

Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises

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I. Introduction

The last decades have witnessed fundamental changes in domestic and international environments. Far from being an exception here, corporations are at the forefront of these changes. The privatization and deregulation of economies and the liberalization of trade have diminished the state's influence on daily economic lives of its people. Globalization has erased artificial borders between national economies and societies around the world. Whilst developed states and societies of the global north have benefited extensively from the fruits of free international trade, individuals, populations and developing states in the global south have often been faced with the adverse consequences of globalization. In this context, the activities of corporations have often served as the catalyst for human rights violations by or involving corporations. International investments by multinational corporations are in the center of the current debate on globalization. The Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises [hereinafter 'OECD Guidelines'] are the only corporate responsibility instrument formally adopted by state governments.¹ The OECD Guidelines are recommendations addressed to enterprises operating in OECD countries. However, corporations are encouraged to extend good practices throughout the universe. They form part of a broader and balanced instrument of rights and obligations – the OECD Declaration on International Investment and Multinational Enterprises. They remain the most prominent multilateral document on various aspects of corporate responsibility and the role of international investment. Endorsing governments have obligations to promote that corporations comply with the Guidelines, with clear directions laid out by the OECD. Today, standard setting for the protection of human rights has largely come of age at the international level. Increasing international attention has in the last twenty years been devoted to the impact corporations have on human rights. The present contribution briefly examines the implementation procedures under the OECD Guidelines for Multinational Enterprises as part of OECD Declaration on International Investment and Multinational Enterprises.

Whereas much has been written on corporations and human rights², few of the research agendas have so far concentrated on human rights dimension of the OECD Guidelines.

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¹ See section III.

² Nicola Jägers, *Corporate Human Rights Obligations. In Search of Accountability*, Intersentia, Antwerp, 2002; Steve R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* 111 *Yale Law Journal* 443 (2001); Peter T Muchilinski, *Multinational Enterprises & The Law*, OUP, 2007, 515.; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 2006, ch.6; Philip Alston (ed.): *Non-State Actors and Human*

Through an analysis of OECD Guidelines this paper aims to establish whether OECD Guidelines may have the potential to contribute to the regulation of multinational enterprises. This is done through an analysis of the jurisprudence developed on the issue by the National Contact Points in relation to the OECD Guidelines for Multinational Enterprises. Whereas this article demonstrates that the OECD Guidelines have a measurable impact, it argues that the implementation procedures under the OECD Guidelines must be strengthened. In this light, it makes for a new direction of the implementation procedures under the OECD Guidelines.

The remainder article will be structured into six parts. In the second part the author defines the conundrum of corporate responsibility for human rights, followed by a presentation of factual contexts of alleged human rights violations by or involving corporations present the of the OECD Guidelines. In the third part, the historical development and substantive content of the OECD Guidelines is examined, whereas the fourth part investigates implementation procedures of the OECD Guidelines for Multinational Enterprises. In this part, legal arguments under OECD Guidelines will be applied to the factual context assessed in the light of OECD Guidelines Implementation procedures. In this light, a growing number of jurisprudence of NCPs in relation to human rights will be critically assessed. In the fifth part shortcomings and weaknesses of the OECD Guidelines will be examined and assessed. In this part the author makes a number of proposals for more effective functioning of the implementation procedures under the OECD Guidelines. In the last part the OECD Guidelines for Multinational Enterprises will be placed within the context of wider debate on corporate responsibility for human rights.

II. Defining the Conundrum

1. Investment, Corporations and Human Rights

Economists, lawyers and social scientists alike have for a number of years agreed that foreign investments have the potential to act as a catalyst for the enjoyment of an individual's human rights, particularly in developing countries. This is even more so considering that corporate investors are often not explicitly obliged under investment agreements to observe human rights even though they exert considerable power over individuals, communities and indigenous populations. Such assertions have strengthened the normative link between human rights law and international law on foreign investment on a general level.

In 2006 the developing countries attracted \$380 billion of foreign direct investment.³ Corporations, particularly transnational corporations, are increasingly operating most of the foreign direct investments in developing countries. They have assumed the role of the cardinal actors in foreign investment, even though states and individuals are also often acting as investors. International investment standards are mainly aimed at greater investor

Rights, OUP, 2005; D. Kinley and J. Tadaki; *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44:4, *Virginia Journal of International Law*, 931-1024; M. Kamminga, "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", in P. Alston (ed.), *The EU and Human Rights* (OUP), 1999, pp.553-569. Ol. De Schutter; *Transnational Corporations and Human Rights*. Edited by. Oxford, Portland, OR: Hart Publishing, 2006.

