at describing joint problem-solving possibilities, a full Stakeholder Assessment examines the detailed substantive concerns and claims of the parties to determine whether mediation is likely to be successful.

A Stakeholder Assessment should produce a detailed informal problem-solving design that has been discussed and approved separately by each party. This would lay out the scope of the agenda, set a timetable, list issues for joint fact-finding, define the responsibilities of the parties, and describe expectations regarding the confidentiality of the proceedings. The results of the Assessment should also include an indication of who will mediate (internal vs. external), whether more than one mediator will be involved (co-mediation), and what role other NCPs might play.

### 3.2 Conducting a Stakeholder Assessment

There are several steps and considerations involved in conducting a Stakeholder Assessment:

1. Choose an Assessor. It is important to have a credible, skilled individual or organization conduct the Assessment. An effective assessor should possess the professional commitment and capability to

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<sup>27</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 82.  
<http://dx.doi.org/10.1787/9789264115415-en>

interview stakeholders from an unbiased perspective, and to analyze, summarize and report the results in a way that all the stakeholders will perceive as clear, accurate, and fair. It is especially important that NCPs look for an assessor who is credible and competent.

- Credibility: An assessor must be viewed as unbiased and credible in order to establish trust and build rapport with the stakeholders. Credibility is the key to fruitful interviews. Although it is not impossible, NCPs should be aware that their dual role (reverting to a formal findings role if informal problem solving fails) may lead stakeholders to be less forthcoming if they suspect that information they provide could be used “against them” in a findings process.
- Competence: An assessor should possess excellent communication and conflict analysis skills, and preferably some exposure to disputes involving the social and environmental impacts of corporate operations. Knowledge of the OECD *Guidelines* and the role of the NCP operations are also desirable. In addition, to be effective it is important that the assessor have an understanding of the local context and circumstances surrounding the case. NCPs may benefit from engaging a local assessor who has knowledge of the language and cultural environment in the country in which the specific instance originates.

2. Establish the limits of confidentiality. NCP staff should work with the assessor and the parties to make agreements concerning confidentiality before the Assessment begins. The OECD *Guidelines* state: “while the procedures... are underway, confidentiality of the proceedings will be maintained.”<sup>28</sup> According to the Commentary, the facts and arguments of a case, as well as sensitive business information, should remain confidential “in order to build confidence in the *Guidelines* procedures and to promote their effective implementation.”<sup>29</sup> In most cases, information is not shared with other parties without first obtaining the provider’s consent. In some cases, interviewees may refuse to give this prior consent. In such situations, an assessor may inquire whether information can be shared “without attribution,” which means sharing the information without specifying who provided it. In addition, an assessor or an NCP can personally verify the information provided, in order to share it while maintaining the interviewee’s confidentiality. Alternatively, an assessor may choose to consider information gained from interviews when preparing their Assessment, but to omit that information from their written report.

Before each interview, the assessor must explain the limits of confidentiality and what will be done with the information provided, particularly if it is to be shared with the NCP. Each NCP has the option to decide what information it will keep confidential, within the limits of the *Guidelines*. As a result, NCPs have approached confidentiality in different ways. However confidentiality is approached, it is important that NCPs ensure that the confidentiality limits are clear to the parties. One way to do so is to explain the confidentiality limits in the Terms of Reference document that is mutually developed and signed by the NCP, the parties, and the assessor.

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<sup>28</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 73.  
<http://dx.doi.org/10.1787/9789264115415-en>

<sup>29</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 86.  
<http://dx.doi.org/10.1787/9789264115415-en>

3. Conduct interviews. There are several considerations the assessor should take into account when conducting interviews, such as whom to interview and what questions to ask. These considerations are outlined below:

- Interview Protocol: Based on the information provided by the NCP, the assessor should develop a preliminary list of questions to ask during interviews. This “interview protocol” is subject to change during the course of the Assessment, depending on what is uncovered and the responsiveness of the interviewees. The questions asked during an Assessment are typically designed to:
  - Educate stakeholders regarding the NCP’s role
  - Build rapport and establish trust
  - Explore stakeholder perceptions of the incident(s) or subject of the specific instance
  - Clarify stakeholder interests, incentives and resources for resolving or continuing the dispute
  - Identify areas of convergence and divergence in stakeholders’ interests and perceptions
  - Identify missing stakeholder groups
  - Solicit stakeholder reactions to possible ways of resolving the conflict
  - Restate and confirm main points of the interview with the interviewee
- Type and Number of Interviews: The assessor should conduct a sufficient number of interviews to gather information from a broad and representative set of stakeholders. This might range from 5-50 interviews, depending on the circumstances. Interviews should probably be conducted in a one-on-one format, to encourage openness and build rapport. However, an assessor may also conduct group interviews, or focus groups, in which several stakeholders belonging to the same stakeholder category are interviewed simultaneously. Focus groups can save time, but the group format may inhibit candor if some participants are reluctant to voice their views in front of others.
- Additional Stakeholders: In addition to the parties mentioned in the specific instance, there may be other stakeholders with valuable information to contribute. In fact, it is common for interviewees to suggest other stakeholders who should be interviewed. In addition, the assessor should be careful to include vulnerable or marginalized groups if relevant, because they may not have ready channels of contact or communication with other stakeholders or the NCP. Some stakeholder groups that NCPs have indicated may prove helpful include:
  - Parent Companies
  - Joint Venture Partners
  - Government Agencies
  - Financial Institutions/Investors
  - Community Organizations
  - Local Residents
  - Foreign Embassies
  - Business Community Members

- Social and environmental advocacy groups
  - Informed observers (academic and consulting experts, journalists)
- 
- Stakeholder Prioritization: It is not always possible or efficient to interview all relevant stakeholders, so it is important to be strategic, and to prioritize who should be interviewed depending on the issues that need to be addressed. A stakeholder matrix can be helpful for prioritizing interviews. A stakeholder matrix is a diagram that is used to plot stakeholder categories against the emerging issue agenda. Stakeholders with the most direct interest in an issue should receive the highest interview priority [See Figure 1, below]. A stakeholder matrix can be particularly helpful when the Stakeholder Assessment has to be prepared quickly or with a very limited budget.

