

Confidentiality and Campaigning during Specific Instance Handling by OECD National Contact Points

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1. Introduction

All governments adhering to the OECD Declaration on International Investment and Multinational Enterprises are required to establish a National Contact Point (NCP). NCPs are mandated to further the effectiveness of the OECD Guidelines for Multinational Enterprises ('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. The Guidelines do not provide a formal definition of 'specific instances', however the term is used to describe situations of alleged non-observance of the Guidelines brought to NCPs.¹ Between 2000 and 2016 over 400 specific instances have been submitted to NCPs. Over this period, most NCPs have developed rules of procedure and continue to refine their processes of handling specific instances to address challenges and improve outcomes.

The specific instance procedure is intended to provide a consensual, non-adversarial, forward-looking "forum for discussion" for issues that arise relating to implementation of the Guidelines.² The issue of confidentiality and its relationship to campaigning during specific instances represents an ongoing challenge to NCPs in handling specific instances.

The Procedural Guidance³ recognises that transparency is one of the four core criteria for functional equivalence of NCPs.⁴ The Procedural Guidance of the Guidelines also contains provisions setting out how confidentiality is relevant to specific instances, however, confidentiality is generally seen as an exception to this general provision of transparency.

Related to the issue of confidentiality during specific instances is that of campaigning. Campaigning is not referred to in the Procedural Guidance but has been described as "a series of coordinated activities, such as public speaking and demonstrating, designed to

¹ OECD (2016) Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>

² OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, Section I paragraph C

³ The Implementation Procedures of the OECD Guidelines for Multinational Enterprises are made up of: (i) the Decision of the Council on the Guidelines for Multinational Enterprises, as amended in 2011, (ii) the Procedural Guidance and (iii) the Commentary on the Implementation Procedures. The Procedural Guidance sets out the role of NCPs and the role of the Investment Committee with regards NCPs.

⁴ The Procedural Guidance provides that "NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence." OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, Section I

achieve a social, political, or commercial goal." ⁵ In practice the scope of campaigning with respect to corporate conduct can be quite varied. Some campaigns may focus on boycotts or disengagement from certain industries. Other campaigns may be more targeted, calling for specific action from a company such as improved labour conditions or environmental management or other changes in the context of specific operations. Some stakeholder groups use widespread advocacy platforms such as mass media to share their message with the broader public or consumers while others may be more targeted, engaging with investors or with relevant policy makers.

This paper seeks to address the following questions:

1. What does the Procedural Guidance say about transparency, confidentiality, campaigning and good faith participation?
2. How do NCP's address issues of confidentiality and campaigning through their own rules of procedure and policies?
3. How have other grievance or mediation platforms approached confidentiality and campaigning issues?
4. What are the various stakeholder perspectives on confidentiality and campaigning?
5. What good practices should NCPs take into account in developing effective approaches for balancing transparency and confidentiality concerns?

⁵ Campaigning. Dictionary.com. *Online Etymology Dictionary*. Douglas Harper, Historian. <http://www.dictionary.com/browse/campaigning> (accessed: June 1, 2017).

2. Confidentiality and Campaigning in the Procedural Guidance

This section addresses the links between the interrelated topics of transparency, confidentiality, campaigning and good faith behaviour as set out in the Procedural Guidance.

Transparency under the Procedural Guidance

Transparency is one of the four core criteria for the functional equivalence of NCPs and is explained as follows under the Commentary on the Procedural Guidance:

“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 interest 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.**”⁶ (emphasis added) (See Box 1 for full text of provisions on confidentiality and transparency in the Guidelines).

Once a specific instance process is closed, NCPs are required to make the results publically available.⁷ Where an NCP decides that a submission does not merit further examination the NCP will publish a final statement and may choose whether or not to disclose the identity of the party in the statement. If there is no agreement between the parties, the NCP should identify the parties concerned, issues involved, and the date the issues were raised with the NCP, in the final statement⁸. As appropriate the statement should also include recommendations by the NCP as well as reasons why the procedure did not produce an agreement.⁹ However if agreement is reached, the commentary to the Procedural Guidance does not require parties to be identified (i.e. named) in final statements.¹⁰ In practice in approximately two thirds of specific instances between 2011-2015 NCPs published the names of the company and submitter in their final or initial statements.¹¹

⁶ Id., Commentary on the Procedural Guidance for NCPs, paragraph 9

⁷ Id., Procedural Guidance paragraph C-3

⁸ Id., Commentary on the Procedural Guidance for NCPs, paragraph 35

⁹ Id.

¹⁰ Id., Procedural guidance paragraph C-3

¹¹ OECD (2015) Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015. Page 54.

Box 1. Provisions on Confidentiality in the Procedural Guidance**Procedural Guidance, paragraph I C (4):**

“In order to facilitate resolution of the issues raised, [the NCP will] 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.” (emphasis added)

Commentary para 9:

“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.”

Commentary para 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. (emphasis added)

Commentary para. 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 [...] an NCP believes that, based on the results of its initial assessment, it would be unfair to publically identify a party in a statement on its decision; it may draft the statement so as to protect the identity of the party.”

Commentary para 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.”

Commentary para 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.”

Commentary 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.”

Commentary para 38:

“Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see paragraph 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.”

Confidentiality under the Procedural Guidance

Confidentiality provisions under the Procedural Guidance vary according to the stage of the specific instance. While the confidentiality provisions under the Procedural Guidance are directed towards the NCP, they may also extend to parties to a specific instance process as the NCP may take steps to protect certain information (described in further detail below).