³ See The World Investment Report 2007. *Transnational Corporations. Extractive Industries and Development*, iii.

and investment protection.⁴ Whereas foreign direct investments can stimulate economic growth, development and employment, they can also contribute to improving human rights in many developing countries as a direct consequences of the investments, or alternatively indirectly due to the presence of investments. Despite this, there has been little conclusive evidence that investments do promote growth, development and employment in developing countries.⁵ Rather than presuming that rules and practices of foreign investment contribute to the protection and promotion of human rights, the present paper examines situations where the reverse possibility comes into play. Some corporations express their commitments to observe human rights and related standards.⁶ Even though such statement cannot be simply brushed aside as 'mere gestures',⁷ it is precisely where relationship between foreign investment, corporate investors and human rights stumbles on the first hurdle as voluntary approaches of corporate investors are often given too much weight. Foreign investment may have a varying effect, either positive or negative, on the enjoyment of the individual's human rights. Furthermore, the effects will vary depending on the 'type of investment, the host country, the sector targeted by investment, the motivations of the investor as well as the policies of both host and home country'.⁸ In other words, the potential for investment to affect human rights differs from sector to sector.

Corporate investors can have negative consequences on the individual's enjoyment of human rights, including adverse effect on human rights preserving fundamental labor rights, human rights preserving security and safety of person and those preserving non-discrimination. It appears that the human rights under the strongest pressure from foreign investment include human rights preserving labor rights and non-discrimination, whereas the category of human rights preserving safety and security is likely to prove less problematic. All in all, it appears that developing states are less likely to regulate and monitor corporate investors that do not violate human rights. In this light, the OECD report in 1998 noted that:

*generating economic profit so as to enhance shareholder value in the long term, by competing effectively, is the primary objective of corporations in market economies. Corporate governance must acknowledge this objective while simultaneously fulfilling broader economic, social and other national objectives. This multiplicity of functions is complex but necessary to the perpetuation of the corporation and the market system.*⁹

The next section illustrates how foreign investment may threaten the enjoyment of human rights.

⁴ See International Law Association, First report of the ILA International Committee of International Law on Foreign Investment, 440.

⁵ See U.N. High Commissioner for Human Rights, *Report on Human Rights, Trade, Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003, 6-8.

⁶ See; *Business Recognition of Human Rights: Global Patterns, Regional & Sectarian Variations*, Michael Wright and Amy Lehr research fellows, Kennedy School of Government, Harvard University, under direction of UN Special Representative John Ruggie, 12 Dec 2006. < <http://www.reports-and-materials.org/Business-Recognition-of-Human-Rights-12-Dec-2006.pdf>>.

⁷ See S. Leader, 2006, Human Rights, Risks, and New Strategies for Global Investment, *Journal of International Economic Law*, 9 (3): 657-705, 660.

⁸ *Ibid.* 7.

⁹ See OECD, *Business Sector Advisory Group on Corporate Governance, Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets: A Report to the OECD*, 30-31.

2. Corporations and human rights violations

This section explores the nature and scope of human rights violations by or involving corporations and their officers. Corporations have since centuries been operating beyond the borders of the country in which they are registered ('the home state'). A range of mechanisms make this possible, from wholly owned subsidiaries, joint ventures or other partnerships with foreign companies to supply chain relationships with contractors and suppliers of goods and services. This has raised the question to which extent corporations have responsibility for the protection, promotion and realization of human rights, and the ways in which they can be held accountable for human rights violations connected with their activities. A few real-life scenarios from different parts of the world illustrate the impact corporations have on human rights. In recent decades there has been a growing body of evidence that the impact of corporate activities on poor communities in developing countries can result in violations of human rights.¹⁰ Although, this phenomenon is far from being new, globalization and its inherent forces have created favorable conditions for the rise of corporate actors to power. Today there are some 70,000 transnational corporations, together with roughly 700,000 subsidiaries and millions of suppliers around every corner of the globe.¹¹ Wal-Mart alone is reported to have more than 60,000 suppliers worldwide.¹² The present article identified fifty-seven corporations amidst the 100 largest economies in the world.¹³ It is hence without any doubt that corporations affect quotidian lives of people around the world. Even more so, corporations are part of an extensive web of relationships between actors in the global north and the global south. Commentators estimate the top twenty-five corporations in the World are richer than 170 countries.¹⁴

