

IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES THE NATIONAL CONTACT POINTS FROM 2000 TO 2015

KEY FINDINGS

Fifteen years after the creation of National Contact Points as a means to further the effectiveness of the Guidelines, the OECD has conducted an analysis of the functioning and performance of this unique implementation mechanism. This note summarises the key findings from the report. The full report will be published on 21 June 2016, on the 40th anniversary of the Guidelines.

National Contact Points - a unique implementation mechanism for promoting responsible business conduct

Responsible business conduct is an essential part of an open international investment and trade climate and building a responsible business environment is in the interests of all. When the OECD Guidelines for Multinational Enterprises (the Guidelines) were adopted in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises (the Investment Declaration) they set the bar for the responsible business conduct of enterprises operating internationally. Since then the Guidelines have been subject to review on five occasions to ensure they keep pace with the changing international environment. The most recent revision took place in 2011. Today the Guidelines represent a global framework for responsible business conduct covering all areas of business responsibility including disclosure, human rights, employment and industrial relations, environment, anti-corruption, competition and taxation.

The Guidelines are the only international instrument for responsible business conduct with a built-in implementation mechanism – the National Contact Points (NCPs). All governments adhering to the Investment Declaration are also required to adhere to the Decision of the Council on the Guidelines for Multinational Enterprises. This Decision contains the legally binding obligation for adherents to set up a National Contact Point (NCP), to further the effectiveness of the Guidelines, and make human and financial resources available to their NCP to fulfil their responsibilities.

NCPs are mandated 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.

NCPs have been part of the Guidelines since 1984. However, it was the 2000 review that provided detailed Procedural Guidance on the role and functions of NCPs and gave them a stronger role to deal with all matters relating to the Guidelines, including resolving issues related to the non-observance of the Guidelines by companies. Through this aspect of their mandate, NCPs are the only governmental, non-judicial grievance mechanism, providing access to remedy to stakeholders wishing to raise issues related to operations of companies operating in or from adhering countries.

The 2011 revision of the Guidelines added a chapter on Human Rights aligned with the language of the UN Guiding Principles for Business and Human Rights (UNGPs) to the Guidelines. Furthermore the Guidelines make reference to relevant provisions of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy as well as the Rio Declaration. As such the NCPs also function as a grievance mechanism for widely recognised expectations with regard to business and human rights, labour issues and the environment.

In June 2015, on the occasion of the OECD Ministerial Council Meeting, Ministers called on the OECD to continue its efforts to further strengthen the performance of NCPs, including through voluntary peer reviews and the exchange of best practices. This call was also made in the G7 Leaders

Declaration in June 2015, in which the G7 governments committed to strengthening mechanisms for providing access to remedies including the NCPs. In order to do this, the G7 governments are encouraging the OECD to promote peer reviews and peer-learning on the functioning and performance of NCPs. In addition, the G7 governments committed to ensuring that their own NCPs are effective and that they lead by example.

There have been significant improvements in the handling of specific instances by NCPs

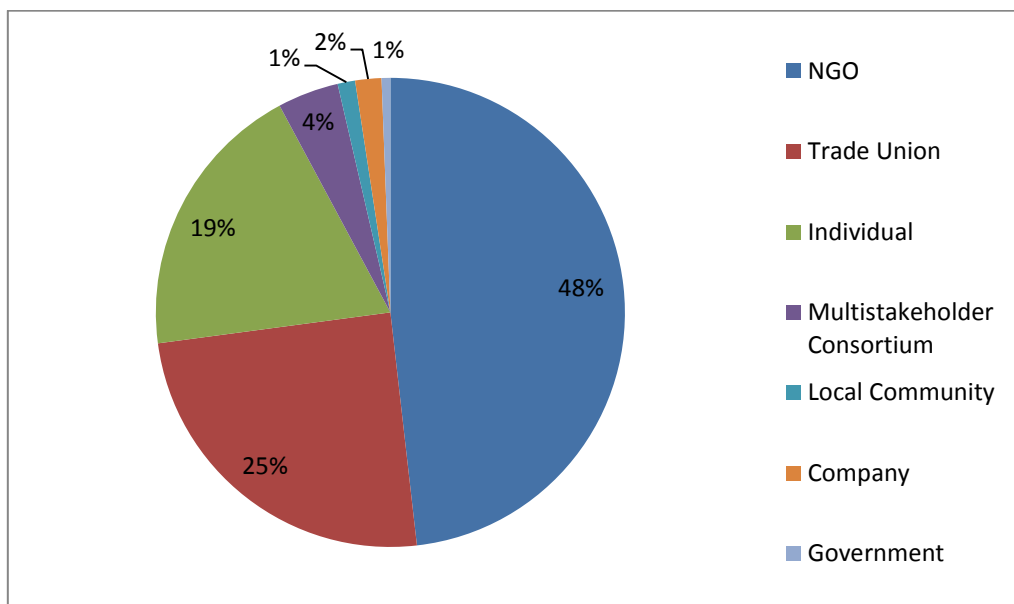
NCPs have the mandate to provide a *forum for discussion* so as to contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. This makes the Guidelines the only government-backed international instrument for responsible business conduct with a built-in non-judicial grievance mechanism. This mechanism has been part of the mandate of NCPs since the 2000 review of the Guidelines. To date over 360 specific instances have been handled by NCPs, addressing impacts from business operations in over 100 countries and territories.

