

## **Workshop report**

### **Effective Use of the OECD Guidelines' National Contact Point (NCP) System**

Capacity-Building and Peer-Engagement for  
Nordic, Baltic, Ukrainian, and Southern Civil Society and NCPs

**28-29 May 2018**

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## Background and goals of the workshop

The OECD's National Contact Points (NCPs) are tasked with promoting companies' implementation of the OECD Guidelines for Multinational Enterprises (the Guidelines) and resolving disputes over allegations of corporate misconduct. As such, NCPs represent a crucial vehicle for advancing responsible business conduct and facilitating access to remedy for individuals negatively impacted by corporate activities. Despite the significant potential of the NCP grievance mechanism, it remains largely underused. Low awareness of the NCP system among civil society organisations (CSOs) and lack of trust and understanding between CSOs and NCPs have often discouraged interaction between them and use of the OECD Guidelines' complaint mechanism.

To overcome these impediments to strengthening the NCP system, OECD Watch invited 41 participants from non-governmental organisations (NGOs), trade unions, and NCPs to attend a two-day workshop on 28-29 May 2018, with the objective to:

- Strengthen the capacity of Nordic, Baltic, Ukrainian, and Southern CSOs to develop effective OECD Guidelines complaints and engage successfully in the NCP dispute resolution process;
- Facilitate understanding and trust between CSOs and NCPs by enabling dialogue between them; and
- Promote peer learning and upward harmonisation of practices among Nordic, Baltic, and Ukrainian NCPs.

## Results and reflections on the workshop

The diverse composition of the group created a unique opportunity for the varying perspectives and experiences of the participants to be shared. The forum enabled capacity building for each stakeholder group through learning from OECD Watch's presentations, from their peers, and from the other stakeholders. OECD Watch sought to encourage an open, honest, and fun atmosphere in which parties could engage each other. Evaluations from participants suggest that this atmosphere was achieved. The evaluation exercise held at the start and end of the workshop showed that progress was made in strengthening knowledge and capacity and improving trust between CSO and NCP participants. Participants appreciated the hands-on, practical set-up of the workshop with its focus on hypothetical cases and mix of small-group and plenary discussion. Participants also appreciated the peer learning and sharing of insights into practices and experiences of peers as well as other stakeholders.

**A follow-up webinar especially for NGOs will be organised in the fall of 2018. Based on interest among NCPs, a follow-up webinar can also be scheduled for NCP participants.**

## Workshop summary

During the two-day workshop, OECD Watch provided a brief introduction of the NCP complaint process and then led participants through six thematic sessions to familiarise participants with key requirements and strategic considerations for six core topics in the development of a successful specific instance: Why file; Complaint drafting; Evidence; Where to file and home-host NCP coordination; Transparency & campaigning, and Mediation. The full group was divided into five sub-groups, each with a diverse composition of CSO and NCP representatives, to allow for more thorough and participatory discussion of each thematic topic through means of five hypothetical cases.

Each thematic session was structured as follows:

- Brief introduction of the subject by OECD Watch (and sometimes a representative of the OECD);
- Plenary discussion for participants to add perspective to the introduction;
- Small group discussion focused on applying lessons-learned to a hypothetical case; and
- Return to plenary for sharing of challenges and insights from the small group discussion, and for final comments on the session topic.

## Notes for each session:

**Monday, 28 May 2018**

### Brief overview of NCP complaint process

In the morning of the first day, after a round of introductions, OECD Watch gave participants a brief overview of the OECD NCP mechanism, the different stages of an NCP complaint process, and the indicative timeline in the Procedural Guidance. In the initial assessment phase, the NCP considers whether the complaint merits further examination. In the mediation phase, the NCP seeks to bring the parties together for mediation aimed at reaching a mutually agreeable solution. If mediation fails, NCPs can make an assessment of alleged violations. At the end of the complaint process, the NCP issues a public final statement which should include provisions for monitoring and follow-up on the agreements and recommendations made by the NCP.