¹⁰ The evidence inter alia includes following reports: Human Rights Watch, *On the Margins of Profit*, 2008; Human Rights Watch, *Curse of Gold*, 2005; Business & Human Rights Resource Centre highlights reported abuses in Angola's diamond industry and obtains company responses, 18 October 2006; *Hot Chocolate: How Cocoa fuelled the conflict in Cote d'Ivoire*, Global Witness, June 2007; Amnesty International; *Clouds of Injustice - Bhopal 20 years on*, December 2004, Friends of Earth; *Behind the Shine: The Other Shell Report 2003*, June 2004; *Lesson not Learnt: The Other Shell Report*, June 2004; Human Rights Watch; *The Price of Oil. Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, 1999. Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, October 15, 2002; See also Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in Democratic Republic of Congo, October 23, 2003; See also *Oil in Sudan: Deteriorating human rights*, Amnesty International, AFR 54/001/2000 Sudan, Oil, and Human Rights, Human Rights Watch, 2003, *Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile*, Sudan, October 2001 and Sudan: Oil in Sudan: Deteriorating human rights, Amnesty International, AFR 54/001/2000, Dominique Lapiere and Javier Moro. *Five Past Midnight in Bhopal*. (Warner Books, 2002), see also: http://www.bhopal.net/campaigningresources/final-info-releases-jpegs/final-info-releases_17.jpg, *Surviving Bhopal 2002: Toxic Present Toxic Future*, report published January 2002 by the Fact-Finding Mission on Bhopal (FFMB). Human Rights Police of Chinese Companies, Conducted under the mandate of the UN Secretary-General's Special Representative for Business and Human Rights, Professor John G. Ruggie, Harvard University, Sep 2007, Myanmar, Amnesty International, section Françoise, 16 Jul 2007, Allegations against Ford for abuses during the military dictatorship (1976-1983) Business & Human Rights Resource Centre, 24 April 2007. See also Tim Butcher, *A Journey to Africa's Broken Heart*, 2007.

¹¹ Research note, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D Overview*, United Nations Conference on Trade and Development, 104.

¹² See announcement of the lecture Prince of Wales's Business and the Environment Programme, <<http://www.admin.cam.ac.uk/news/dp/2007013101>>, accessed 10 February 2008.

¹³ See Revenue: *Fortune 500*, 27 July 2007, and *Gross Domestic Product: World Bank, World Development Report 2007*, indicators world development report.

¹⁴ M.B. Baker: *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 *Wisconsin International Law Journal* 89, 2001, 94.

It appears that the precise scale of FHRs by or involving corporations remains difficult to ascertain. In this regard, the UN Special Representative of the Secretary-General on Business and Human Rights in 2006 found that the extractive sector - oil, gas and mining – dominates the account¹⁵ of reported abuses with two thirds of the total.¹⁶ The study conducted by the International Council on Mining and Metals, for example, examined 38 allegations against mining companies in 25 countries. Another study conducted by the Office of the UN High Commissioner for Human Rights in support of the SRSG's mandate analysed a sample of more than 300 allegations of corporate human rights abuses from all sectors, collected by the Business and Human Rights Resource Centre.¹⁷ J. Ruggie report suggests that mostly 60 percent of reported cases involve direct forms of company involvement in the alleged violations, where the company is alleged to directly commit violations through its own acts or omissions.¹⁸ Only 40 percent of report includes indirect forms of corporate violations.¹⁹

A similar study was undertaken by Corporate Accountability Working Group of the ESCR-Net, which examined situation where corporation adversely affect human rights.²⁰ It found that in the 159 surveyed cases from 66 countries, corporations have negative effect on the individual's enjoyment of human rights.

Alone, the U.N. Panel of Experts on the Illegal Exploitation of the Natural Resources of the Democratic Republic of Congo (DRC) listed, in Annex III of its 2001 Interim report, several corporations in violations of the OECD Guidelines.²¹ Presently, there are more than 40 private military and private security corporations employing more than 40,000 to 50,000 employees in Iraq alone,²² whereas there are more than hundred-thirty private military and security companies operating in all regions of the world.²³ These examples have been widely documented in literature.²⁴ In this context, even the International Court of Justice in

¹⁵ SRSG on Business and Human Rights employed the sample of 65 surveyed instances in 27 countries recently reported by NGOs.

¹⁶ See J. Ruggie, *Interim report of UN Special Representative on business & human rights*, 21 Feb 2006, E/CN.4/2006/97. At paras. 24-30.

¹⁷ J. Ruggie consultation, *Corporate responsibility to human rights*, Geneva, Dec. 4-5, 2007, 2.

¹⁸ See J. Ruggie, *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2, 23 May 2008, 3, 14-15.

¹⁹ *Ibid.* 3, 14-15.

²⁰ Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net), *Collective Report on Business and Human Rights*, Submission to the 8th Session of the United Nations Human Rights Council, Executive Summary, June 2008, <http://www.escri-net.org/usr_doc/ExecSummary_CollectiveReport_eng.pdf>.

²¹ See 2002 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146, and 16 October 2002 Annex I, II and III. See also *infra* section IV.