Most specific instances relate to issues arising from MNEs operating in the manufacturing sector, comprising 33% of all specific instances. Mining and quarrying is the second most represented sector in terms of numbers of specific instances. These proportions have remained relatively constant since 2000. Issues arising in the financial sector have seen significant increases in terms of submissions, from about 8% of specific instances from 2000-2010 to 17% from 2011.

NGOs have historically been the main group using the specific instance mechanism, accounting for 80 specific instances or 48% of all specific instances since 2011, followed by trade unions which account for 41 specific instances or a quarter of all specific instances since 2011. Individuals have filed 33 specific instances since 2011 accounting for 19% of all specific instances in this time period.

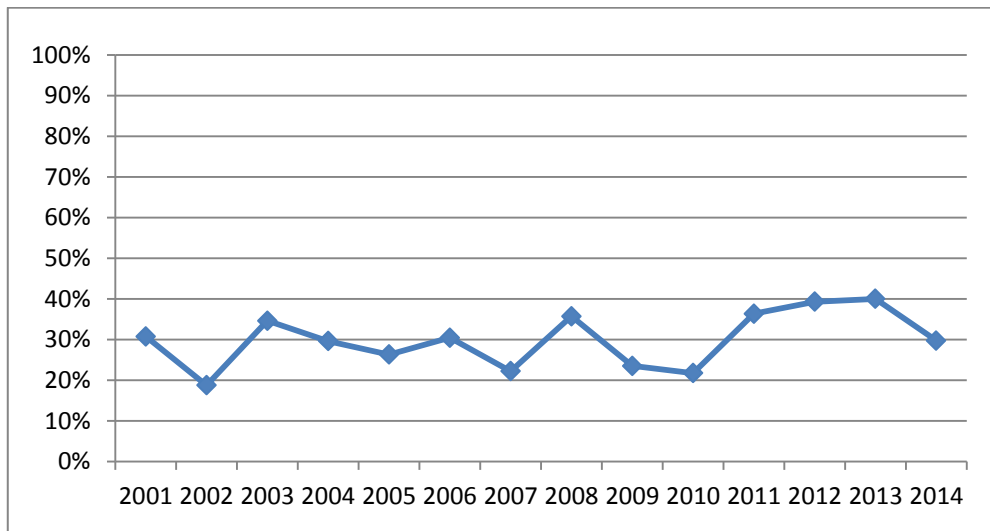
Specific instances treated to date have covered all chapters of the Guidelines with the majority focusing on the chapters on employment and industrial relations (55%), human rights (24%) and environment (21%).

Users of the specific instance mechanism between 2011-2015



Approximately a third of all closed specific instances were not accepted for further consideration at the initial assessment stage. A non-acceptance rate of between 30-40% has been relatively stable since 2000.

Non-acceptance of specific instances (in percentage)