General confidentiality provisions

The Commentary to the Procedural Guidance provides that 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.”¹² Confidentiality provisions for these two categories of information are not specific to a certain stage of the specific instance procedure but are generally applicable. Here *individuals* is used as opposed to *parties* since the identity of the parties should be made public in certain circumstances.

¹² Commentary on the Procedural Guidance for NCPs, paragraph 38

Submission phase

The Procedural Guidance is silent on the circumstances of the submission of a specific instance and any activities that may precede the submission.

Initial assessment phase

Confidentiality is not explicitly mentioned in the Procedural Guidance regarding the phase before an NCP reaches a conclusion on whether a submission merits further examination.

Good offices phase

Confidentiality is mentioned under several provisions in the context of the good offices phase of a specific instance process.

A general principle in the Procedural Guidance states “While the procedures under paragraph 2 under are underway... confidentiality of the proceedings will be maintained.”¹³

- Paragraph 2 refers to situations "where the issues raised merited further examination [and the NCP will] offer good offices to resolve the issues."¹⁴
- “Proceedings” is defined in the Commentary to include the “facts and arguments brought forward by the parties”.¹⁵
- The commentary to the Procedural Guidance setting out the core criteria of transparency echoes this provision stating that “[w]hen the NCP offers its “good offices” [...] it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings.”¹⁶

Furthermore, the commentary states “[w]hen 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.”¹⁷ In the context of the good offices phase of the procedure *identity of the parties* is used as opposed to identity of *individuals* to a specific instance, which should be kept confidential regardless of the phase of procedure.

Conclusion phase

The Procedural Guidance provides for confidentiality during the conclusion of specific instance process with variations according to the outcome. Specific instance processes can be concluded either after the initial assessment phase or after the offer of good offices.

For specific instances concluded at the initial assessment phase, having been found to not merit further examination, the Commentary states: “[the NCP] will make a statement publicly available. [...] If the NCP believes that [...] it would be unfair to publicly

¹³ OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, paragraph C-4

¹⁴ Id., Procedural Guidance paragraph C-2

¹⁵ Id., Commentary on the Procedural Guidance, paragraph 38.

¹⁶ Id., Commentary on the Procedural Guidance, paragraph 9

¹⁷ Id., Commentary on the Procedural Guidance, paragraph 30

identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.”¹⁸

For processes concluded after the offer of good offices, the NCP will “make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information.”¹⁹

For all concluded processes “[a]t the conclusion of the procedures [...] 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.”²⁰

Campaigning in relation to Transparency and Confidentiality in the Procedural Guidance

A specific instance is often filed as a result of a longer history of issues related to RBC or as part of an ongoing campaign towards a particular company. As a result a lot of information related to the issues may already be in the public domain and a public campaign may have already been ongoing for some time before the submission of a specific instance.

Communication about an ongoing specific instance in a campaign context can vary considerably in terms of detail and substance. For example this could include:

- Communication about process:
 - the filing of a specific instance involving an identified company.
 - the outcomes of an initial assessment of a specific instance involving an identified company.
 - the outcomes of the good offices phase involving an identified company.
- Communication about the issues:
 - the underlying facts or claims made by the submitter of the specific instance based on publicly available information.
 - the contents of a specific instance submission.
 - information provided by the company during the good offices phase of the process.

As noted above, under the Procedural Guidance, information subject to confidentiality provisions will vary depending on the relevant phase of the specific instance process. Under the Procedural Guidance there are no explicit recommendations regarding confidentiality around the filing phase of the specific instance or during the initial assessment phase, before an NCP reaches a conclusion on whether a submission merits further examination. However according to the Procedural Guidance/commentary the identity of *the individuals* to the process and/or business sensitive information should not be disclosed at any stage.

¹⁸ Id., Commentary on the Procedural Guidance , paragraph 32

¹⁹ Id., Procedural guidance paragraph C-3

²⁰ Id., Procedural Guidance paragraph C-4

Once the initial assessment procedure has been completed, several provisions on confidentiality apply. Most important in the context of campaigning are provisions providing that the identity of the parties may be protected when good offices are offered or when the specific instance is not accepted for further examination. This provision is relevant “where there are strong reasons to believe that the disclosure of this information would be detrimental to one or more of the parties.”²¹ The text of the Procedural Guidance uses an example of withholding the identity of a submitter of a complaint from an enterprise (i.e. to guard against retaliation or to protect whistle-blowers) but is not limited to this context.

The confidentiality provisions of the Procedural Guidance note that once a submission has been accepted for further examination and good offices have been offered facts and arguments brought forward *by the parties* are not to be disclosed, either once good offices are underway or once the proceedings have been closed. However the Procedural Guidance does not include restrictions on facts or information about the issues raised in a specific instance that are publically available, irrespective of the stage of the specific instance process. In addition, once the process is closed parties are free to communicate about and discuss the issues raised in the specific instance where they have not reached agreement on those issues.²²

Campaigning and Good faith behaviour under the Procedural Guidance

In addition to confidentiality provisions, issues around campaigning can be related to good faith behaviour as well as to promoting the consensual nature of the specific instance process. As set out in the Procedural Guidance, NCPs will “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.”²³

The specific instance process is designed to be constructive and focused on consensus-building. NCPs can make recommendations to companies and the process can contribute towards building longer-term, constructive engagement between companies and stakeholders. The Procedural Guidance also provides that “[t]he 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.” *[bullets added]*²⁴

The Procedural Guidance includes no explicit mention of campaigning.