²² See Minutes of the Dialogue on private military and security companies and human rights, Meeting at the Business & Human Rights Resource Centre, London, 8 May 2007, 2. Private military industry is worth up to \$100 billion annually. Singer, Peter W., *Corporate Warriors – The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca and London, 2003, 8. See *Documentary Iraq for Sale: The War Profiteers*, 2006: Jeremy Sachil, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*, Nation Books, 2007.

²³ Business and Human Rights Resource Centre (<<http://www.business-humanrights.org/>>) currently lists over 28 individual companies in "Security companies" section, 47 companies in our "Military/defense" section, 43 companies in our "Arms/Weapons" section, and 3 companies in our "Prison companies" section. We also have a general section called "Security issues & conflict zones." Accessed 15 January 2008.

²⁴ Beth Stephens, *The Amoral Profit: Transnational Corporations and Human Rights*, 20 *Berkeley Journal of International Law* 45, 51-53 (2002); Aaron X. Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in the U.S. Courts?*, 5 *Yale Human Rights & Development Law Journal*.

its decision *concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda)²⁵ refers to the Porter Commission Report, which include evidence that, for example, ‘General Kazini gave specific instructions to UPDF²⁶ Commanders in Isiro, Bunia, Beni, Bumba, Bondo and Buta to allow the Victoria Company to do business uninterrupted in the areas under their command’,²⁷ which facilitated looting, plundering and exploitation of the DRC’s natural resources committed by members of the UPDF in the territory of the DRC.

Violations leveled against corporations include allegations of crimes against humanity, torture, racial discrimination, genocide, forced and child labor, slavery, environmental degradation and a broad array of human rights violations in relation to local communities, especially indigenous people.²⁸ The extractive sector: oil, gas, and mining (cobalt, diamonds), account for most allegations of the human rights violations, by or involving corporations. In this regard, claims brought under the auspices of the Alien Torts Statute in the United States offers another illustration.²⁹ The food and beverage industries have also noted some violations, followed by the clothing and footwear industry, and the information and communication technology sector.

III. The OECD Guidelines for Multinational Enterprises and Human Rights

In first instance, the approach of the OECD guidelines to corporate responsibility for human rights needs to be analyzed. The present section attempts to clarify the nature and scope of the OECD Guidelines for Multinational Enterprises, whether they are effective and whether they could serve as a point of departure for enforcing human rights obligations of corporations. Presently, the OECD Guidelines for Multinational Enterprises are the only global corporate responsibility instrument that has been formally adopted by states. In this regard, the OECD Member States are required to establish National Contact Points (NCP)

241, 244-45 (2002); Ariadne K. Sacharoff, Multinationals in Host Countries: Can they be Held Liable under the Alien Tort Claims Act for Human Rights Violations?, 23 *Brooklyn Journal of International Law* 927, 958-64 (1998); John C. Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 2 *University of Pennsylvania Journal of Labor and Employment Law*, 463, 464-65 (2000); Lena Ayoub, Nike Just Does It and Why the United States Shouldn’t: The United States’ International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad, 11 *DePaul Business Law Journal* 395, 400- 11 (1999); Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 *Berkeley Journal of International Law* 91, 131-36 (2002); Mahmood Monshipouri, Claude E. Welch, Jr. & Evan T. Kennedy, Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities, 25 *Human Rights Quarterly*, 965, 973-77 (2003). Second, of the largest 100 economies in the world, 51 are TNCs and only 49 are states. Nicola Jägers, The Legal Status of the Multinational Corporation under International Law, in *Human Rights Standards and the Responsibility of Transnational Corporations* 260 (Michael K. Addo ed., 1999).

²⁵ ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *International Court of Justice*, 19 December 2005.

²⁶ *Congo Uganda Peoples Defence Force*.

²⁷ ICJ, *Case concerning Armed Activities on the Territory of the Congo*, para. 248 of the judgment.

²⁸ See John Ruggie, *Interim report of UN Special Representative on business & human rights*, 21 Feb 2006, E/CN.4/2006/97.

²⁹ Alien Torts Claims, Act of 1789) 28 U.S.C. § 1350. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Human rights lawsuits have been brought under ATCA against corporations including BHP Billiton, Cape PLC, Chevron/Texaco, Coca-Cola, Exxon Mobil, Occidental Petroleum, Rio Tinto, Shell, Talisman Energy, Union Carbide/Dow, Unocal, Wal-Mart.

which has the primary responsibility to ensure the follow-up of the Guidelines at the national level. In this regard, the present study attempts to show that the domestic implementation of the OECD Guidelines remains a challenge in a number of countries and that international law is limited in its reach into domestic spheres for the stimulation of implementation. To this end, it examines a growing amount of case law under National Contact Points in relation to human rights and it investigates challenges faced by a number of states regarding the implementation of the OECD Guidelines. In conclusion, the study suggests that these problems are all surmountable by strengthening existing system of the National Contact Points.