**Figure 1: Blank Stakeholder Matrix\***

	Importance of Issue to Stakeholder and Preferred Outcome		
	Issue 1	Issue 2	Issue 3
Stakeholder Group 1	<p><i>How important is this issue to this category of stakeholders?</i></p> <p><i>What do these stakeholders most and least want to have happen with regard to this issue?</i></p> <p><i>What additional information do these stakeholders think needs to be gathered with regard to this issue?</i></p>		
Stakeholder Group 2			
Stakeholder Group 3			

\* The above questions should be asked of each stakeholder group about each issue. At a minimum, the stakeholders who are most concerned about each issue should be interviewed, and the views of the most concerned stakeholders on each issue should be compiled in the matrix.

4. Summarize Information and Offer Recommendations: The Stakeholder Assessment report summarizes the findings from the Assessment interviews and recommends an appropriate process design. The assessor should first produce a draft report that is shared with the parties, and then finalize it based on a variety of considerations, including:

- Has a draft of the Stakeholder Assessment been reviewed by everyone interviewed, to verify the accuracy and completeness of the information presented?
- Are the findings reported without inappropriately identifying individual stakeholders?
- Is the report available in languages other than English if necessary?
- Will the Stakeholder Assessment be made public before the beginning of a mediation process? After the process?

The final Stakeholder Assessment report should help the NCP(s) and the stakeholders to:

- Understand the underlying interests and concerns of the stakeholders
- Prioritize the issues that are most relevant for the promotion of the *Guidelines*
- Identify areas of potential agreement, and areas of disagreement that a problem-solving process is unlikely to resolve
- Identify challenges to the process (for example, adversarial attitudes of the parties)
- Frame the issues to be addressed in the informal problem-solving process
- Identify missing parties who should be involved in the problem-solving process
- Propose one or more options for effective process, in light of the issues presented
- Estimate the level of resources (including time, staff, and costs) needed for the process

### 3.3 Making the Decision to Proceed with Mediation

Not every case will be suitable for mediation. After the stakeholders have reviewed the Assessment, the NCP might hold a meeting at which the parties can make any changes to the proposed problem-solving process, and confirm that they want to proceed. Depending on the outcome of that meeting, the NCP may or may not choose to go forward with mediation or another form of problem solving. In making this decision, the NCPs should ask whether the proposed process can meet the following criteria:

- Key parties, particularly those whose cooperation is essential for success, have agreed to participate;
- The parties agree on the agenda;

- Sufficient resources are available to support the problem-solving process;
- The parties agree that any agreement reached through mediation will be binding.

If these requirements are met, and the parties agree to proceed with mediation or another form of problem solving, the NCP and the parties should confirm the selection of a mediator or process facilitator and begin.



## Part Four: Mediation

*“Offer, and with the agreement of the parties involved, facilitate access to...conciliation or mediation to assist in dealing with the issues.”*

*- OECD Guidelines, Section II(C), Implementation in Specific Instances*

### 4.1 Mediation or Conciliation?

The OECD *Guidelines* instruct NCPs to offer “conciliation or mediation to assist in dealing with the issues”<sup>30</sup> in specific instances. While this suggests that mediation and conciliation are two distinct processes, the *Guidelines* do not indicate which to use when. In fact, most people don’t make a distinction between the two processes, instead using them interchangeably to describe any voluntary problem-solving process in which an intermediary helps multiple parties resolve their differences. In many instances, the term mediation actually includes or implies conciliation. There are, however, differences between the two processes:

Conciliation: Conciliation is generally, though not exclusively, used in labor disputes and industrial relations. The term is applied to a fairly broad range of interventions, and there is no universally accepted definition. In general, however, conciliators act to promote a mutually acceptable resolution of a dispute, integrating their substantive expertise and understanding with the parties’ own assessments of the situation. In many but not all uses of conciliation, conciliators propose possible ways to resolve the dispute. The parties are then free to accept or reject the proposed resolution. Because of the more directive approach of the intermediary, conciliation is sometimes characterized as an “evaluative process.” In other words, the conciliator evaluates the situation and then explains to the parties how they ought to think about their “no agreement” or “walk away” options.

Even though this evaluative approach is non-binding, it has been criticized because it can create an adversarial environment and because it limits the parties’ role in resolving their differences. Moreover, conciliation often includes a heavy emphasis on factual or legal findings, rather than focusing on the parties’ interests. Finally, some conciliators discourage direct dialogue between the parties by using “shuttle diplomacy,” a process in which the neutral moves back and forth between the parties instead of having them meet face-to-face.