²¹ Id., Commentary on the Procedural Guidance , paragraph 30

²² Id., Procedural Guidance paragraph C-4

²³ Id., Procedural Guidance, C-2 and Commentary to the Procedural Guidance paragraph. 29.

²⁴ Id., Procedural Guidance, Commentary to the Procedural Guidance paragraph. 21.

3. Confidentiality and Campaigning in NCPs' Rules of Procedure and other mechanisms

NCP Rules of Procedure

Under the Procedural Guidance “NCPs should provide information on the procedures that parties should follow when raising or responding to a specific instance [...] including confidentiality.”²⁵

Most NCPs have developed rules of procedure or policies regarding confidentiality in specific instances. (See Table in Annex B). Out of the 33 NCPs with publically available rules of procedure, 30 have provisions on confidentiality.²⁶ Seven NCP rules of procedure include a provision that if their confidentiality provisions are breached, the specific instance process may be suspended.²⁷ In interviews other NCPs have noted that while they may not suspend proceedings due to breaches of confidentiality they may comment on the good faith engagement (or lack thereof) of the parties in their final statements for specific instance.

Many of the confidentiality provisions of NCP rules of procedure reflect the language of the Procedural Guidance and some go beyond to address additional contexts. For example, some NCP rules of procedure include provisions on confidentiality during the submission of a specific instance and prior to the conclusion of initial assessment. Some include general restrictions around public campaigning.

The rules of procedure of six NCPs include reference to campaigning.²⁸ Out of these, three ask parties to a specific instance to refrain from or halt campaigning against the other party during a specific instance process.²⁹ Two ask parties to consider the impacts of public statements on the success of the outcome of a specific instance process but do not explicitly restrict campaigning activities.³⁰ One states that the NCP cannot advise parties about public statements relating to information they provide.³¹

²⁵ Id., Commentary on Procedural Guidance, paragraph 15

²⁶ The three NCPs that do not have provisions on confidentiality are the NCPs of Chile, Colombia and Denmark

²⁷ These are the rules of procedure of Canada, Germany, Japan, Norway, Spain, Switzerland and the United States.

²⁸ These are the rules of procedure of Canada, Germany, Japan, the Netherlands, the United Kingdom, and the United States.

²⁹ These are the rules of procedure of Canada, Germany and the United States.

³⁰ These are the rules of procedure of the Netherlands and Japan.

³¹ These are the rules of procedure of the UK.

Other mechanisms

In addition to explicit inclusion of criteria around campaigning in rules of procedure some NCPs have unpublished internal policies or positions on this issue. For example some NCPs have a practice of disallowing campaigning as a condition to mediation during a specific instance.

Additionally the terms relating to confidentiality and campaigning may be agreed to by the parties to a specific instance process ahead of time through mediation agreements. Such agreements establish the ground rules and conduct the parties will be expected to follow during the mediation.³² The NCPs of Canada, Denmark, the Netherlands, Norway, Switzerland, the United States include confidentiality provisions in terms of reference for mediation. Some NCPs have established template mediation agreements while others negotiate terms of mediation on a case by case basis. (See Annex B for complete list).

Expectations around communication with the media and the public can be clarified from the outset through these processes. These might include procedures for reviewing and approving public information materials and public statements.³³

³² See Consensus Building Institute (CBI), NCP Mediation Manual (February 2012), page 46

³³ Id., page 47

4. Confidentiality and campaigning under other grievance mechanisms and mediation platforms

The NCP mechanism exists within a landscape of various other non-judicial grievance mechanisms including: company or operational level grievance mechanisms; other national level grievance mechanisms such as National Human Rights Institutions (NHRIs), mechanisms linked to finance or development institutions or mechanisms specific to certain initiatives.³⁴ Understanding the policy and procedure with respect to confidentiality and campaigning for some of these different mechanisms can help to provide a useful comparison with processes at the level of NCPs. The examples below are intended to be illustrative rather than comprehensive and provide inspiration to NCPs seeking to tailor their confidentiality policies.

International Chamber of Commerce

The International Chamber of Commerce (ICC) is a global alternative dispute resolution venue which provides several different processes for dispute resolution including arbitration, mediation and the use of dispute boards which accompany the performance of a contract.³⁵

With respect to mediation, the process most similar in nature to that of the NCPs, the ICC has the following rules on confidentiality:³⁶

"In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law:

- a. the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential; (emphasis added)
- b. any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement."

And "[u]nless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:

³⁴ See ACCESS, Database of Grievance Mechanisms, for complete database. <http://accessfacility.org/database-grievance-mechanisms>, last accessed March, 2017.

³⁵ ICC, "Dispute Boards" <https://iccwbo.org/dispute-resolution-services/dispute-boards/>

³⁶ ICC (2014), Mediation Rules, Article 9. https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/#Article_9

- a. any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;" (emphasis added)
- b. "b. any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;
- c. any admissions made by another party within the Proceedings;
- d. any views or proposals put forward by the Mediator within the Proceedings; or
- e. the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement."

In sum while the confidentiality provisions for ICC-led mediation cover information exchanged during mediation proceedings they do not cover the fact that the mediation is taking place nor publically available information. The mediation rules are silent with respect to campaigning issues.