1. The Development of the OECD Guidelines

The OECD was created in 1961 as an organization of countries 'sharing a commitment to democratic government and market economy'.³⁰ The predecessor of the OECD was the Organization for European Economic Co-operation (OEEC), which was established to regulate American and Canadian aid under the Marshall plan for rebuilding of Europe after the Second World War.³¹ The OECD has since aimed to 'build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development in industrialized as well as developing countries'.³²

Since the 1970s a number of attempts have been made to adopt a comprehensive legal and binding document regulating corporate activities. However, most attempts failed due to political disagreements between Western and socialistic countries, including most prominently the UN Draft International Code of Conduct for Transnational Corporations.³³ The Guidelines, however, were the first international legal document on corporate responsibility. They were firstly adopted by the Organization for Economic Co-operation and Development in 1976 and they have been reviewed several times: in 1979, 1982, 1984, and 1991 and most recently at the Ministerial Meeting of 27 June 2000.³⁴ The timing here is significant, in that the Guidelines were adopted during the discussion on a draft Code of Conduct on Transnational Corporations within the United Nations,³⁵ the first attempt at a universal and complete instrument on multinational enterprises MNEs, both because of its global scope and its comprehensive subject matter. Several different regulatory regimes have been thereafter established under the United Nations, International Labor Organization, OECD and World Bank for regulation of corporations respectively. They vary as to how successfully they contribute to the protection of international values system.

³⁰ OECD, <www.oecd.org>, accessed 16 February, 2008.

³¹ *Ibid.*

³² *Ibid.*

³³ U.N. Draft International Code of Conduct for Transnational Corporations. 23 Int'l Leg. Mats. 626 (1984), which after many years of drafting and negotiation, within the U.N. Commission on Transnational Corporations was never adopted.

³⁴ The revised text of the Guidelines was adopted by the governments of 29 member countries of the OECD and Argentina, Brazil, Chile and the Slovak Republic at the OECD Ministerial Meeting on 27 June 2000. For the discussion of the 2000 review of the OECD Guidelines, see Jonas Oldenziel, *The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct?*, SOMO, Amsterdam, September 2000.

³⁵ See Jan Huner, *The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises, in Liability of Multinational Corporations under International Law* 197, 198 (Menno T. Kamminga & Saman Zia-Zafiri eds., 2000), cited in Elisa Morgera; An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy and Outstanding Questions in the Lead up to the 2006 Review, *Georgetown International Environmental Law Review*, 2006, 18, 4, 751-777.

As noted, the Guidelines were reviewed most recently in 2000, just after the collapse of the negotiations within the OECD of a Multilateral Agreement on Investment (MAI).³⁶ The aim of the negotiations was to draft an agreement, which would include all aspects of investment protection.³⁷ The complaints mechanism under OECD Guidelines was developed only at 2000 Review the Guidelines as the Guidelines did not include complaint mechanism until 2000. The MAI was negotiated only by OECD members, but would be considered open to signature by non-OECD countries once completed; however attempts to harmonize international rules on investment failed. Part of the reason was that States did not reach a consensus on the international standards for the protection of foreign direct investment. As a consequence, the Guidelines remained a separate document and were significantly revised in 2000.³⁸

2. Nature and scope of the guidelines

Currently, the OECD Guidelines for Multinational Enterprises are the only corporate responsibility instrument formally adopted by state governments. They remain the most prominent interstate document on various aspects of corporate responsibility and the role of international investment. Endorsing governments have non-binding obligations to promote that corporations comply with the Guidelines, with clear directions laid out by the OECD. That being said, the Guidelines have been adopted by the thirty-six OECD States³⁹ and been accepted by four non-member states: Argentina, Brazil, Latvia and Lithuania and they are to apply to corporations not only in the OECD states but also worldwide. In other words, the OECD Guidelines extend also to territories of non-OECD States where corporations registered in the OECD Member-State operate. In this light, it appears that most of the largest corporations are covered with the OECD Guidelines. The largest corporations are based in the developed countries in global north. The 71 largest corporations from a list of the World's 100 largest corporations are based in only five countries (France, Germany, Japan, the United Kingdom and the United States).⁴⁰ 25 corporations based in US are in the list of the 100 largest non-financial corporations.⁴¹

At the time of adoption the Guidelines were considered to be voluntary and even nowadays the Guidelines state in their first operative paragraph:

The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with

³⁶ See Pieter van der Gaag, *OECD Guidelines for Multinational Enterprises: Corporate Accountability in a Liberalized Economy?* 1 (2004), <<http://www.oecdwatch.org/docs/paper%20NC%20IUCN.pdf>>. Accessed 10 April 2008.