Mediation: The Association for Conflict Resolution (ACR), a well-regarded mediation organization in the United States, describes mediation very succinctly as “a process in which one or two neutral mediators help people in a dispute communicate with one another, understand each other, and if possible, reach agreements that satisfy the participants’ needs.”<sup>31</sup> Mediation is distinguished from conciliation in that it focuses more on the underlying interests of the parties than on their legal

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<sup>30</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 84.  
<http://dx.doi.org/10.1787/9789264115415-en>

<sup>31</sup> Association for Conflict Resolution (2010), “What is Conflict Resolution? Conflict Resolution Terms and Processes”,  
<http://www.acrnet.org/Page.aspx?id=691>

rights. According to ACR, this interest-based approach “helps people reach their own agreements, rebuilds relationships, and, if possible, generates lasting solutions to their disputes.”<sup>32</sup>

Another difference between the two approaches is that a mediator rarely proposes the terms of the ultimate resolution. Instead, the mediator facilitates a discussion among the parties, as they try to negotiate a way of meeting their interests. Because of the facilitative approach of the intermediary, mediation is often characterized as a “facilitative process.”

So which should I choose? Although mediation and conciliation are conceptually different, many “process neutrals” (people who act professionally as mediators and conciliators) use both, alternating between evaluative and facilitative approaches as the need arises. NCPs can choose to use either approach, since they are both voluntary and both fall within the boundaries set by the *OECD Guidelines*. The tools and approaches described in this Manual are geared primarily towards facilitative processes used in mediation., though can inform both conciliation and mediation approaches.

## 4.2 Distinctive Elements of NCP Mediation

1. Governmental Authority (See also page 18): NCP mediation is inherently distinctive because it is provided through a state-based grievance mechanism. At a broad level, this gives NCPs a special responsibility to ensure that their mediation processes are easily accessible and provide parties with appropriate protection. Moreover, only NCPs have the authority necessary to issue public statements of findings, which gives them a special role in – and important influence on – the overall problem-solving process. In addition, there are several other unique attributes that distinguish NCP mediation from other mediation processes.

2. Substantive expertise: In addition, NCPs are subject matter experts in the areas of international trade and investment, which confers on them a certain amount of professional credibility in the eyes of the disputing parties.

3. Bound by OECD Guidelines: NCP mediation is intended to uphold the *OECD Guidelines*. As a result, parties who engage in NCP mediation are more likely to develop an agreement based on the *Guidelines* than external mediation processes are. The *Guidelines* hold corporations to a high performance standard – sometimes higher than the standards imposed by local and national laws. This fact is particularly relevant in situations where claims are filed in non-adhering countries. In these cases, the Commentary encourages NCPs to “pursue enquiries and engage in other fact finding activities... [including] contacting the management of the firm in the home country, and as appropriate, government officials in the non-adhering country.”<sup>33</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 86.  
<http://dx.doi.org/10.1787/9789264115415-en>

4. Unique Recourse: If parties are unable to reach a resolution during mediation, the NCP in its Final Statement can make recommendations as appropriate, on the implementation of the *Guidelines*. This represents a unique recourse for parties who cannot reach agreement through mediation; in most other types of mediation, the typical recourse is a legal trial. Such court actions are generally lengthy and costly, and they typically address only limited legal questions rather than the full scope of the parties' interests. Though an NCP Final Statement does not preclude legal action, it offers an alternative that may be of interest to the parties in the event that they cannot reach agreement.

5. Government Oversight of Agreements: In many countries, a written, signed, mediated agreement is considered a binding contract, whether it is produced through an NCP or an external mediator. However, *compliance* with a mediated agreement depends on how mediated agreements are treated in the particular legal jurisdictions involved. In the case of an NCP-mediated agreement, the relevant NCP office or (other) government agencies can monitor the agreement. Since there is no set procedure for NCPs to impose governmental sanctions on multinational enterprises that breach a mediated agreement, enforcement mechanisms need to be worked out in each problem-solving agreement.

#### 4.3 Essential Skills of Effective Mediators

There are no explicit procedures within the *Guidelines* for conducting a mediation or choosing a mediator. Instead, each NCP office is free to conduct mediations in whatever way it sees fit, so long as it complies with the “functional equivalence criteria” laid out in the *Guidelines*. While some NCP offices, like the Dutch NCP, often choose to mediate disputes on their own, others, like the UK NCP, draw on a pre-established panel of external professional mediators. In either case, the mediator must possess certain essential mediation skills – or core competencies – that are crucial to informal problem solving. This section discusses these competencies:

Neutral. An effective mediator must be perceived by all parties as neutral and unbiased. As noted already, the fact that NCPs and their staff have governmental authority can affect parties' perception of their neutrality and impartiality. As the Norway NCP noted in the 2008 OECD review of NCPs, the “lack of political independence may also be a problem when a dispute involves a state-owned enterprise.”<sup>34</sup>

There are steps NCPs can take to manage these potential conflicts of interest. For example, unlike most NCPs, the Dutch NCP has an independent structure that separates its government members from stakeholder group members. This independent structure has allowed the Dutch NCP to play a direct role as mediator while still being viewed as credible by many stakeholders. Another option, which was already noted, is for the NCP to employ an external professional mediator. Professional mediators are independent and free of government ties, and may therefore be more likely to be

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<sup>34</sup> OECD (2008), “Review of NCP Performance: Key Findings”, OECD-ILO Conference on Corporate Social Responsibility, <http://www.oecd.org/dataoecd/34/15/40807797.pdf>

perceived as neutral. Regardless of whether an internal or an external mediator is used, every effort should be made to check for potential conflicts of interest or other sources of bias, so the parties can be assured about the intermediary's neutrality.