### Introduction to hypothetical cases and OECD Watch “Case Check” tool

Five CSO leaders introduced the group to five hypothetical cases developed by OECD Watch to channel small group discussions into more concrete practice on case development and consideration.

- Case 1: India, Environmental and human rights impacts (including against indigenous community) from Swedish pharmaceutical plant.
- Case 2: Tanzania, Environmental and human rights impacts from Russian uranium mine.
- Case 3: Finland, Labour rights impacts against Estonian migrant workers by Finnish employment agency and Russian and German power companies.
- Case 4: Uganda, Labour rights impacts on predominantly women plantation workers by a Dutch horticulture company.
- Case 5: Indonesia, Labour rights impacts on predominantly women textile workers by Danish textile company.



Following introduction of the cases, OECD Watch gave participants a demonstration of how to use OECD Watch’s “Case Check” tool to determine whether and where to file an NCP specific instance, and which Guideline provisions to highlight as having been breached. The Case

Check guides users through a set of questions that are relevant for potential complainants who seek advice on whether the OECD Guidelines apply to a specific case. At the end of the Case Check users can download a PDF with tailored advice relevant to that case. The case check is accessible here: <https://www.oecdwatch.org/oecd-watch-case-check>.

Following that demonstration, in the small groups, the CSO leaders led participants through their cases in a bit more detail while going through the OECD Watch online Case Check for each case.

### Thematic Session 1 - Why file? What can civil society achieve through an NCP case?

#### Goals of the session

- What does meaningful remedy mean to complaints?
- What remedies can NCPs help facilitate?
- How can NCPs encourage companies to engage meaningfully and provide remedy when necessary?

#### Presentation

OECD Watch presented mixed results from NCP cases in terms of providing tangible outcomes for complainants. In OECD Watch's experience of 15 years, the majority of complaints are rejected on a few grounds: that they are not material and substantiated; that their resolution may not advance the Guidelines; or that there are parallel (legal) proceedings underway related to the same case. Even where complaints are accepted by NCPs, complainants rarely result in agreements that satisfy complainant's goals for compensatory or injunctive remedy. This may result in part from misalignment of complainants' goals and NCPs' capacities; it also may result from procedures at many NCPs that are not conducive to achieving meaningful outcomes; or from challenges complainants face in compiling a strong complaint. The outcome statistics of cases filed by trade unions show a more optimistic picture. This may result from a few things: that trade unions often are more experienced with negotiating with companies; that the issues to be mediated are sometimes of a less severe character compared to cases brought up by NGOs; and that companies may feel more responsibility to workers within their supply chain than to external communities impacted by their operations.

### Plenary discussion

In plenary, the role of NCPs in enabling dialogue was discussed. Discussants noted shared concern that because of their different structures, mandates, and interpretation of the Guidelines, some NCPs have rejected cases that other NCPs would not have turned down.

The plenary discussion also addressed the potential for NCPs to facilitate access to remedy, including compensation. An NCP representative observed that NCPs themselves cannot provide remedy, but can steer conversation in that direction during mediation. CSO participants noted that it is because of a lack of alternative paths to remedy that complainants, feeling themselves in a desperate situation, bring to NCPs cases that allege severe human rights abuses. Some CSO participants observed that they hesitate to encourage partners to use the NCP mechanism, because its use has high resource costs with low chances for meaningful outcomes. Without the prospect of compensation or another substantive outcome, an NCP process can feel meaningless to affected victims. Although in some cases general NCP statements or determination of breach of the Guidelines by companies can be helpful, complainants often do want (some form of) compensation. NCP representatives asserted that NCPs cannot provide compensation. CSO representatives, in response, argued that NCPs should nevertheless feel able to suggest that a company provide compensation voluntarily, if such an outcome seems warranted on an ethical, human level, in light of the companies' actions and the harm to complainants.