³⁷ See Stephen Tully, *The 2000 Review of the OECD Guidelines for Multinational Enterprises*, 50 *International and Comparative Law Quarterly* 394 (2001). Elisa Morgera; *An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review*, 18 *Georgetown International Law Review*.

³⁸ *Ibid.*

³⁹ Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Slovenia, Estonia, Russia, Indonesia, Israel and Chile.

⁴⁰ UNCTAD World Investment Report 2005: *Transnational Corporations and the Internationalization of R&D* (New York and Geneva: United Nations, 2006) 15-18.

⁴¹ *Ibid.* 15.

*applicable laws. Observance of the Guidelines is voluntary and not legally enforceable.*⁴²

The Guidelines were initially thought as addendum to the OECD Declaration on International Investment and Multinational Enterprises of which they still form part. They constitute a legal document, which includes only a non-binding collection of principles and standards for responsible business conduct consistent with applicable laws. Even though they are not fully enforceable, they nevertheless represent adhering countries' expectations for multinationals enterprise's behavior. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.⁴³ The Guidelines include a set of standards to be respected, in addition to relevant national law, for multinational corporations coming from OECD Member states, operating at home or abroad. To this end, Peter Costello stated that: 'The Guidelines are not a substitute for not should they be considered to override local law and regulation. They represent supplementary principles and standards of behavior of a non-legal character, particularly concerning the international operation of these enterprises.'

⁴⁴ That said, this wording may be explained by ensuring level playing field for corporations from capital exporting nations, which operate in countries with low regulatory standards. Additionally, the Guidelines state that 'Governments adhering to the Guidelines should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest'.⁴⁵

The OECD Guidelines do not define term 'multinational' whose meaning varies throughout the world. They are addressed to 'all entities, including parent companies, local subsidiaries, as well as intermediary levels of the organization'.⁴⁶ To the extent that the parent companies actually exercise control over the activities of their subsidiaries, they have a responsibility for observance of the Guidelines by those subsidiaries.⁴⁷ That said the Guidelines avoid making specific recommendations in relation to the division of responsibilities between parent companies and their local entities apart from that they all have to observe the Guidelines.

3. Content of the Guidelines

The Guidelines are divided in eight chapters: general policies; employment and industrial relations; disclosure of information; competition; financing; taxation; environmental protection; and science and technology. Each chapter consists of a chapeau⁴⁸ and eight paragraphs. The chapeau refers to applicable law and regulations which are meant to acknowledge the fact that the MNEs, while operating within the jurisdiction of particular countries may be subject to national, sub national, as well as supranational levels of regulation and employment.

⁴² *The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary*, DAFFE/IME/WPG (2000) 15 Final (OECD: Paris, 2001), Concepts and Principles I.1.

⁴³ *Ibid.* See preface of the Guidelines, Section 1.

⁴⁴ OECD Guidelines, Commentary, DAFFE/IME/WPG(2000)15/FINAL, para 2.

⁴⁵ OECD (2001) Concepts and Principles I.6.

⁴⁶ OECD Guidelines, Chapter 1, Section 3.

⁴⁷ *Ibid.*

⁴⁸ In international law chapeau refers to introductory text setting out objectives and principles.

The preambular paragraph of the OECD on International Investment on national treatment notes that governments are to ‘accord enterprises, treatment consistent with international law’.⁴⁹ The latter formulation in the preambular paragraph would thus seem to indicate that the drafters are referring to international legal obligations, which are incumbent on States, including obligations to respect fundamental human rights. The OECD Guidelines include a specific provision on human rights obligations of corporations. In this regard, the Guidelines stipulate in the chapter on General Policies that Enterprises should *respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments*.⁵⁰ It is necessary to ascertain what is meant by this concept. Firstly, interpretations of this provision may vary, even though the Commentary to the OECD Guidelines explains that enterprises are to act consistently with host states’ existing international human rights obligations. Secondly, the fact that not all states have ratified all human rights treaties may pose some problems in the protection of standards and in the interpretation of the Guidelines. It may appear, however, that corporations are expected to adhere to human rights obligations. To this end, the official Commentary of the OECD Guidelines stipulates:

*On a related issue, while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.*⁵¹

Even though the Commentary employs cautious language, it appears to recognize that corporations are obliged to comply with fundamental human rights and that they need to work with state governments towards their protection and promotion. In this regard, the Guidelines include broad obligation to respect ‘human rights of those affected by their activities’. The Commentary further obfuscates the role of MNEs to those unspecified circumstances ‘where corporate conduct and human rights intersect and the General Policy II.5 states that enterprises should ‘refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labor, taxation, financial incentives, or other issues.’ Multinational enterprises from the territories of adhering States are encouraged to observe the Guidelines wherever they operate.