Credible. As already noted, NCPs may find it challenging to gain credibility in the eyes of stakeholders, particularly in light of their status as government officials. Another barrier to their credibility is the dual fact-finding and mediation role that most NCPs are expected to play. In order to preserve credibility, an NCP might consider delegating the fact-finding and mediation functions to separate NCP staff, or using an external mediator to lead the mediation process. Whether internal or external, a mediator must be perceived as credible by all parties to be effective.

Professional Mediation Skills. To maximize the chances of success, a mediator should be trained in mediation and conciliation skills and have extensive experience managing informal problem-solving efforts. External mediators often undergo professional training and certification, resulting in stronger mediation skills. For example, the Association for Conflict Resolution requires practitioners to have a minimum of forty hours of conflict resolution training and three years, or over 200 hours, of conflict resolution experience to qualify for membership.<sup>35</sup> Although very few NCP staff members are professionally trained mediators, there are examples of successful NCP-led mediations. Still, NCPs that choose to conduct their own mediations may want to consider co-mediating with an external, professional mediator, or investing in mediation training.

Substantive Knowledge. An effective mediator usually has a working knowledge of the substantive issues in the dispute. The majority of NCP staff work within economic and foreign affairs ministries, and therefore interact extensively with the international business community. As a result, they are well positioned to gain experience in multinational trade matters and to draw upon the expertise of their government colleagues. Many NCPs noted in a 2008 OECD Review of NCPs that “direct access whenever needed to government expertise and networking is...essential.”<sup>36</sup> Indeed, such access endows an NCP mediator with almost immediate credibility within the trade and investment community.

However, this expertise can also lead to perceptions of bias and undermine perceived neutrality. Ideally, a mediator will have both corporate expertise and direct experience working with community groups, local governments and other non-corporate stakeholders affected by private sector projects and operations.

External mediators are less likely to be perceived as biased, but they may lack the technical experience of NCP staff. Efforts to engage external mediators who possess a working knowledge of multinational trade and corporate responsibility issues and experience working at the community level, or to pair NCP staff with external mediating partners, are options for providing the right set or mix of skills required.

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<sup>35</sup> For more details on ACR membership requirements, see <http://www.acrnet.org/Educator.aspx?id=555>

<sup>36</sup> OECD Investment Division, Directorate for Financial and Enterprise Affairs, “Review of NCP Performance: Key Findings,” prepared for OECD-ILO Conference on Corporate Social Responsibility, June 2008, p.6. Available at [www.oecd.org/dataoecd/34/15/40807797.pdf](http://www.oecd.org/dataoecd/34/15/40807797.pdf).

Cultural and Language Competencies. A successful mediator should be culturally competent and able to communicate in the local language. NCP mediators usually possess these skills when the incident occurs in the NCP country. However, many incidents occur in countries that do not adhere to the OECD *Guidelines*, and it is unlikely that the NCPs involved will be familiar with the local culture and/or language.

In such instances, the Commentary encourages NCPs to engage foreign embassies or government officials in the country where the incident allegedly occurred. Even when this type of help is sought locally, however, language barriers and travel considerations still often pose challenges to successful mediation. Where possible, NCPs involved may find it beneficial to engage an external mediator residing in the country of incident or in a nearby region. A local mediator will be able to communicate with key stakeholders and will better understand the cultural implications of the issues involved. It may not, however, be possible to find a local mediator in every case.

Understanding of Good Mediation Practice Standards. Within the field of professional mediation in the United States and Europe, sets of mediation standards have been established by the Association for Conflict Resolution, the American Bar Association, the European Code of Conduct for Mediators, and a number of state court systems. In addition, customary practice has evolved over the past two decades into widely accepted standards of practice. As a result, professional mediators often follow a similar process in which they meet privately with the parties prior to a potential mediation to help them increase their understanding of the issues involved, explore interests, develop an agenda for problem solving, and formulate agreements (if possible). This process is fairly flexible, and experienced mediators are skillful in knowing when to follow it and when to deviate from it.

#### **4.4 The Mediation Process**

While NCPs have no established mediation process, the functional equivalence principle requires that each NCP mediation be conducted in a way that is visible, accessible, transparent, and accountable.

A mediator goes through a series of steps to assist the parties in developing an agreement that satisfies their most important interests. Throughout all of these steps, good communication between the parties, careful management of the process, discretion, and access to outside expertise are key. It is also important to set realistic expectations from the outset.

This section reviews the steps in the mediation process, particularly as they relate to standard NCP notification requirements.

##### **Step 1: Setting the Stage**

Obtain Formal Consent: Before engaging in mediation, a mediator must obtain formal consent to participate from all of the parties. This should be done via Terms of Reference that the parties and mediator agree upon.

Obtaining consent can be difficult in cases where the parties have no experience with informal problem solving, and when cultural or language differences hamper comprehension. Mediators should ensure that the parties have consented willingly, and have not been coerced into participating. In order to obtain *informed* consent, a mediator should be certain that each party understands the scope and limitations of mediation, and should take the time to correct any misconceptions that may have emerged. Mediators should also emphasize the voluntary nature of the process, and make clear that a party can stop the mediation at any time.

Asking parties to review and sign the Terms of Reference (including a statement of the goals and ground rules of the mediation) is one tool that mediators use to ensure that all parties are agreeing to the process. Where community members are not comfortable using written documents, the mediator can talk through the process, and confirm and document parties' agreement to participate.

Clarify Expectations: During the first meeting of the parties, a mediator should clarify the purpose of mediation and address the parties' expectations as they emerged from the Assessment and as they are captured in the Terms of Reference. The mediator should also emphasize his or her neutrality, which precludes taking sides or making judgments, and explain any limitations that apply to the particular mediation. Limits might include restrictions in non-adhering countries, limits on confidentiality, and constraints presented by parallel procedures.