Participants noted that the NCP forum is currently mainly used by complainants to obtain remedy for past harms, rather than for prevention of future harms.

Participants discussed the reasons why companies might engage in mediation. In the experience of those present, companies engage because of reputational risks and economic loss. Companies often have to be convinced to participate. Filing a complaint can put companies on the radar of responsible investors. It has been the experience of one of the participants that investors continued to ask for opinions on cases that were concluded many years ago. Therefore, investor-pressure can sometimes encourage companies to engage in complaints.

The "legal"/"non-legal" character of NCP cases was discussed. Several NCP representatives expressed a desire to avoid NCP cases taking on a legal character. They encourage companies to participate in mediation as a means, perhaps, to avoid litigation, and have also encouraged companies not to bring company lawyers to the mediation table.

Participants also discussed the challenge that not all complaints can be filed against the company that directly violated the Guidelines (due to lack of NCP jurisdiction over such companies). In such cases, it is difficult for complainants to demand change in an indirect way through a related company.

### Small group discussion

In small groups, participants discussed what outcome the complainants in the hypothetical cases would want, and what outcome they would likely achieve through an NCP process. Compensation was mentioned as a desired outcome by nearly all sub-groups. That said, other desired outcomes were also identified, such as consultation with communities, due diligence and policy/practice change by the company, establishment of an operational-level grievance mechanism, and simple recognition by the company or NCP of suffering caused and experienced.

## Thematic Session 2 - Drafting a successful complaint

### Goals of the session

- What are the OECD admissibility criteria?
- What elements should a complaint contain?
- How should those elements be presented?

### Presentation

Although there is no uniform way or length in which complaints should be presented to NCPs, there are six admissibility criteria complainants should ensure their complaint satisfactorily addresses:

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

OECD Watch advice for complainants is to identify the Who, How, What, Why, When, and Where of the complaint. The rough template presented is as follows:

- [If possible, try to write in English or NCP language]
- The **identity** of the complainant and its interest in the matter;
- Name and address of the **NCP**;
- Short **introduction** to the case;
- Your **purpose** for writing the complaint;
- **Company information** (including contact details and company structure);
- Information on the broader **background** of the case & violations;
- **Relevant chapters and paragraphs of the Guidelines**;
- Detailed information on the **alleged breaches** and developments to-date;
- Other relevant **standards** the NCP should consider;
- **Previous attempts** to resolve the case with the company or a mechanism;
- **Complaint goals**, requests, demands;
- **Confidentiality request**;
- Statement of **good faith** to engage in the procedure;
- **Attachments** or appendices with further information;

### Plenary discussion

What surfaced during the plenary was that the level of evidence needed to be included in a complaint is a big topic of discussion (see also thematic session 3). In OECD Watch's view and that of the most-recent Chair of the OECD Investment Committee's Working Party on Responsible Business Conduct, the admissibility criterion requiring complaints to be "material and substantiated" should be interpreted simply to mean that the complaint is "plausible," i.e. demonstrates a plausible violation of the Guidelines and a plausible link between the harm and the company targeted. Deeper consideration of evidence should occur later, during the good offices period of the specific instance process, and not during the initial assessment phase, to ensure more plausible cases advance into the process.

Several CSOs present compared writing a complaint letter to preparing for an exam, given the level of detail required for submissions. NCPs asserted that written and precise information is necessary. CSOs asked NCPs to guide would-be complainants on what documentation is needed, before rejecting incomplete cases outright. At least two NCPs indicated that they do already provide technical advice to potential complainants in a preliminary stage on how to best draft a complaint, as part of their general assistance to all parties to a complaint process. The core criteria of NCPs is to be accessible and transparent, and that they should handle

complaints in an impartial and equitable manner. Many NCPs therefore give advice to complainants on how the complaint mechanism should be used.