Specific instances have resulted in important impacts

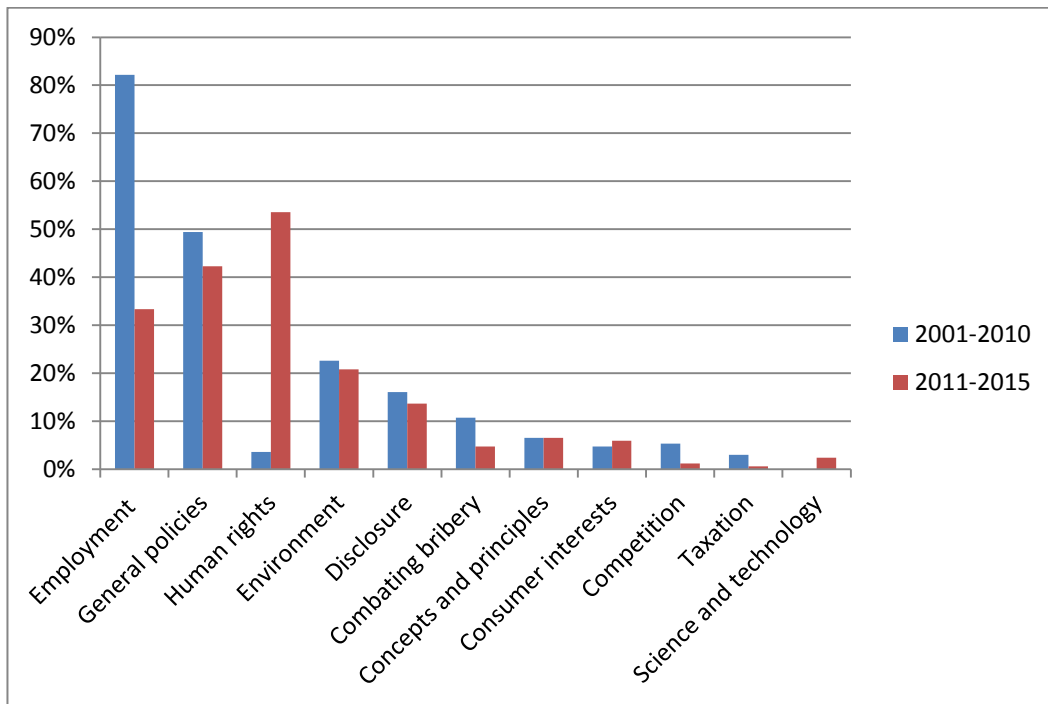
Between 2011 and 2015, approximately half of all specific instances which were accepted for further examination by NCPs resulted in an agreement between the parties. Agreements reached through NCP processes were often paired with other types of outcomes such as follow-up plans and have led to significant results, including changes to company policies, remediation of adverse impacts, and strengthened relationships between parties. Of all specific instances accepted for further examination between 2011-2015, approximately 36% resulted in an internal policy change by the company in question, contributing to potential prevention of adverse impacts in the future.

In some instances which did not result in agreement between the parties some positive outcomes were nevertheless achieved such as clarification of expectations under the Guidelines and increased use of leverage by companies and investors to promote RBC.

Since the introduction of the chapter on human rights to the Guidelines in 2011 specific instance proceedings have resulted in stronger human rights policies and due diligence processes in a number of companies. NCPs have handled specific instances dealing with a wide range of human rights issues such as the rights of indigenous peoples, lethal injections, and the right to privacy.

Specific instances dealing with employment issues have led to some important results, such as engagement with governments to end child labour, formalisation of employment and improved workplace health and safety. For example, one specific instance resulted in a mutually acceptable solution in which a company agreed to the establishment of 200 permanent positions in one of its factories, a significant change for the factory which had been employing high proportions of temporary labour.

Main themes of specific instances (before and after 2011)



NCPs have also handled a range of environmental issues including unsustainable agricultural practices and mitigation of environmental impacts associated with extractive operations and large infrastructure projects. In one specific instance an oil exploration company committed to cease exploration in a UNESCO recognised national park and “not to conduct any operations in any other World Heritage site”.

Some NCPs have developed significant skills and experience in mediation and problem-solving

In recent years, some governments have made significant efforts in providing NCPs with resources needed to handle specific instances more efficiently; for example, by providing a budget to hire external experts, including mediators; providing training in mediation and problem solving to NCP staff, etc. On the other hand, insufficient resources and a lack of support translate into a lack of skills development for a number of NCPs; this is a challenge since the mandate requires NCPs to address increasingly complex and sophisticated issues.

Application of the Procedural Guidance for handling specific instances is not uniform

While there have been many successful outcomes from the specific instance mechanism over the past 15 years, significant variations in the practice of NCPs has contributed to uneven performance in handling specific instances. Significant challenges remain with regard to the handling of specific instances. Stakeholders have highlighted several challenges including accessibility of the NCP due, for example, to procedural rules imposing statute of limitations, overly restrictive definitions (e.g. of the terms “multinational enterprise”, “adverse impact”, “business relationship”), costs for parties to participate in mediation, and the overly stringent interpretation of the requirement than an issue be “material and substantiated”. In addition to accessibility issues non-acceptance of specific instances due to parallel proceedings, delays, insufficient use of recommendations or determinations in final statements, and lack of clear or equitable procedures have also been highlighted by stakeholders as areas for improvement. Recurring challenges mentioned by NCPs in dealing with specific instances include balancing confidentiality and transparency; cooperation between NCPs and resource constraints.