Compliance and Advisor Ombudsman

Another comparable mechanism to NCPs is that of the Compliance and Advisor Ombudsman (CAO) an independent recourse mechanism for the International Finance Corporation (IFC) and MIGA (Multilateral Investment Guarantee Agency). The CAO provides several different services with respect to activities supported by IFC and MIGA including dispute resolution for parties affected by these activities, compliance reviews, and an advisory mechanism.

Under the confidentiality provisions of the CAO Ombudsman the "CAO is bound by IFC and MIGA disclosure policies that require the confidentiality of certain business information to be respected [...] Furthermore, while CAO reports related to a case may be released publicly, CAO may not publish information received from parties in the course of a case if disclosure of that material is restricted under IFC or MIGA disclosure policies [...] CAO will safeguard a party's request for confidentiality, including confidentiality of identities. CAO will indicate publicly when it has restricted disclosure of information in response to such a request from a party."³⁷

In sum under CAO guidelines, reports related to a case may be released publicly provided sensitive business information is safeguarded, and in certain instances, may also protect the identity of individuals. The CAO has no provisions specific to campaigning or whether parties involved in ongoing dispute resolution may publically communicate on the fact that the process is taking place. The CAO also systematically publishes full overviews of both open and closed cases describing the issues raised, details about the projects in question, and overviews of the status of the case and outcomes, where available.³⁸

³⁷ Compliance Advisory Ombudsmen (CAO) (2007), Operational Guidelines <http://www.cao-ombudsman.org/about/howweare/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

³⁸ See <http://www.cao-ombudsman.org/cases/>

National Human Rights Institutions

National Human Rights Institutions (NHRIs) work to promote human rights on a domestic level and in some cases provide dispute resolution mechanisms. Similar to NCPs, NHRIs have flexibility in how they are structured and each NHRI that provides dispute resolution has its own rules of procedure to govern the process. While NHRIs vary in whether they offer dispute resolution and the procedures they apply to these processes they all operate under the framework of the Principles relating to the Status of National Institutions (The Paris Principles). The Paris Principles were adopted by the UN General Assembly resolution 48/134 of 20 December 1993 to provide a high-level framework for organisation of NHRIs. With respect to confidentiality they note that "[a] national institution may be authorized to hear and consider complaints and petitions concerning individual situations. [...] [T]he functions entrusted to them may be based on the following principles: (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality."³⁹ As the Paris Principles are high-level principles, they do not provide detailed guidance on the extent of confidentiality but, as written, suggest that confidentiality of proceedings is an expectation that is recognised "where necessary."⁴⁰

Only a few NHRIs provide dispute resolution services and those that do have interpreted this principle in a variety of ways. For example, the Australian National Human Rights Commission provides that "Conciliation is a confidential process [...] [T]he complainant and respondent will agree to keep conciliation discussions and negotiations confidential. The Commission will ask both sides to agree to this in good faith. This means that you agree not to use what is said and done in the conciliation process in any further proceedings if the complaint does not resolve. You also agree not to make the information public in any other way."⁴¹

The Australian National Human Rights Commission also notes that "[i]f the complaint is not resolved or discontinued for some other reason, the President of the Commission will decide if there has been a breach of human rights." This opinion will be available in a public document at the end of the process.⁴²

From the rules as written it is clear that, similar to the Procedural Guidance, the facts and arguments brought forward in a process should not be publically shared nor used in future proceedings between the parties. In cases where the complaint is not resolved the Australian National Human Rights Commission undertakes a determination of the issues and makes this public. It is unclear whether the fact of the conciliation is also expected to be kept confidential while it is ongoing.

³⁹ Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993

⁴⁰ Id.

⁴¹ Australian Human Rights Commission: Understanding and preparing for conciliation - Human rights and ILO <https://www.humanrights.gov.au/understanding-and-preparing-conciliation-human-rights-and-ilo#Heading31> accessed 23 May 2017]

⁴² <https://www.humanrights.gov.au/australian-human-rights-commission-s-complaint-process-complaints-about-breaches-human-rights>.

The Canadian Human Rights Commission simply provides that "[T]he mediation process is voluntary and confidential."⁴³

Legal proceedings

In contrast to non-judicial proceedings, public legal proceedings generally have a wider berth for transparency, with variations based on the jurisdiction and the stage of proceedings. Of particular significance to the promotion of transparency amongst public courts was the evolution of the common-law right "to access court records to inspect and to copy". This principle maintains that court resources must be accessible to members of the public and is viewed as crucial to protecting civil rights as well as maintaining the integrity of the court system.⁴⁴ Proceedings at public courts are usually fully transparent to the public and in only in exceptional circumstances are court documents sealed and inaccessible.

⁴³ Canada National Human Rights Commission: What can I expect? <http://www.chrc-ccdp.gc.ca/eng/content/what-can-i-expect> accessed 23 May 2017]

⁴⁴ Wikipedia contributors, 'Public records', Wikipedia, The Free Encyclopedia, 13 February 2017, 18:17 UTC, https://en.wikipedia.org/w/index.php?title=Public_records&oldid=765307482 [accessed 23 May 2017]

5. Perspectives of stakeholders on confidentiality and campaigning:

The institutional stakeholders to the OECD⁴⁵ have various perspectives on the subject of confidentiality. In the context of this paper, BIAC, TUAC and OECD Watch were asked to provide a statement with their views on the subject of campaigning and confidentiality. Box 2 reproduces these statements. The three stakeholder groups agree that non-public information exchanged in the context of a specific instance process irrespective of the stage of the specific instance should be kept confidential however divergences exist with respect to views on campaigning. While BIAC has noted that campaigning is counter-productive to building broad-based trust in the process, OECD Watch has stated that campaigning can incentivise the company in question to prioritise resolution of the dispute through NCP-facilitated mediation, leading to a more positive outcome for the NCP process.