At the grassroots level, complainants often find it difficult to access the NCP without help from OECD Watch or another well-funded (often northern) NGO. In the perspective of OECD Watch and CSO participants, complainants on the ground find it helpful to partner with a CSO in the company's home country and co-file the complaint. OECD Watch has very limited capacity to help complainants develop their complaints.

### Small group discussion

In the small groups, participants discussed which elements of a successful complaint would be most challenging to write, how these challenges can be overcome, and on which claims complainants should focus. Finding evidence for direct impacts was assessed to be possible by the groups, although the costs of doing so can be a burden. More challenging is to establish supply chain links or linking impacts to subsidiaries, because such information about companies is hard to access in the public sphere. Also a great concern is the safety of complainants in filing complaints.

## Thematic Session 3 - Evidentiary requirements and complaint substantiation

### Goals of the session

- What types of evidence can strengthen a case?
- What does it mean for a complaint to be "material" and "substantiated"?
- What substantiation standard should NCPs apply at the initial assessment stage?

### Presentation

Complainants generally spend a great deal of time in gathering evidence to substantiate allegations of a complaint. What has been challenging for complainants is that different NCPs apply different standards of substantiation as part of the initial assessment of the case. Whereas some NCPs assess complaints on the "plausibility" of factual allegations (as mentioned above), others require factual allegations to be "proven." Evidence collected by CSOs that can help substantiate claims include: academic or NGO reports, newspaper articles, scientific samples, correspondence with the company, victim testimonies, human rights or environmental impact assessments, or company documents or policies.

### Plenary discussion

Since the discussion for thematic session 2 had already touched on the issue of substantiation, the workshop continued with a more in-depth discussion on evidentiary requirements. Participants, including NGOs and NCPs seemed largely to agree that complaints should set out factual allegations that are "plausible", not necessarily "proven". One CSO participant added that especially when seeking mediation, it may not be so important to substantiate every allegation.

CSO participants asked NCPs to undertake fact-finding on their own part to observe the harms themselves. Many NCPs do conduct fact-finding missions. CSOs recognized that while some NCPs cannot or do not generally do this, partly from lack of resources, CSOs noted that victims have trouble accepting that NCPs cannot do more to understand the impacts directly.

### Small group discussion

In the small groups, participants brainstormed what evidence could be collected for each hypothetical case. Types of evidence identified include impact assessments, written testimonies, articles, NGO reports, salary slips, judicial judgments, photographs and soil/water samples. What was thought to be more difficult is, for example, to prove that workers are fired because they went on strike or establish a link between company headquarters and subsidiaries. On the basis of information considered in the sub-groups, NCP participants' preliminary assessment was that in all hypothetical cases the information that could be collected would be sufficient to declare these cases admissible if they were to be filed for real.

Tuesday, 29 May 2018

## Thematic Session 4 - Where to file and home-host country NCP coordination

### Goals of the session

- How should complainants decide where to file?
- What are best practices for NCPs in coordinating on a case?
- How can NCPs best handle complex complaints (subsidiaries, letterbox companies, etc.)?

### Presentation

Given the reality of complex corporate structures and supply chains, this session focused on discussing where complainants should file their complaint and which NCPs should accept a complaint. In principle, complaints should be filed with the NCP where the issues raised in the complaint occurred. “Issues” in this sense are broader than impacts and can include addressing decisions or policies at the headquarters level. This can result in the filing of complaints at multiple NCPs. When different companies in the same case are involved, there could also be different NCP cases in parallel, each with a different outcome (e.g. POSCO case).

When complainants file a complaint with both the host- and home-country NCPs, the NCPs should identify a lead among themselves, with the other NCP taking a supporting role. The Guidelines allow flexibility in determining which NCP should lead, and pragmatism – determining which NCP is best capable of achieving the mandate of NCPs to facilitate discussion and promote adherence to the Guidelines – should be a strong guide.