Confirm Commitments to the Ground Rules: Ground rules establish the standards of conduct that the parties will be expected to follow during the mediation, and therefore have the power to influence the tone of the mediation. They should be jointly developed by the parties, the convener (NCPs), and the mediator based on the Stakeholder Assessment.

In general, written ground rules should make explicit the following:

- Goals of the mediation
- Relationships among the parties, the NCP(s) and mediator(s): this refers to considerations such as the accountability of all the participants to each other; the way meeting summaries will be produced and distributed (if at all); and specific forms of support to be provided to the parties (for example, technical/consultant assistance). It also includes a statement of the mediator's accountability to the NCP(s) and the parties for impartial assistance and confidentiality.
- Parties' responsibilities: responsibilities may include representing and communicating with their organizations/constituencies; attending meetings; providing information and other resources; and participating in a constructive manner.
- Organization of meetings: organizational questions include who is responsible for chairing/facilitating meetings; who will draft meeting summaries if applicable; and who will provide logistical support for meetings.
- Responsibilities of the mediator: common mediator responsibilities include facilitating the process and assisting in resolving disagreements; helping to resolve questions about the interpretation of ground rules; and engaging in confidential communications with parties as necessary.

- Guidelines for parties' discussions and negotiations: it is important to make clear how parties are expected to interact with each other. For example, it is common to instruct parties to speak in turn without interruption; to make an active effort to understand and respond to each other's concerns; and to speak respectfully to one another.
- Communication with the media and the public: public communication procedures should be clarified from the outset. These might include procedures for reviewing and approving public information materials and public statements.
- Any other issues the parties want to address.

## Step 2: Framing the Issues

Clarify Interests: Before mediation begins, the mediator should help each party clarify its interests. If an effective Stakeholder Assessment has been conducted, it will help the mediator and the parties identify and clarify interests. With or without a prior Stakeholder Assessment, the parties should work out internal agreement on their priorities, so they know what they are trying to accomplish through mediation. This is particularly important for representatives of local or indigenous stakeholder groups with limited access to information or communication sources, and for multinational executives who may be subject to complicated reporting structures within their company. All parties should be prepared to explain their interests to the others and answer questions about the reasoning behind their interests. Clearly defined interests will help the parties communicate their expectations and allow them to be clear about the tradeoffs they might be willing to make.

Examine BATNAs: Before a mediation begins, each party needs to clarify, or at least estimate, its "Best Alternative to a Negotiated Agreement" (BATNA). A BATNA represents a party's next best option if they cannot reach an agreement with the other parties. By clarifying their BATNAs, the parties can determine what their minimum requirements are *before* they engage in informal problem solving. After all, no party would accept a negotiated agreement that offered less than what it could count on if it broke off the negotiations altogether. The strength of a party's BATNA is an important source of leverage, or power, in a negotiation. If a party has a good "walk away" alternative, then it can and will resist proposals that are less appealing. Strong BATNAs may also weaken a party's commitment to mediation; after all, why "come to the table" if you can get everything you want without engaging in negotiation? Examples of poor BATNAs include negative media attention associated with the failure of informal problem solving, a public Final Statement in case mediation was unsuccessful, or accepting a corporate action because there is no legal recourse available to reverse it.

Develop an Agenda or Work Plan for the Process: The activities described above should be linked to the development of an agenda (in the case of a single meeting) and work plan (where multiple meetings are envisioned) for resolving the issues. The mediator can prepare a draft agenda/work plan based on the information gathered during the Assessment, and present it to the parties for adoption. Mediators generally provide agendas/work plans that:

- Summarize the issues and interests of greatest concern to the parties

- Provide a scope of the topics for discussion
- Frame issues in neutral, positive terms, if possible
- Prioritize items for discussion, with input from the parties

### **Step 3: Explore Issues and Interests**

Explore Issues and Interests: The mediator is responsible for creating an atmosphere that is conducive to joint investigation of issues, productive dialogue, and relationship building among participants. The most effective mediators are able to work both on the specific agenda items and on group dynamics, aiming to build a sense of shared purpose, positive working relationships and camaraderie. Depending on the parties and the issues involved, a mediator may use any or all of the following facilitation techniques:

- Summarize key points of agreement
- Ask probing and clarifying questions to draw out more information
- Guide parties away from adversarial or blaming language
- Uncover underlying interests related to issues being discussed
- Highlight the relevant data related to each issue
- Look at external forces that limit or create possibilities
- Identify any objective standards that can be used to judge possible solutions
- Obtain the parties' acknowledgement of each others' interests
- Identify shared interests or common ground

Initiate Joint Fact-Finding: Joint fact-finding is useful in cases where there are conflicting expert opinions regarding some aspect of the dispute. In the context of NCP mediation, joint fact-finding can be particularly useful in helping parties build a shared understanding of commercial or human rights issues and their implications. During joint fact-finding, stakeholders work jointly to define the technical questions that need to be answered, and to select qualified consultants that are acceptable to all parties. The parties then work with the consultant to: (1) refine the questions that need to be answered; (2) set the terms of reference for any technical studies that need to be done; (3) monitor (and possibly participate in) the study process; and (4) review and interpret the results. Joint fact-finding may be particularly helpful in cases involving specific instances about environmental or social impacts, disputed financial analyses of multinational enterprise transactions, or disputes regarding the impact of labor practices on employee health.