Box 2. Perspectives of Institutional Stakeholders on Confidentiality and Campaigning

TUAC:

TUAC considers it a priority to strengthen transparency in the specific instance process. The provision of timely, publicly available information helps build stakeholder confidence and allows other actors, such as investors, to use their leverage in the process so increasing the likelihood of better outcomes. Transparency is also the best promotional tool for NCPs who, across all regions, are struggling to make the Guidelines better known and better implemented. Conversely, a process that shrouds itself in secrecy, whilst seeking to prevent complainants from taking other coordinated actions to pursue their goals, risks deterring complainants, losing stakeholder confidence and undermining the efforts of NCPs, the OECD and stakeholders to strengthen the impact of the OECD Guidelines on-the-ground.

The Rules of the Guidelines

Transparency and Confidentiality

Transparency is one of just four operational core criteria underpinning the functioning of NCPs across all their activities. The Procedural Guidance specifically recognises the importance of transparency for the accountability of the NCP and public confidence, stating that “as a general principle the activities of the NCP will be transparent”. As regards the specific instance process, however, the Procedural Guidance also recognises the need for confidentiality. It includes respect for

⁴⁵ Institutional stakeholders to the OECD include the Business and Industry Advisory Committee to the OECD (BIAC), the Trade Union Advisory Committee to the OECD (TUAC) and OECD Watch

confidentiality in its definition of good faith conduct under the Guidelines.

According to the Procedural Guidance, the following stages/elements of the specific instance should be kept confidential:

- identity of the individuals involved in specific instances (not the parties);
- sensitive business information;
- identity of complainants where the NCP considers they are at risk, for example, from retaliation by the company;
- identity of the company where the specific instance has been found not to have merit and the NCP considers it unfair to disclose its name;
- all information disclosed during the provision of good offices/conciliation/mediation, unless otherwise agreed by the parties;
- confidential elements of the agreement reached by parties.

The Procedural Guidance does not require any of the following to be kept confidential:

- fact of filing a specific instance;
- issues raised in the specific instance;
- the specific instance itself;
- names of the parties, other than under the circumstances described above;
- Initial Assessment;
- outcome of the NCP process including the: names of the parties; date of the specific instance; the issues raised; and the role played by the NCP and in addition:
- rejected specific instance: the reasons for rejecting the case;
- accepted specific instance, agreement reached: the fact that the case was accepted and the NCP offered good offices, the date when the agreement was reached, details of the non-confidential part of the agreement, agreed follow-up steps, if any;
- accepted specific instance, no agreement reached: the fact that the case was accepted and the NCP offered good offices, observations on why the proceedings did not reach agreement; findings on whether the Guidelines have been breached if any, recommendations to the company; follow-up on recommendations, if any.

The Procedural Guidance does not address how confidentiality should be agreed between the parties – whether through verbal or written agreements. There is no requirement or expectation that parties should sign written confidentiality agreements.

Campaigning

No explicit reference is made to campaigns or campaigning in the Procedural Guidance. However, under the confidentiality rules it is clear that complainants should not reveal the names of individuals involved in a specific instance in their campaigns, nor information provided during the provision of good offices/conciliation/mediation

proceedings. The good faith provisions of the Procedural Guidance further require that complainants engage in the NCP process with a view to finding a solution and refrain from misrepresenting the process or engaging in any threatening or retaliatory behaviour. There is no inherent conflict, however, between complainants meeting these good faith requirements and engaging in a campaign, especially given that the purpose of most trade union campaigns is to establish dialogue with the company.

It is also clear that the principles governing the handling of specific instances limit the extent to which NCPs can interfere in the campaigns of complainants. NCPs are required to be equitable so that parties can engage in the process on fair and equitable terms. A one-sided intervention by the NCP requiring a complainant to stop campaigning would make the terms of engagement less fair and less equitable by reducing the complainant's bargaining power and exacerbating unequal power relations. NCPs are also required to operate in accordance with the "principles and standards contained in the Guidelines" including the internationally recognised human right to freedom of expression, set out in the International Covenant on Civil and Political Rights.

Trade Union Experience on Transparency and Confidentiality

In the majority of specific instances filed by trade unions, the fact of filing the specific instance, the issues raised and the names of the parties have been made public. TUAC is not aware of examples where such transparency has led to the failure of the specific instance.

To the best of TUAC's knowledge, trade unions have respected confidentiality during the offer of good offices/conciliation/mediation proceedings in the vast majority of cases. TUAC knows only of one specific instance filed by trade unions, where confidentiality was not respected.

For the most part, confidentiality has been agreed verbally by the parties. Trade union experience does not indicate that there is any need for written confidentiality agreements, which risk being perceived by complainants as an unnecessary hurdle, therefore effectively serving as a deterrent.

Campaigns

Campaigns are the rule not the exception in specific instances filed by trade unions. It should not be surprising that trade unions engage in a coordinated set of actions to achieve their goals and that the filing of a specific instance is unlikely to be their first or only action.

TUAC's understanding is that trade unions for the most part agree to suspend their campaigns as part of the negotiations for entering into conciliation/mediation. TUAC is not aware of any specific instance where the existence of a trade union campaign led to the failure of a specific instance. On the contrary, it is TUAC's assessment that campaigns contribute to the success of specific instances – the offer to stop the campaign provides a bargaining chip for getting companies to the table, just as continuing or re-starting the campaign provides a "consequence" if mediation is refused or fails.

