Introduction by the Editorial Team

Pursuant to the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines), the adhering states are obliged to establish the National Contact Points (NCPS) to promote and implement the OECD Guidelines. One important task of the NCPS, as per the 2000 revision, is to resolve disputes arising during implementation. This is the “specific instances mechanism” under which any interested party (in practice mostly a trade union or a nongovernmental organization) can submit a complaint against a company operating within or from respective adhering state.¹ According to OECD statistics, most complaints concern violations of human rights, general policies, issues related to employment and workers’ rights, and the environment.² The specific instances procedure is a nonjudicial (and nonbinding) grievance mechanism based on the principles of impartiality, predictability, and compatibility with the OECD Guidelines (in addition to the main principles underlying the operation of NCPS, such as visibility, accessibility, transparency, and accountability).³ Once the complaint passes an initial screening assessment and is admitted for further investigation, an NCP can refer the parties to mediation as part of the good offices procedure.⁴ Two conditions for such a referral are included in the OECD Guidelines: the parties need to explicitly agree on mediation and commit to participate in mediation in good faith.

So, what does mediation look like in the context of the specific instances mechanism before the NCPS? Mediation is a process in which a neutral mediator facilitates negotiation between the parties to help them resolve their dispute. Once the parties reach a mutually acceptable solution, they will issue a binding agreement that can be enforced in courts. Just as each adhering state has flexibility in setting up its NCP, no specific guidelines detail how mediation

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² Ibid.
⁴ Ibid., “Procedural Guidance I C 2 (d).”
should be conducted before NCPS. In some cases, mediation is conducted by the members of the NCP themselves; in others, external professional mediators will be appointed. The rules of procedure also differ, especially when it comes to provisions on confidentiality and the duties of the parties during the mediation.

All this results in a relative fragmentation of mediation procedures within each NCP, which calls for a more systematic discussion on the suitability and effectiveness of mediation in the context of NCP’s specific instances. Critics could certainly point to the lack of awareness of parties about crucial aspects of mediation, such as the practicalities of the process, the mediator’s role and independence, or the costs of mediation, all seeming to undermine the effectiveness of mediation in the context of the complaints before the NCPS.

Another problematic (and difficult) requirement concerns the need to obtain the parties’ consent to refer their dispute to mediation, especially when such disputes concern violations of human rights and workers’ rights (both highly sensitive issues), the discussion of which is already problematic before NCPS.

Another problem concerns the confidentiality of mediation proceedings, which may be seen as undermining the principle of transparency underlying the NCPs’ work, especially when realizing the potential power of inviting public scrutiny of human rights violation through the NCP complaints.

That said, mediation generally—a consensual process advancing societal interactions—has considerable potential for enhancing the effectiveness of both the NCPS’ specific instance procedures and the OECD Guidelines. Specifically, it may offer parties a neutral and flexible forum in which they can focus on their interests instead of positions only, emphasizing the ways to move forward. Also, mediation resulting in mutually acceptable solutions taking the form of a binding agreement could be a milestone tool to advance the effectiveness of the otherwise nonbinding procedures before the NCPS. To increase the potential of mediation in this context, a more holistic and proactive stance by NCPS in promoting the awareness of mediation between the parties would be welcome.

The current issue includes five commentaries pointing to the use of mediation in the context of the NCPS’ procedures, three of which offer (directly or indirectly) important insights into the issues raised in this editorial. The first commentary is by Kari Otteburn, a doctoral research fellow at the Leuven Centre for Global Governance Studies, KU Leuven. Otteburn sheds light on the

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6 Ibid., section 2.1.2.
interplay between mediation, specific instances before the Belgian NCP, and the parallel court proceedings in local courts in India in the case between the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker’s Associations (IUF) and AB InBev, one of the world’s largest beer producers. The case, brought on behalf of the Haryana Breweries Limited Mazdoor Union, concerned the alleged retaliation against unionized workers and the interference with right to organize by AB InBev in Sonipat, Haryana, India. Otteburn’s main focus (and criticism) is on the Belgian NCP that—after a mediation conducted by an external mediator had concluded with no resolution—refused to issue a recommendation to parties. Otteburn observes that such a decision runs contrary to the NCP’s mandate to further the effectiveness of the OECD Guidelines through specific instances. After noting that the role of NCP is rather limited after the unsuccessful mediation, Otteburn points to the need for further improvements to the OECD Guidelines’ framework on the role and functioning of the NCPs.

Two commentaries by Tequila J. Brooks and Jernej Letnar Černič—although not discussing the role of mediation extensively—point to the ineffectiveness of processes before NCPs, also those including referrals to mediation. Brooks, an international employment policy specialist in Washington, DC, discusses the final statement of the German NCP in the specific instance handling between Südwind Institut, Sedane Labour Resource, Bogor, Clean Clothes Campaign and Adidas AG. The specific handling concerned the mediation procedure including a number of mediation sessions by the NCP and the Interministerial Committee on the OECD Guidelines, which failed to result in a mutually acceptable solution. In its final statement, the German NCP expressed the belief that mediation could have been an effective mechanism in the case at hand, but that the NCP was unable to bring the parties to settlement. As Brooks observes, the underlying problem was the lack of trust between the parties stemming from the difficult relationship between the complainant and the respondent that undermined most of the NCP’s mediation efforts. This consideration is important when it comes to the overall effectiveness of mediation in specific instance procedures before NCPs. The extent to which NCPs can offer services to enhance trust between the parties remains an open issue.

Černič, professor at the Faculty of Government and European Studies at New University, Ljubljana in Slovenia analyzes two conflicting decisions by the US and Australian NCPs regarding the complaint by IUF against Coca-Cola Amatil regarding the alleged violation of certain international labor law standards by two of its subsidiaries. Although the US NCP did find that the specific instance merited further examination and referred the parties to mediation, the Australian NCP found that the complaint did not pass initial examination
even though one of the parties raised issues that it had not duly participated in mediation before the US NCP. The reasoning behind this decision was that the two parties already had their complaint handled (and referred to mediation) by the US NCP. According to Černič, these conflicting decisions undermine the effectiveness of the OECD Guidelines and may call for more unified approach to handling of specific instances by NCPS globally.

Last, though not directly related to the topic of this editorial, we would like to highlight the contribution by Dylan Casey Marshall, an M.A. researcher at the European University Institute and an alumnus of the Law Programme at The Hague University of Applied Sciences. His commentary “The Advancement of Bangladeshi Labor: The ILO Committee of Experts Observes What Is (Still) to Be Done” is the result of Dylan Casey Marshall winning the case commentary competition organized for students of The Hague University of Applied Sciences and Leiden University. Congratulations Dylan! We invite you all to read Dylan’s and other contributions in this issue.

As always, the editorial team welcomes suggestions from readers of cases to be included in later issues. Please email ilarc@hhs.nl.