### Plenary discussion

In practice, NCPs participants have experienced that NCP cooperation and alignment is not always easy. For example, dealing with companies with a complex organizational structure with relevant units in different countries, or dealing with companies with two headquarters, makes determination on which NCP should lead complex. NCPs asked CSOs filing at numerous NCPs to specify, in the complaint letter, which NCP the CSO would like to lead and what collaboration by other NCPs is sought. CSO participants observed that the functioning of an NCP is an important factor to consider in choosing where to file a complaint. Currently peer reviews are a means to raise the bar among NCPs and allow learning between so-called stronger and weaker NCPs.

### Small group discussion

In the small groups, participants assessed with which NCP(s) complainants in the hypothetical cases should file their complaint. Generally it was thought to be easy to determine at which NCP to file the complaint in case of a direct violation by a company. However, if complainants could also file complaints against business partners (such as buyers or investors), the strategic decisions (such as whether to target high-profile buyers vs. high-amount buyers) was not so easy. Small groups discussed the challenge of identifying business partners. They also discussed the challenge of determining where to file a case when the host-country has no NCP, and where the lead company is also not from a country with an NCP (or with a weak NCP).

## Thematic Session 5 - Balancing transparency and confidentiality

### Goals of the session

- What case elements should be confidential?
- How can campaigning help a case?
- How can NCPs help establish a good balance between transparency (including campaigning) and confidentiality?

### Presentation

The Guidelines place a priority on transparency in the NCP process: transparency is one of the core criteria for NCPs under the Guidelines. However, NCPs take various approaches towards balancing transparency and confidentiality. During the presentation, OECD Watch noted that confidentiality is appropriate for certain subjects: business secrets; personally-identifying details; and the contents of mediations between parties,

during the mediation phase of the complaint. Beyond these subjects, OECD Watch noted that transparency should be prioritized: the NCP itself, and complainants, should be able to discuss publicly that a complaint has been filed, what the allegations are, and how the basic case status evolves.

OECD Watch observed that a topic closely linked to transparency/confidentiality is campaigning by NCPs. Many NCPs discourage campaigning by CSOs. OECD Watch noted that campaigns are a critical way for CSOs to right the balance between companies and complainants by raising public awareness, and thus raising the stakes for companies choosing not to engage in the mediation. OECD Watch noted how campaigns in past cases have particularly helped raise awareness of responsible investors, who have then exerted their own pressure on the companies to take action on the underlying issues. OECD Watch's advice to NGOs is that they should make their own strategic decision on whether campaigning will help bring companies to the table, or be counterproductive.

OECD Watch also noted that NCPs should only base decisions on information that is shared equally with both parties, for it would be unfair for NCPs to decide a case against either party based on information that party has not been allowed to see and dispute.

### Plenary discussion

Several topics were discussed during the plenary. CSOs observed that there have been cases in which assessments were made based on information by the company not shared with complainants. CSOs argued that NCPs should push back when companies seek to claim that an entire case should be kept confidential to protect company secrets: NCPs can narrowly excise legitimately sensitive portions and otherwise enable transparency. Further, if companies refuse to provide evidence by saying all the evidence is confidential, this should have consequences for the company in the NCP report. The NCP needs to make a final statement where they assess whether the company has complied with the Guidelines and give recommendations on how the company could change its practice in order to comply with the Guidelines.

On the issue of campaigning, CSO participants asked how NCPs would respond if complainants would continue campaigning and how they perceive campaigns being continued by other parties than the complainants. Sometimes campaigns are broader than the complaint itself, and the complaint features as only one part of that larger campaign. NCPs have different positions on this. Some NCPs are open to campaigning, understanding that it public awareness can increase balance between the parties. Some NCP representatives felt that campaigning can sometimes frighten/discourage companies from engaging openly and honestly in the mediation.