BIAC:

Business at OECD (BIAC) supports the effective implementation of the OECD

Guidelines for Multinational Enterprises and stresses the importance of a common understanding among all stakeholders of the nature of the NCP specific instance procedure. To encourage proactive business involvement, it is essential to establish trust and build confidence in the NCP procedure.

Stakeholders should agree that the NCP procedure is a consensual and non-adversarial mediation platform and need to ensure respect of the provisions of the procedural guidance, including those related to confidentiality and transparency. In this context, it is important for business that NCPs ensure that the parties involved in a specific instance procedure engage on fair and equitable terms, with due respect of the confidentiality of sensitive information.

NCPs themselves must respect the confidentiality provisions of the Guidelines. Confidentiality of the proceedings, including oral statements, and all written materials shared throughout the duration of the process must be maintained. When confidentiality is being violated, or when the NCP procedure is being misused for political purposes, the NCP should intervene and ensure that the procedural guidance is being respected by all parties.

Business underlines that public campaigning during the NCP procedure is not compatible with the nature of the procedure and infringes the principles of good faith and confidentiality, which are core elements of the Guidelines. In order for mediation to be successful, the parties must demonstrate good faith. This involves respecting confidentiality and refraining from campaigning against the other party throughout the process.

NCPs should clearly communicate at the outset of a specific instance that all parties must approach the process in good faith with a willingness to move towards mediation, dialogue and problem solving and to work constructively towards a future-oriented solution that is in the interest of all parties involved.

Public campaigning leads to antagonising parties instead of bringing them together in a constructive attitude. It is therefore not compatible with a specific instance procedure, which is designed to be constructive and consensus-building, and is counter-productive to building broad-based trust in the process.

NCPs should make clear that the NCP procedure is available only to those parties that are willing to abide by the rules and procedures of the NCP and engage in good faith. The choice of notifiers to engage in an NCP procedure should bring with it the acceptance – at least during the time of the NCP procedure – to stay away from confrontational campaigning

As the NCP system is being increasingly used and to encourage proactive engagement by business, more than ever, we need a common understanding and clear communication on what the system is : It is a platform to help parties work constructively on the basis of facts and trust towards a common future-oriented solution, which is to the advantage of all parties.

OECD Watch:

The Procedural Guidance for the Guidelines stipulates that one of the core criteria with which NCPs must handle complaints is transparency. NCPs should ensure that the parties can engage in the specific instance process on fair and equitable terms by providing access to information relevant to the procedure. At the same time, NCPs

have to be aware of the need to protect sensitive business and other stakeholder information, such as the identity of individuals involved in the case. In order to prevent and mitigate security risks that complainants (such as human rights defenders or labour leaders) may face when using the NCP system, OECD Watch encourages NCPs to have safety protocols in place.

The general rule for the initial assessment phase is transparency. OECD Watch advises NGOs to always assess the risks (e.g reprisals from the company including threats or a lawsuit) before making allegations about a company (publicly or through an NCP complaint). Some NGOs issue a press release upon filing their complaint with the NCP and publicize the case while the NCP is conducting the initial assessment. This should be considered an acceptable strategy that can help raise awareness about the issues in the complaint and increase pressure on the company to engage in the process to quickly and genuinely resolve the problem. Furthermore, some of the best-performing NCPs make the outcome of the initial assessment public on their website, and complainants are also free to do so.

After the case has been accepted the next phase of the process can include mediation and other exchanges between the parties, fact finding by the NCP, and the drafting of a final agreement or statement. OECD Watch's rule for this phase is transparency of process, but confidentiality of content. The Procedural Guidance is clear that NCPs should seek to keep sensitive information confidential once the initial assessment has been concluded and the case has been accepted. During the entire time that the specific instance is being handled by the NCP, complainants should not publicly disclose information, including correspondence, documentation, or opinions that are learned or exchanged during the process. This will assist NCPs in encouraging both parties to be as open and transparent within the process as possible which is important because NCPs may not base decisions on information supplied by the company that has not also been made available to the complainants. Given that the NCP has the authority to stop mediation at any point if confidential information is made public by a party, a non-disclosure agreement should not be necessary if NCPs clearly stipulate within their procedural rules what information must be kept confidential during the proceedings and that the NCP will stop mediation if the confidentiality provisions are not adhered to by the parties.

Committing not to disclose information exchanged during the process does not mean that complainants cannot conduct a public campaign against the company (based on publicly-available information) while the process is on-going. In a number of recent cases, public campaigning by complainants during an OECD Guidelines case has incentivized the company in question to prioritize resolution of the dispute through NCP-facilitated mediation, leading to a more positive outcome for the NCP process than would have occurred if the complainants had not engaged in a public campaign. OECD Watch believes firmly that it is up to the complainants, not the NCP, to decide whether or not to engage in public campaigning during the process. Even if complainants decide not to pursue a high-profile public campaign, OECD Watch believes it is acceptable for complainants to communicate publicly about purely procedural aspects/events in specific instance processes. Such procedural aspects include whether or not the company responds to the allegations (though not the content of the company's response), whether meetings between the parties are being organized or have taken place (though not the content of the meetings), and if mediation has begun/ended. As long as it does not conflict with the agreed need to

protect information exchanged by the parties, transparency on these objectives and the procedural elements of a case is crucial to maintain the legitimacy and effectiveness of the Guidelines.