Chapter 4 of the OECD Guidelines refers to fundamental labor rights. It stipulates that enterprises *should* contribute to the effective abolition of child labor and contribute to the elimination of all forms of forced or compulsory labor.⁵² The Commentary to the Guidelines refers to all four fundamental principles and rights at work which are contained in the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work.⁵³ This provision undoubtedly sets forth the belief of the drafters that a corporation should respect the prohibition of forced and child labor. Yet, the language used is of such a general and imprecise nature, that it leaves many questions unanswered. It appears peculiar why the

⁴⁹ OECD Declaration on International Investment and Multinational Enterprises, at II.I.

⁵⁰ OECD Guidelines, General Policies II.

⁵¹ Commentary of OECD Guidelines (2001) General Policies II.2. Para. 4.

⁵² OECD Guidelines, Chapter 4, 1 (c and d)).

⁵³ ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, <<http://www.ilo.org/dyn/declaris/DeclarationWeb.IndexPage>>. Accessed 10 April 2008.

Guidelines refrain from stricter formulations stipulating that corporations shall not use forced, compulsory or child labor as included in UN Norms. In this regard, the commentary does not offer any clear explanation as to the obligations of corporations. It includes recommendations that multinational enterprises should contribute to the effective abolition of child labor in the sense of the ILO 1998 Declaration and ILO Convention 182 concerning the worst forms of child labor.⁵⁴ It does not appear that the Commentary attempts to distinguish between the ‘contribution to the effective abolition of child labor’ with binding prohibition of child labor in international law. In other words, the Commentary appears to suggest that corporations are to follow ILO Convention 138 and Recommendation 146 (both adopted in 1973) concerning minimum ages for employment. With regard to prohibition of forced labor, it appears that there is another way to reach the same conclusion by referring to the Commentary to core labor rights and prohibition of forced labor based on the ILO Conventions 29 of 1930 and 105 of 1957⁵⁵, which employ binding language. The foregoing suggests that, as a matter of principle, the provisions in chapter four contain legal rules and principles, which are legally binding and can possess as much normativity as any other provision. To what extent this is indeed the case, however, ultimately depends on the interpretation in individual cases. Similarly, the Guidelines also include a standard non-discrimination clause, which reads as follows:

*Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices: Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.*⁵⁶

Even though the OECD guidelines refer to human rights which corporations need to respect, those human rights obligations are not framed in mandatory terms. Despite this vagueness in wording of the Guidelines, it appears that even leading international business associations, the International Chamber of Commerce (ICC), International Organization of Employers (IOE), and the Business and Industry Committee to the OECD, agree that all corporations are ‘expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent’.⁵⁷ This could form a platform for drafting more mandatory obligations in the revised Guidelines. From the text and official commentary of the Guidelines it appears that the Guidelines do not draw a qualitative distinction between the group of core rights and other labor rights. However, it does not seem that the difference is made intentionally as there is no explicit reference to fundamental rights and other rights.

Most commentators assess the content of the Guidelines with the attitude that lawyers and the public may ignore them due to their status as non-legally binding ‘soft law’.⁵⁸ In similar

⁵⁴ Commentary to the OECD Guidelines, para. 22.

⁵⁵ Commentary to the OECD Guidelines, para. 23.

⁵⁶ OECD Guidelines, Chapter 4, 1 (d).

⁵⁷ International Organization of Employers, International Chamber of Commerce, Business and Industry Committee to the OECD, Business and Human Rights: The Role of Business in Weak Governance Zones, December 2006, para.15.

⁵⁸ See answer of panelists to the question of author on the status of OECD Guidelines in the United Kingdom, Exploitation of Natural Resources: The Role of Foreign Investment, 18 May 2008, British Institute of International and Comparative Law, Chair: Professor Philippe Sands QC University College London; Matrix Chambers Speakers: Professor Peter Muchlinski, School of Law, SOAS University London Thomas J Dimitroff British

vein, P. Muchilinski has suggested that although the Guidelines are not binding, they represent consensus on what constitutes good corporate behavior in an increasingly global economy.⁵⁹ By contrast, A. Clapham notes that a corporation's record on the application of the Guidelines may be pertinent for investment decisions of developing states.⁶⁰ It appears, however, the home countries of MNEs have at minimum a moral duty to ensure that the OECD standards are observed worldwide. In this vein, next section analyses of implementation procedures under the OECD Guidelines.