Some governments have been innovative in increasing the impact of their NCP

Specific instances are not legal cases and NCPs are not judicial bodies. As such NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a conciliation or mediation process. Nevertheless the NCP system can generate important consequences. For example, some NCPs issue final statements upon concluding specific instance processes which include recommendations to companies based on the particular circumstances of the case. Certain NCPs also make determinations, setting out their views on whether a company observed the Guidelines or not. Such practice can have reputational impacts for companies and can encourage engagement of companies in the process. Furthermore, in some contexts governments consider NCP statements with regard to economic decisions, e.g. in the context of public procurement decisions or in providing diplomatic support.

NCPs are making efforts to promote the Guidelines, but these efforts remain uneven

A key function of the NCPs is to promote the Guidelines, and most NCPs have focused their efforts on this part of their mandate. Activities by NCPs to raise awareness of the Guidelines amongst different stakeholders range from hosting and organising promotional activities, workshops and conferences, to engaging regularly with key stakeholders and developing and disseminating promotional material on the Guidelines. Viewed as a whole, the NCPs have taken important steps in promoting the Guidelines as a useful tool for enterprises, governments, unions, NGOs and other interested parties.

Significant work has also been carried out by BIAC, OECD Watch and TUAC (and their affiliates in different countries) in ensuring that their various constituents are informed of the Guidelines and in particular of the existence and role of NCPs.

However, although in some countries the Guidelines are known by enterprises, trade unions and civil society representatives, they are less well known in others. In addition, the Guidelines are often not known beyond CSR practitioners or business and human rights experts, who are directly involved in the policy debates about them. Also, while major listed multinationals may be familiar with the Guidelines, this does not necessarily apply to SMEs.

Conformity with the core criteria and obligations is improving, but remains uneven

NCPs are required to operate in accordance with the core criteria of visibility, accessibility, transparency, and accountability. Most governments have made significant progress in ensuring their NCPs meet the core criteria, while others are still lagging behind. Most significantly, some NCPs do not appear to meet any of these criteria, even several years after their creation.

NCPs are required to report annually on the nature and results of their activities, including with regards the handling of specific instances. In addition they are encouraged to publish their annual reports online to promote transparency and accountability amongst their stakeholders and other NCPs and to report on their activities within their governments. Here also, improvements have been made, but more could be done.

Most NCPs are visible, but not all of them are accessible

Adhering governments are responsible for informing the public of the availability of the Guidelines-related facilities. Websites are one way to make the NCP *visible*. They are the natural entry point to contact an NCP, and the most obvious place for the NCP to communicate about the Guidelines, its role and procedures. While most NCPs have a website, a review shows that while some are clear, complete and easy to navigate, others are poorly designed, lack relevant information and do not provide basic contact details.

Accessibility is still a challenge for a number of NCPs. Many NCPs provide clear rules of procedure for submitting and handling specific instances, and many recognise the possibility of considering specific instances in cases where one party is not willing to engage or where there are parallel proceedings ongoing. However, according to users of the NCP mechanism (mainly NGOs and trade unions), the rules of procedure in place for some NCPs may *de facto* impede accessibility, such as high substantiation requirements or short statutes of limitation. Furthermore, some NCPs systematically do not accept specific instances for further examination on the basis of one party not being willing to engage, or when parallel proceedings (e.g. in a national court) are in place. Stakeholders have also highlighted that the resource constraints faced by some NCPs (e.g. to cover translation and interpretation costs) result in obstacles for meaningful participation by parties in specific instance processes.

NCPs can do more to ensure transparency and accountability

Transparency is closely linked to accountability, and essential to gain confidence of the general public, especially in relation to specific instances. Some NCPs communicate with stakeholders through regular newsletters, or hold regular meetings, thereby making the NCP better known and making its role and activities more transparent. There are, however, significant differences among NCPs in the way they deal with transparency around specific instances. A few NCPs publish their initial assessments once they have accepted a specific instance, and most publish the final statements for specific instances in a timely manner. However, some NCPs do not fully meet the requirement to make the results of specific instances publicly available, or do not report on specific instances to the OECD secretariat in a timely manner.