Academic research has indicated that one of the barriers to NCPs being more effective is power imbalances in mediation. NCPs should be conscious of the fact that overly strict restrictions on campaigning during a specific instance can exacerbate power imbalances, to the detriment of the NCP's effectiveness in helping parties resolve the issue at hand. Requiring commitments from complainants to refrain from speaking out publicly about the company and the ongoing case (if this is done in a way that respects the confidentiality of information exchanged during the process) directly undermines the existing power of the less powerful group.

At the conclusion of a case, the Procedural Guidance instructs NCPs to make the results of the process publicly available in a public report or statement, taking into account the need to protect sensitive information. Outcomes should always be transparent unless it can be argued that not publicizing the outcome would be in the best interest of effective implementation of the Guidelines. In order to ensure transparency, as well as ensure that mediated agreements are adhered to by the parties involved, NCPs should be required to keep a case registry and publish documents such as initial assessments, final statements and agreements. Complainants should also be free to communicate about the outcome and process of the case, keeping in mind the need to respect the confidentiality of sensitive information exchanged during the process.

In some countries and jurisdictions, the NCP operates under legislation that gives the public the right to access to all correspondence between the NCP and the parties, with the exception of those parts of documents that contain commercial secrets (this is a narrower concept than the concept of 'confidential information').

6. Identified good practice with respect to confidentiality and campaigning in specific instance processes

Provisions on confidentiality are essential to most mediation processes. Confidentiality provisions can encourage parties to engage with one another, to share information openly with those involved in the mediation and to develop stronger, trust-based relationships. Indeed, confidentiality is an element which attracts some parties to use alternative dispute resolution mechanisms over legal proceedings and in the context of a specific instance process may influence the company's decision to participate in the mediation or not.

Under the Guidelines confidentiality can also serve as a positive incentive to reaching an agreement between the parties as public statements identifying the parties are only explicitly required where a specific instance is found to merit further examination and parties fail to reach an agreement or refuse to engage in the process.⁴⁶ Parties interested in protecting their identity may therefore be motivated to engage in the process with a view to reaching an agreement.

However, overly broad restrictions on confidentiality may discourage use of the specific instance mechanism by submitters. Campaigning focused on the specific instance proceeding is different than general campaigning protesting on a situation or problems caused by a company's activities. Worker organisations or NGOs often file a specific instance as part of a broader, more general campaign. As a specific instance proceeding can last months to years, policies prohibiting any campaigning of any kind throughout this time can be discouraging to parties considering making a submission to an NCP. In some instances, where campaigns were ongoing prior to submission of a specific instance and information related to a specific instance is already in the public domain, it may be challenging or unfeasible to halt all activities that could be defined as campaigning.

Additionally broad confidentiality policies, for example those that bar discussing the existence of an ongoing specific instance, may also contribute to limiting access to information for other stakeholders and can prevent potentially positive engagement. For example several NCP specific instances have resulted in successful resolution due in part to engagement by investors. In March 2015, a case was brought to the Dutch NCP involving the human rights impacts associated with sales of a pharmaceutical product by a Dutch company used for lethal injections in prisons in the United States. In its final

⁴⁶ "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." OECD Guidelines for Multinational Enterprises (2011), Commentary on Procedural Guidance, para, 35 (emphasis added)

statement the NCP noted “*dialogue as well as disengagement by some [investors] appear to have contributed to improvements in Mylan’s conduct.*”⁴⁷ One of the most high profile NCP cases brought to the United Kingdom NCP was resolved when SOCO International, an oil exploration company, committed to ceasing oil exploration in Virunga National Park, a World Heritage Site in the Democratic Republic of the Congo. The successful outcome has been attributed in part to engagement by SOCO’s investors in parallel to the specific instance process.⁴⁸

In some cases, policies which favour transparency can be used to offset some of the risks that confidentiality provisions are meant to address. For example, with the increase of public campaigning during specific instances, the Swiss and French NCPs both decided to begin publishing initial assessments in an effort to ensure that information in the public domain is impartial and balanced, and to promote transparency.⁴⁹ The Belgian NCP also recently started systematically publishing initial assessments in order to promote transparency.

When creating policies on confidentiality NCPs should be careful in balancing the various risks and benefits and understanding the concerns and interests of both parties involved in the process.

Good practice with respect to balancing confidentiality and transparency during specific processes includes policies which are:

- **Predictable:** Rules around confidentiality and campaigning should be clear and care should be taken to ensure they are understood by parties before a specific instance process commences.
- **Equitable:** In developing rules around confidentiality and campaigning the preferences and needs of both parties should be taken into account.
- **Clear:** Rules around confidentiality and campaigning should be clear and specific. For example, what is considered impermissible with respect to campaigning should be clearly defined.
- **Flexible:** Different specific instances may raise different concerns around confidentiality. Rules and processes should be flexible enough to respond to specific needs, without however undermining predictability.
- **Transparency-driven:** Confidentiality is an exception to the core criteria of transparency for NCPs. Therefore, rules around confidentiality should promote transparency to the greatest extent possible.