Adapt to Cultural Differences: In NCP cases, it is not uncommon for the parties to possess distinct cultural identities. It is important to be aware of the ways in which cultural differences can complicate mediation. For instance, the direct way of speaking that is common to Western cultures may be entirely unacceptable to people from other parts of the world. They may be more amenable to subtle and indirect inquiries, only after some level of personal trust is established. Helping parties understand and appreciate other parties' norms and customs is the mediator's responsibility. The same is true for other differences, like gender and age, that sometimes come into play in mediation.

Caucus: Unlike a "joint session," when the mediator meets with all of the parties at once, a caucus is a private meeting between the mediator and a single party. Mediators use caucusing for a variety of reasons, for example to deflate strong emotions or to investigate a party's concerns about something that may have happened in joint session. A caucus can also be used to confront a party who is displaying aggressive or confrontational behavior in joint session. Caucuses are particularly valuable because it is usually easier for a mediator to get an honest response from a party in this more private setting. In order to avoid the appearance of bias, however, mediators usually hold caucuses with each party, one after the other. Parties may also request a caucus, as sometimes happens when one party feels that another is behaving inappropriately.

#### **Step 4: Generate Options**

Joint Problem Solving: Joint problem solving can take many forms, including brainstorming, revising or updating existing agreements or proposals, or putting forward hypothetical scenarios that imagine alternative futures. For each issue on the agenda, it is important to explore possible responses that would be advantageous to all parties. Focusing on both shared and divergent interests may also help to expand the number of options the parties are able to generate. In NCP cases, parties usually have divergent interests – for example, multinational enterprises often take a purely commercial perspective, as opposed to labor unions that emphasize workers' concerns. During mediation, parties may find that focusing on their differing interests along with their common interests can lead to mutually acceptable solutions. In the above example, this strategy might lead to the realization that when the company does well financially, there are more opportunities to respond to the interests of labor.

"What if" scenarios are particularly useful for coming up with options that address what appear to be conflicting interests. Using this technique, each party offers hypothetical "deals" that they think might be acceptable. They do this in a brainstorming fashion, without any implied or formal commitments. The more options the parties can produce, the more likely they are to find something that will work for all sides. In order to prevent being locked into an idea before all potential options have been explored, parties should preface their proposals with a "what if" statement (i.e. "What if you do X and I do Y?").

Evaluate Options: After the parties, with the help of the mediator, have gone through the process of generating options, they will need to settle on a package that all sides can support. On issues where the parties cannot easily find a satisfactory resolution, they might consider using one or more of the following strategies:

Seek Wise Trade-offs: Wise trade-offs are helpful when the parties value key issues differently. For example, while an MNE and an environmental NGO may both care about the environment, the MNE may place greater value on its reputation as a sustainable enterprise, and the NGO may value

cleaner transportation methods that are less harmful to the environment. As a result, the MNE might be willing to pay more for a cleaner transportation method, and in exchange the NGO might be willing to promote the MNE as a “green” company among its counterparts and constituencies.

Contingent Agreements: In situations where conflict is the product of different forecasts about the future, parties might consider using a contingent agreement. This is a way for parties who disagree about the impact of a proposed option or agreement to reduce any risk they might face, by putting in place a procedure for altering the terms of an agreement depending on what happens in the future. For example, an MNE and a labour union may disagree about the future impacts of the MNE’s mining operations on workers’ health. Accordingly, they may adopt a contingent agreement under which the mining operations move forward, but with stipulations about what actions will be taken if negative health impacts do occur.

Objective Standards: The parties may consider appealing to certain principles, standards or criteria to help them jointly assess various options or packages. In this context, "objective" doesn't necessarily mean "correct," but rather refers to evaluative criteria that if applied by a “neutral observer” would lead to a clear ranking or selection. Some examples of objective standards include prevailing industry or community norms, past precedent, or appeals to fairness.

## **Step 5: Develop Agreement**

Finalize the Agreement: Before folding the options into a formal package or agreement, the parties should take time to consider the possible obstacles to implementing the agreement. The parties may want to allow several days for each side to talk with their lawyers, advisors or other constituents before signing an agreement. A reasonable timeline should be set for this review.

Implementation Capacity: Before they sign the agreement, parties must be sure that their organization has the capacity to fulfill the commitments enumerated in it. For example, if implementation requires the cooperation of multiple divisions or levels within a governmental agency, a corporation, or local government, commitments must be obtained from all of these groups.

Flexibility and Reform: The parties should agree on a procedure that will allow them to make subsequent adjustments to the agreement if that is important to achieving their joint goals. The mediator should help the parties establish a plan of action in case the agreement does not produce the desired results. For example, they might agree to conduct a mid-stream evaluation if it appears that the agreement is not being implemented properly.

Monitoring the Agreement: The parties should work with the mediator to specify indicators that can be used to track whether parties are complying with the agreement. Monitoring can be done by the NCP(s) involved, an external party or, alternatively, the parties might agree to take responsibility for joint monitoring at regular intervals.

Improving Relationships: Maintaining good working relationships is particularly important when MNEs, government, or local labor organizations will need to interact again in the future. Once mediation has been completed, it is usually a good idea for all of the parties involved to review how the process worked and what they can learn from it.

#### 4.5 Additional Considerations for NCP Mediation

As already discussed, NCP mediation differs in some respects from other types of mediation. Some of the issues associated with these differences have already been considered. There are, however, a few additional considerations for NCPs engaging in mediation:

Confidentiality Versus Transparency: All mediations should proceed in a way that provides confidentiality for the parties. For instance, sensitive business information is generally considered confidential, and a mediator should not share such information with the other party without the provider's consent. NCP mediations face additional questions of confidentiality, however. For example, if a mediator is an external professional, that individual needs to clarify at the outset what information he or she will or won't share with the NCP. The mediator also needs to make clear what information will remain confidential after the conclusion of the informal problem-solving process.