It became clear through the discussion that while campaigning may be done in a way that respects an NCP's transparency/confidentiality rules (i.e. the campaigning does not breach agreements on what material must be kept confidential), sometimes NCPs can see campaigning as a breach of good faith or trust. It is thought that if complainants refrain from campaigning, this would increase the trust between the parties. However, CSOs pointed out that companies are not asked to stop harmful activities during mediations, to give complainants trust, so the request for CSOs to stop their core work of campaigning during a case is imbalanced. CSOs argued that campaigning is not a sign of ill faith, but of desire for a balanced mediation.

## 13:15-15:45: Thematic Session 6 - Elements of successful mediation

### Goals of the session

- How does mediation work in the NCP system?
- What are key preparation steps for mediation?
- How can NCPs and parties promote constructive mediations?

### Presentation

As part of the complaint process, NCPs typically offer mediation to try solving the problem between complainants and the company. When preparing for mediation, complainants should determine what the desired outcomes from such mediation would be. In that exercise it is advisable for complainants to consider all outcomes that might benefit them in addition to their preferred outcome, what outcomes could be feasible or appealing to the company, and what the complainants' best alternative to a negotiated agreement is. What



NCPs should prepare the logistics and timetable of the mediation, the ground rules for the mediation, who will be mediating (someone from the NCP or an independent mediator) and how agreements reached will be recorded and monitored. NCPs should also be conscious of power-imbalances between parties.

## Plenary discussion

OECD Watch emphasised that victims are often in a vulnerable position and should not risk hurting themselves by engaging in a mediation process they feel cannot benefit them. Some CSOs attested that there have been cases where the outcome of mediation made complainants worse off than they had been previously. CSOs discussed the importance of preparing victims for a mediation process, and noted that northern NGOs can sometimes play a helpful role in training as well as participation in mediation. Some NCPs noted that they try to help parties prepare for mediation by, for example, bringing parties in for a pre-mediation talk to discuss the mediation process, or providing complainants training before the mediation. Several NCP and CSO representatives agreed that it is not helpful to have company lawyers join the discussion, as they can intimidate complainants and steer the conversation toward the non-liability of the company and the voluntary nature of the Guidelines, instead of focusing on acknowledging harms experienced and seeking solutions. Participants also discussed the pros and cons of having an NCP member, versus a trained external mediator, handle the mediation. There is no best practice. Some NCPs noted that they are working on building their own capacity to act as mediators.

## Small group discussion

The envisioned plan for this sixth and final thematic session was for participants to engage in mock-mediations on their hypothetical cases. A key element of the mock mediation is for parties to “switch roles” to better understand the motivations and frustrations experienced by the other stakeholders (NCP, company, complainant). Unfortunately, fears of inclement weather caused many workshop participants to need to leave the workshop early. Therefore, this final exercise was cancelled and the workshop adjourned an hour or two early.



## Annex: Small Group Discussion Questions

### Theme 1: Why File? What outcomes and remedies are achievable?

- What are all the remedies and outcomes sought by the complainants in this case?
- Do the complainants value some remedies and outcomes more highly than others?
- What is likely the company's\*\*\* goal for the mediation?
- Where do the complainants' and the companies' goals overlap?
- Are there creative ways to meet goals of both the company and the complainants?
- Can the company provide all of the remedies desired by complainant?
  - If so, why hasn't the company done so yet? If not, why not?
- What tools, arguments, allies can the NCP use to encourage the company to provide some or all desired remedies?
- How can the NCP still help the company and complainant find ways to mitigate the harms complainants have suffered?

### Theme 2: How to draft a successful complaint?

- Talk through the OECD Guidelines' initial assessment criteria and discuss what they mean for your case:
  - The identity of the party concerned and its interest in the matter.
  - 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.
- Which are the strongest claims in this case to lead with?
- Looking at the OECD Watch list of (p. \_\_\_ of the OECD Watch guide), what other facts and elements of the case should be included?
- What challenges does the complainant face in drafting the complaint? (e.g. Limited access to evidence? Limited knowledge of the Guidelines? Safety risks for HRDs? Language barriers? Human rights issue that is not highly-valued socially (such as rights of illegal immigrants or indigenous)? Company's political connections?)
- What can the complainant do, and what can the NCP do, to address some of these obstacles?
- What might make this complaint difficult for NCPs to understand and/or effectively take forward? (Unclear argument? Unclear relation to Guidelines? Lack of evidence? Language barrier? Political obstruction? Obstruction by the company?)
- What can the NCP do to resolve these obstacles?