⁴⁷ NCP of the Netherlands, (April 2016) Final Statement Mylan and Bart Stapert) <https://www.oecdguidelines.nl/documents/publication/2016/4/11/bart-stapert-attorney-vs-mylan>

⁴⁸ NCP of the United Kingdom (July 2014) Final Statement following agreement reached in complaint from WWF International against SOCO International plc, <https://www.gov.uk/government/publications/uk-ncp-final-statement-wwf-international-and-soco-international-plc-agreement-reached>; See also Stephanie Maier, *Aviva Investors’ third report on SOCO: How shareholders can exert influence to promote sustainable business conduct*, 9 June 2016. <http://www.eiris.org/blog/aviva-investors-third-report-on-soco/>

⁴⁹ OECD (2015) *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*. Page 47

7. Conclusion

Balancing confidentiality and transparency in the context of specific instance processes is an ongoing challenge for NCPs. How NCPs should treat issues around campaigning can also be difficult and may be further complicated by a lack of specificity around what activities may be considered to encompass "campaigning." When developing policies and rules around confidentiality and/or campaigning NCPs are encouraged to consult and understand exceptions with respect to transparency and limits to confidentiality outlined in the Procedural Guidance of the Guidelines. Rules around confidentiality and campaigning that are predictable, equitable, clear, flexible, and promote transparency to the greatest extent possible, represent good practice. NCPs looking to develop or amend policies on confidentiality can also consult with their stakeholders and other NCPs to understand which approaches would be most effective in promoting positive outcomes of specific instances.

Additional issues to consider when developing provisions on confidentiality and/or campaigning are included in Annex A.

Annex A. Issues to consider when developing provisions on confidentiality and/or campaigning

- Does the NCP have a position on confidentiality and/or campaigning? Is it available publicly?
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- Should there be an ad hoc or model confidentiality developed for each mediation/conciliation between the parties?
- How does the NCP deal with potential threats to confidentiality provisions (e.g. freedom of information laws, bad faith conduct, leaks of confidential information etc.)?
- What criteria can be used to assess:
 - Whether there are *strong reasons* to believe that the disclosure of certain information would be detrimental to one or more of the parties?
 - Whether ongoing campaigning prevents genuine engagement with a view to finding a solution to the issues raised?
- What are the consequences of not respecting provisions on confidentiality?

Annex B. References to Confidentiality and Campaigning in NCP Rules of Procedure as of January 2018

	Closed a specific instance between 2011-2016	Rules of procedure on handling SI - available online	Provision(s) on confidentiality included in NCP rules of procedure	Provision(s)on campaigning included in NCP rules of procedure	Sanctions provided for breach of confidentiality	Use confidentiality agreements for mediation/conciliation
Argentina	✓	✓	✓	✗	✗	✗
Australia	✓	✓	✓	✗	✗	✗
Austria	✓	✓	✓	✗	✗	✗
Belgium	✓	✓	✓	✗	✗	✗
Brazil	✓	✓	✓	✗	✗	✗
Canada	✓	✓	✓	✓	✓	✓
Chile	✓	✓	✗	✗	✗	✓
Colombia	✗	✓	✗	✗	✗	N/A
Costa Rica	✗	✓	✓	✗	✗	N/A
Czech Republic	✗	✓	✓	✗	✗	N/A
Denmark	✓	✓	✗	✗	✗	✓
Egypt	✗	✗	N/A	N/A	N/A	N/A
Estonia	✗	✗	N/A	N/A	N/A	N/A
Finland	✓	✓	✓	✗	✗	✗
France	✓	✓	✓	✗	✗	✗
Germany	✓	✓	✓	✓	✓	✓(where requested)
Greece	✗	✓	✓	✗	✗	N/A
Hungary	✗	✗	N/A	N/A	N/A	N/A
Iceland	✗	✗	N/A	N/A	N/A	N/A
Ireland	✗	✓	✓	✗	✗	N/A
Israel	✗	✗	N/A	N/A	N/A	N/A
Italy	✓	✓	✓	✗	✗	✗

	Closed a specific instance between 2011-2016	Rules of procedure on handling SI - available online	Provision(s) on confidentiality included in NCP rules of procedure	Provision(s)on campaigning included in NCP rules of procedure	Sanctions provided for breach of confidentiality	Use confidentiality agreements for mediation/conciliation
Japan	✓	✓	✓	✓	✓	✗
Jordan	✗	✗	N/A	N/A	N/A	N/A
Korea	✓	✓	✓	✗	✗	✗
Latvia	✗	✗	N/A	N/A	N/A	N/A
Lithuania	✗	✗	N/A	N/A	N/A	N/A
Luxembourg	✓	✓	✓	✗	✗	✗
Mexico	✓	✓	✓	✗	✗	✗
Morocco	✓	✓	✓	✗	✗	✗
Netherlands	✓	✓	✓	✓	✗	✓
New Zealand	✓	✓	✓	✗	✗	✓
Norway	✓	✓	✓	✗	✓	✓
Peru	✓	✓	✓	✗	✗	✗
Poland	✗	✓	✓	✗	✗	N/A
Portugal	✗	✗	N/A	N/A	N/A	N/A
Romania	✗	✗	N/A	N/A	N/A	N/A
Slovak Republic	✗	✓	✓	✗	N/A	N/A
Slovenia	✗	✗	N/A	N/A	N/A	N/A
Spain	✓	✓	✓	✗	✓	✗
Sweden	✓	✗	N/A	N/A	N/A	✗
Switzerland	✓	✓	✓	✗	✓	✓
Tunisia	✗	✗	N/A	N/A	N/A	✓
Turkey	✓	✓	✓	✗	✗	✗
United Kingdom	✓	✓	✓	✓	✗	✓
United States	✓	✓	✓	✓	✓	✓
Total (yes)	28	33	30	8	6	11

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