On the other hand, because the NCP informal problem-solving process is provided through a state-based grievance mechanism, the *Guidelines* require transparency, and there is an inherently public element to NCP mediations. For example, the Australian NCP notes on its website, "Parties should be aware that information and documents provided to the NCP will be subject to the operation of the *Freedom of Information Act 1982*, and could be released to an applicant under that Act, unless it was exempt. Parties should also be aware that the Commonwealth Parliament can seek the production of information and documents from the NCP."<sup>37</sup> In short, NCPs need to ensure that parties involved in a mediation understand the balance between confidentiality and transparency.

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<sup>37</sup> The entire confidentiality policy of the Australian NCP can be accessed online at [www.ausncp.gov.au/content/content.aspx?doc=specific\\_instances.htm](http://www.ausncp.gov.au/content/content.aspx?doc=specific_instances.htm)

### **Case Example: Confidentiality**

The *Guidelines* direct NCPs to protect “sensitive business information” during specific instance proceedings. However, “sensitive business information” is not clearly defined in the *Guidelines*. In 2003, several NGOs filed a specific instance against the BTC consortium of oil companies for numerous breaches of the *Guidelines* including human rights and tax law violations. The UK NCP accepted the case and conducted a site visit to the affected region. The UK NCP’s decision to keep the MNE’s response to the findings of the site visit confidential was controversial. The UK NCP ultimately found that the consortium had not violated the *Guidelines*, and refused to release the consortium’s report that had contributed to the NCP’s findings. The complainants appealed to the independent Steering Committee that oversees the UK NCP, and the Steering Committee agreed that the UK NCP had handled the specific instance poorly. The BTC consortium eventually released the controversial report to some of the complainants (OECD Watch Quarterly Reports February 2010).

Limited Resources: Resources are required for most mediation tasks, such as site visits to the area of conflict and, more importantly, provision of qualified mediation assistance (i.e. a professional mediator and/or mediation training for staff). Accordingly, limited resources may mean that NCPs and the parties can accomplish less than what they would like in a mediation. It is important for NCPs to set realistic expectations for both the parties and for their staff in terms of what can be accomplished with the resources available for mediation.

Co-Mediation: As mentioned earlier in this manual, NCPs may choose to mediate with another NCP, or with an external mediator. Co-mediation can provide NCPs with a variety of benefits, including mutual support; additional creativity and/or skill; a balance of technical expertise; more geographic, cultural and/or demographic diversity; and opportunities for peer learning and mentoring. On the other hand, co-mediators may face challenges such as differences of style and strategy, uneven mediator participation, or even conflict between the mediators. To manage these challenges, it is important for mediators to work together from the outset to create a common strategy and approach, and to clarify their respective strengths and weaknesses. During the mediation, co-mediators may need to take short breaks to discuss strategy, and debrief periodically to discuss lessons learned and provide each other with feedback.

## Part Five: Wrapping Up

*If the parties involved do not reach agreement on the issues raised, the NCP should issue a statement and make recommendations as appropriate.*

- OECD Guidelines, Part II, Section I (C)(3)

### 5.1 The Final Statement

At the conclusion of every effort to respond to a specific instance complaint, the NCP must issue a Final Statement. This section addresses the final stages of the NCP process, with a focus on reporting the results of the mediation process in the Final Statement.

### 5.2 Successful Mediation

In cases of mediation that conclude successfully, the NCP usually helps parties produce a written agreement (mediation agreements are described in the previous section of this manual). For its part, the NCP must prepare a Final Statement. Some NCPs include the details of the mediation agreement in the Final Statement. For example, the Dutch NCP (whose procedures are posted on its website) works with the parties to prepare a joint Final Statement that lists the parties, describes the facts of the case, and summarizes the agreed solutions.<sup>38</sup> The UK NCP also publishes details of the mediation agreement in its Final Statement.<sup>39</sup>

Joint final statements can have major advantages for enforceability and reinforcing positive relationships. Though negotiating the wording can be challenging, jointly drafted statements about the outcome of a mediation tend to reinforce commitments to implementation, and can also strengthen parties' understanding of and commitment to the *Guidelines*.

### 5.3 Partially Successful Mediation

In cases of mediation that are partially successful, meaning that the parties reach agreement on some issues, but not on everything, the parties may want to draft a mediation agreement that highlights areas of consensus.

The Final Statement of the NCP should, however, describe both the agreement reached and the issues still in dispute, as well as the reasons why the NCP decided that the issues raised merit further

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<sup>38</sup> The Dutch NCP Specific Instance Procedures can be accessed online at [www.oecdguidelines.nl/ncp/filing-complaints/](http://www.oecdguidelines.nl/ncp/filing-complaints/)

<sup>39</sup> Access the full UK NCP Specific Instance Procedure online at [www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures](http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures)

examination and the procedures the NCP initiated in assisting the parties. As appropriate, the statement could also include the NCP's recommendations on the implementation of the *Guidelines*.

In these cases, it is particularly important that the NCP consider the impact of its Final Statement on the partial agreement. If the Final Statement tilts heavily in favor of one party's view of the situation, it may reduce incentives for that party to maintain its commitment to the agreement, and/or may alienate the party whose view of the situation is challenged, reducing that party's commitment as well. NCPs must exercise good judgment in determining the balance between the fact-finding value of the Final Statement and its value in supporting the agreement among the parties.