Better reporting of NCP activity would help enhance their visibility and accountability, including within the government

There are significant divergences in the levels of *accountability* of NCPs. Many NCPs do not report at all to different government agencies on their activities, or only do so on an ad hoc basis; a few report to Parliament. Some NCPs do not report at all.

A small number of NCPs fail to meet their minimal obligation of reporting annually to the OECD, and among those which do, some only provide partial information. In addition, although the majority of NCPs participate actively in the peer learning meetings held at the OECD and are active in organising peer-learning events for NCPs in their own countries, a small number of NCPs do not attend, nor engage in other kinds of information or experience sharing with other NCPs. A stronger demand within governments for NCPs to report on their activities would be helpful to increase the visibility and raise the internal profile of NCPs and would be an opportunity to highlight the achievements and shortcomings due, for example, to a lack of resources.

NCP structures have been evolving to promote diversity, policy coherence, and impartiality

Governments have flexibility in the way they set up their NCP and the NCP should retain the confidence of social partners and other stakeholders. Over time different types of structures have emerged. Increasingly, driven by the growing expectations around responsible business conduct standards and the growing complexity of specific instances submitted to NCPs, some governments are moving away from the “mono-agency” structure where an NCP is housed in one single Ministry, and are seeking to expand the areas of expertise available within the NCP. For example, some governments have created NCPs that include representatives from several Ministries. Some NCPs are based in one Ministry, but involve other Ministries and other stakeholders, such as enterprises and labour representatives, either as part of their core structure, or through advisory bodies. Some governments have re-structured their NCPs into an office with independent experts and a supporting secretariat attached to a Ministry.

Since 2001, most NCPs have been located in the Ministry which has responsibility for economic issues and investment (e.g. Ministry of Business and Growth, Ministry of Economy, Ministry of Investment, Ministry of Trade, Ministry of Finance, etc.). A total of 34 NCPs are currently located within governmental departments in charge of economic or financial issues, while six are located in Ministries or departments of foreign affairs and four are structured as independent agencies.

A total of 19 governments have created advisory bodies for their NCPs and six have created oversight bodies as of January 2016. Advisory bodies are generally multi-stakeholder platforms and can include representatives from trade unions, NGOs, enterprises or academia. Many advisory bodies also include representatives of other government agencies, thus providing such NCPs with a means of improving policy coherence at the national level. Oversight bodies are commonly composed of representatives from several governmental departments, enterprises, trade unions and non-governmental organisations. One of the roles of oversight bodies is to monitor the effectiveness of the NCP, ensuring that correct and fair procedures are followed in line with the NCP procedures for dealing with complaints.

Overview of NCP advisory and oversight bodies

NCP	Advisory	Oversight	NCP	Advisory	Oversight
Argentina			Jordan		
Australia	✓		Korea		
Austria	✓	✓	Latvia		
Belgium	✓		Lithuania	✓	✓
Brazil	✓		Luxembourg		
Canada			Mexico		
Chile	✓		Morocco		
Colombia	✓		Netherlands	✓	
Costa Rica			New Zealand	✓	
Czech Republic			Norway		
Denmark			Peru		
Egypt			Poland		
Estonia			Portugal		
Finland	✓		Romania	✓	✓
France			Slovak Republic		
Germany	✓	✓	Slovenia		
Greece			Spain	✓	
Hungary		✓	Sweden		
Iceland			Switzerland	✓	
Ireland			Tunisia		
Israel	✓		Turkey		
Italy	✓		United Kingdom	✓	✓
Japan	✓		United States	✓	

Lack of resources is one of the main challenges for many NCPs

While most adhering countries have set up and maintain NCPs, the resources and budgetary support provided to enable them to discharge their functions is uneven. Resource constraints are frequently cited by NCPs as being a barrier in fulfilling their mandate and consistently singled out by stakeholders as a major problem with regard to the NCP system. This is in conflict with the commitment by adherent countries under the Decision of the Council on the Guidelines for Multinational Enterprises to make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities.

A few NCPs are well-resourced, but many others lack staff and budget

A number of NCPs have indicated that a lack of financial resources poses a challenge in fulfilling their mandate. Few NCPs have staff solely devoted to the responsibilities of the NCP and some do not have any dedicated staff. In most NCPs, members of staff are also responsible for other portfolios. Most NCPs are composed of a mix of full-time and part-time staff, with additional support being requested as needed. Several NCPs – particularly those with their secretariats housed in a Ministry of trade or foreign affairs are staffed by officials sharing several functions.