### Theme 3: Evidence and Substantiation

- NCPs are instructed to determine whether the issue raised is "material and substantiated". Discuss what that would mean for your case.
- What type/amount of evidence should NCPs look for to deem this cause "plausible" to accept at the initial assessment stage?
- What type/amount of evidence should NCPs need to find the company has violated the Guidelines?
- What type of evidence does the complainant have in this case?
- What additional evidence could help, and how can the complainant access this?

- What challenges are there in collecting or presenting evidence for this case? (Risk to safety of HRDs? Lack of resources for scientific testing? Lack of access to victims/site? Lack of access to company material?)
- How can the complainant, and the NCP, help overcome these challenges?
- What evidence is impossible to access, and can that impossibility be explained to the NCP?
- How can the NCP respond to a case with only some, or only certain types, of evidence?
- What can the NCP do to investigate the matter on its own?

#### **Theme 4: Where to File, and Home-Host NCP Coordination**

- In this case, could the complainant file in more than one location? Which?
  - If there are several NCPs possible for filing, what considerations are there for filing in each of these different NCPs? How can the complainant learn these considerations, if they do not know?
  - With which NCP does the complainant have the strongest likelihood of success in filing? Why?
  - Does the complainant have other options outside of the NCP system? (Court filing? Complaint mechanism of a development bank? Company-hosted complaint or mediation process? Government-hosted administrative proceeding?)
  - If so, should any of those options be pursued alongside, or instead of, the NCP option? Which, and why?
- If the complaint can be filed at two NCPs (often home- and host-country NCP, or NCP of different companies)...
- Should both NCPs accept the case, or just one? On what jurisdictional grounds should either accept or reject?
  - Which NCP should lead the case?
  - Are there typical challenges that NCPs face in collaborating with another NCP, that could be faced here?
  - What are challenges NCPs face in determining when to accept a case based on jurisdiction?
- Special cases...
- Does this case involve a letter box company, and how can the NCP address that?
  - Does this case involve a subsidiary company, and how can the NCP address that?

#### **Theme 5: Balancing Transparency and Confidentiality**

- Do the complainants in this case think publicity could help? If so, publicity about what?
- Do the NGOs want personally-identifying details or other aspects of the complaint to be kept confidential?
- Does it appear that there are trade secrets or personally-identifying details that the company would want kept private?
- Is there an aspect of the case or final outcome that the company might want public? (e.g. its goodwill engagement in finding a solution)
- What pressures might the NCP face to encourage transparency or confidentiality in this case? (Gov't law on transparency or confidentiality? Gov't or company pressure to keep the case confidential?)
- What seems like a good balance between transparency and confidentiality in this case?
- How can the NCP establish that balance here (and in other cases)?

#### **Theme 6: Mediation**

##### *Pre-Mediation Questions for Complainants?*

- What are our top outcomes sought, in order?
- What real remedies might be appealing or feasible to the company?
- What is our "BATNA"?
- How can we create shared value?

*Pre-Mediation Preparatory Questions for Companies?*

- What are our top outcomes sought, in order?
- What real remedies might complainants ask for?
- What real remedies could we provide that can be beneficial for us?
- What is our “BATNA”?
- How can we create shared value?

*Pre-Mediation Preparatory Questions for Companies?*

- What do we expect parties to seek in terms of outcomes?
- Do we see any potential remedies/outcomes of mutual benefit to parties?
- How can we model constructive behavior encouraging listening, understanding, and creativity in developing solutions?
- How will we respond to non-constructive behavior?