## 5.4 Unsuccessful Mediation

Not every case will result in successful mediation. For one thing, some specific instances are not deemed appropriate for mediation in the first place. In other cases, a mediation may be unsuccessful because parties who are initially willing to enter mediation withdraw in the middle of the process. The November 2010 OECD Watch Quarterly Report describes a case in which the Argentina NCP was faced with this situation when Skanska, a Swedish construction company, initially agreed to engage in mediation to resolve the corruption allegations brought by the Center for Research and Prevention of Economic Crime (CIPCE), an Argentine NGO. Nearly one year later, Skanska withdrew from the mediation.<sup>40</sup>

This type of unsuccessful mediation can be, though is not always, transferred to the NCP findings process, and the Final Statement issued contains the NCP's findings and recommendations on the implementation of the *Guidelines* as appropriate.

The most clear-cut cases of unsuccessful mediation are those in which one or both parties refuse to come to the table. Given the voluntary nature of the mediation process, it is often difficult to convince parties to engage, particularly large MNEs who may feel they have a good chance of prevailing in other legal, regulatory and/or legislative processes. In some cases, complainants may prefer to pursue legal redress, or to use the NCP's formal findings process. For example, the November 2010 OECD Watch Quarterly Report reported that in December 2009, several Guatemalan CSO complainants refused to engage in face-to-face or private mediation, offered by the Canadian NCP, with the Canadian gold mining company Goldcorp. Instead, the complainants asked the NCP to undertake appropriate fact-finding, and emphasized their desire for an NCP final statement with recommendations.<sup>41</sup>

## 5.5 Oversight of Implementation

Implementation of the mediated agreement and/or Final Statement recommendations is a critical stage in the grievance process. Unfortunately, ongoing oversight of implementation is not yet

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<sup>40</sup> OECD Watch (November 2010), "OECD Watch Quarterly Case Update of OECD Guidelines Cases Filed by NGOs", Vol. 5 Iss. 2, p. 6, [http://oecdwatch.org/publications-en/Publication\\_3594/view](http://oecdwatch.org/publications-en/Publication_3594/view).

<sup>41</sup> Ibid., p. 4

common NCP practice. For example, the 2010 OECD Watch evaluation report, “Ten Years On,” reported a case in which the an NCP attempted to resolve allegations of human rights abuses brought by an international NGO, against a mineral trading company, through mediation. The mediation was ultimately unsuccessful, so the NCP conducted an examination, which found the company in breach of the *Guidelines* on labor and human rights, and then issued a Final Statement with recommendations. Although the company subsequently claimed that it stopped trading minerals in the incident country, the company was later found to be affiliated with another supplier that was well known for labor and human rights abuses.<sup>42</sup>

While the NCP was commended for its handling of the mediation in this case, the OECD Watch evaluation report pointed out that the “NCP’s inability or unwillingness to monitor adherence allows companies simply to ignore the statement and continue business as usual with no consequences.”<sup>43</sup> As this case illustrates, without proper oversight and enforcement of Final Statement recommendations, the specific instance process can be undermined.

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<sup>42</sup> OECD Watch (2010), “*OECD Watch - 10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct*”, OECD Watch, p. 37, [oecdwatch.org/publications-en/Publication\\_3550](http://oecdwatch.org/publications-en/Publication_3550)

<sup>43</sup> Ibid.

## Professional Mediators Resource List

- AfDB DACON is a database of Individual Consultants and Consulting Firms maintained by the African Development Bank Group. <http://www.afdb.org/en/projects-operations/procurement/consultancy-services-dacon/>
- National Roster of Environmental Dispute Resolution and Consensus Building: <http://www.ecr.gov/Resources/Roster/Roster.aspx>
- KSG Corporate Social Responsibility Initiative: <http://www.hks.harvard.edu/m-rcbg/CSRI/>
- BASES WIKI Site ([baseswiki.org](http://baseswiki.org)): these organizations were listed as featured contributors in the KSG BasesWiki site:
  - Meta-Culture
  - Africa Centre for Dispute Settlement
  - Centre for Effective Dispute Resolution
  - Commission for Conciliation, Mediation and Arbitration (CCMA)
- Bases WIKI: list of mediators signed up as users: <http://baseswiki.org/en/Mediators>



## Select Sources

The following sources are referenced at least once in the text of this manual. Information specific to each NCP can be found at their individual websites.

- Fairman, David and Dixon, Larry. “Consensus Building/Conflict Resolution Toolkit.” *Consensus Building Institute*, December 2002.
- OECD. “*OECD Guidelines for Multinational Enterprises*.” OECD.
- Ruggie, John. “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework.” *A/HRC/14/27, Human Rights Council, 14th session* (available from <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>).

### Websites

- American Bar Association: <http://www.abanet.org/>
- Association for Conflict Resolution: <http://www.acrnet.org/>
- Business and Industry Advisory Committee to the OECD (BIAC): <http://www.biac.org/>
- Compliance Advisor/Ombudsman for the International Finance Corporation and Multilateral Investment Guarantee Agency, World Bank Group, [www.cao-ombudsman.org](http://www.cao-ombudsman.org).
- *OECD Guidelines for Multinational Enterprises*:  
[http://www.oecd.org/document/28/0,3746,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html)
- OECD Watch: <http://oecdwatch.org/>
- The Trade Union Advisory Committee (TUAC):  
<http://www.tuac.org/en/public/index.phtml>