Frequent staff turnover and weak knowledge management hamper NCP efficiency

In addition to a lack of sufficient resources, a lack of institutional knowledge and management, due to frequent staff turnover, the absence of written terms of reference and rules of procedure, and inadequate record-keeping have been identified as shortcomings in the functioning of some NCPs. A lack of consistency among staff working as part of the NCP, and insufficient institutional support can mean that at times the minimum level of manpower, experience and support needed to properly fulfil NCP tasks is not present.

There is room for greater involvement of NCPs in the sector projects under the “proactive agenda”

The “proactive agenda” aims to promote the effective observance of the Guidelines by helping enterprises identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries. Central to its potential to effect change on a broad scale is its use of multi-stakeholder processes which gives relevant stakeholders the opportunity to participate side-by-side with enterprises in developing tools and strategies to avoid and address risks of adverse impacts.

Since 2011, significant work has been carried out to help companies implement the recommendations of the Guidelines, often initiated by NCPs themselves. Examples include work on responsible supply chains in the garment and agriculture sector as well as meaningful stakeholder engagement in the extractive sector. Some NCPs have actively participated in this work by chairing or participating in advisory groups or providing comments on documents. However there is room for greater involvement of NCPs in the projects, in particular, in promoting the work to relevant enterprises to encourage implementation.

Some NCPs are involved in the development of broader responsible business conduct policy

Certain NCPs are involved in the development of broader responsible business conduct policy, including the development of National Action Plans (NAPs) on Responsible Business Conduct and/or on Business and Human Rights. Currently 10 adhering countries have developed NAPs on business and human rights. In all but one of these NAPs, NCPs are highlighted as a non-judicial mechanism relevant to promoting access to remedy. In addition another 16 adherent countries are in the process of developing NAPs. Several of these countries have reported strong involvement of NCPs in the development of the NAP.

The NCP system is attracting increased attention

There is growing interest from non-adhering countries in building structures that can undertake NCP-like activities and provide leadership on responsible business conduct matters. For example, in close collaboration with the OECD and supported by direct engagement with several NCPs, the government of Myanmar established a focal point on responsible business conduct. In July 2015, the OECD and the Chinese government agreed on a programme of work for joint activities. A number of these activities focus on helping China strengthen its framework for responsible business conduct, and notably, to jointly set up a platform on responsible business conduct issues in China, to assist and support Chinese industry to apply and implement responsible business conduct, including sector specific instruments and guidelines.

A new Action Plan aims to strengthen National Contact Points

The OECD Action Plan to strengthen NCPs was adopted by the Working Party on Responsible Business Conduct in December 2015 and responds to calls from OECD Ministers and G7 Leaders. The Action Plan describes individual activities in the form of peer reviews and capacity building and collective activities which include peer learning and the creation of tools and resources. To date, NCPs have benefited from several peer learning sessions at the OECD and at NCP-led meetings which bring together smaller numbers of NCPs and offer an opportunity for sharing experience. Peer reviews have proven beneficial both for the reviewed NCP as well as the peer reviewers and are recognised as a useful tool to identify achievements and areas for improvement. Under the Action Plan, 12 NCPs have committed to undergo a peer review by 2018.

Realising the potential of National Contact Points

There are various advantages inherent to NCPs. Firstly, the broad scope of the Guidelines, across subject matter and business relationships, means that NCPs provide a platform for discussion and resolution of a wide range of issues. Furthermore it means that NCPs are not limited to considering impacts occurring within their borders, but may consider issues occurring across global supply chains.

Additionally NCPs facilitate access to consensual and non-adversarial means of dispute resolution, such as conciliation or mediation. This can be significantly quicker and less expensive than court proceedings or arbitration, and can enable the parties to engage in a process aimed at reaching a mutual agreement rather than a judgement. The process is designed to be constructive and result in recommendations for how companies could make improvements as well as allow for the development of longer term, constructive engagement between companies and stakeholders.

Strengthening the internal functioning of NCPs as well as ensuring that external frameworks promote strong outcomes under the NCP system will be necessary to ensuring that they live up to their full potential. In order to achieve this objective NCPs need adequate resources to fulfil their mandate. Furthermore, promoting policy coherence which recognises the role and value of the NCP system will also be useful. This may include tying consequences to specific instance proceedings in export credit decisions or support in international economic diplomacy, or recognizing the role of NCPs in NAPs or other relevant government policy.