Although 'soft-law' instruments are usually considered non-binding, they may develop into binding or 'hard' law in the forthcoming years. Two approaches of legal rule turning into international customary law can be distinguished. 'Soft law' instruments may influence the practice of states, and they may result in creation of an international customary law rule. Another possibility is that 'soft law' documents are developed into international treaties. In this way, a number of 'soft law' declarations appear to generate high levels of compliance. The OECD Guidelines are one such example, particularly as the implementation procedures are binding upon State parties. International law also often lacks coercive enforcement of the sort we see in the domestic context.⁶¹ A. Guzman argues that a level of commitment is what is important to determine the legal quality of instrument.⁶² The next section examines implementation procedure under the OECD Guidelines.

IV. THE OECD Guidelines' Implementation Procedure

Identifying obligations under the OECD Guidelines is only one of its aspects. As important is the question how state and corporations themselves can respond to violations of the Guidelines. Presently, victims of human rights violations by or involving corporations have little or no access to justice either in their home country or in the country where the corporation in question is registered or, indeed, in the international arena. The following section examines the potential implementation procedure under the OECD Guidelines. It does so in two steps: firstly, by examining the complaints mechanisms under the Guidelines, and secondly, by examining complaint brought before respective National Contact Points. The decision of the OECD Council of June 2000 paved the way for the establishment of implementation procedures of the OECD Guidelines.⁶³ Following this decision, a three-tiered implementation procedure has been developed. This framework includes two institutional stages, which are combined with the role of advisory committees. Those stages are:

- The National Contact Points (NCP),
- The OECD Investment Committee (CIME),

Petroleum, Regional External Affairs Advisor, Africa, Middle East, Russia and the Caspian Sofia Goinhas Global Witness, Ruggie, at 21.

⁵⁹ Peter T Muchilinski, Human Rights and Multinationals – Is There a Problem? 77 *International Affairs* 31 (2001).

⁶⁰ A. Clapham, *Non-state actors and human rights*, OUP, 2006, 207.

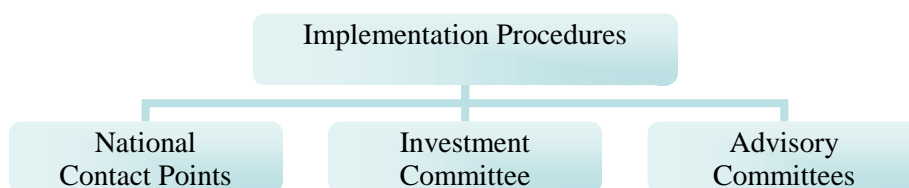
⁶¹ See K. Raustiala, Raustiala's Reply, *Opinio Juris*, 13 Feb 2008, < <http://opiniojuris.org/2008/02/13/raustiala-reply>>, accessed 10 Feb 2008.

⁶² See A. Guzman; *How International Law Works*, OUP, 2007.

⁶³ Decision of OECD Council, 27 June 2000 - C(2000)96/FINAL.

- The advisory committees of business and labor federations (The *Business and Industry Advisory Committee*, Trade Union Advisory Committee, and non-governmental organizations represented by OECD Watch).

Figure 1: Implementation procedure under the OECD Guidelines



The comparative advantage in relation to other international initiatives regulating corporate behavior of the OECD Guidelines is its Implementation procedure. Domestic implementation remains a challenge in a number of countries. This also has an influence on the OECD Guidelines since the primary responsibility for the implementation of the Guidelines remains that of each state government. The Guidelines represent 'shared expectations for business conduct',⁶⁴ and governments expect companies to adhere to them even though observance is not legally enforceable.⁶⁵

Opinions still differ on the desirability of enhancing the legal quality of the instrument, with France proposing mandatory standards and the UK preferring an essentially moderate approach.⁶⁶ The Business and Industry Advisory Committee (BIAC) responded in its last review of OECD Guidelines to the NGO efforts to render the Guidelines compulsory through the backdoor of a sanctions regime by arguing that proper focus should be on promoting business awareness if it is in its self-interest.⁶⁷ Similarly, the OECD Investment Committee (CIME) suggested that market discipline and host government expectations were sufficient because the voluntary but legal nature of the document is reaffirmed throughout the Guidelines.⁶⁸ Procedures for hearing complaints and 'clarifying' the guidelines were met with disappointment from trade unions, who invested some effort in filing complaints, only to see little change at the national level in a few cases where dispute moved from the level of the National Contact Point to the Committee on International Investment and Multinational Enterprises.

1. Complaint mechanisms under the OECD Guidelines

The decision of the OECD Council obliges OECD Member States which have primary responsibility to ensure the implementation of the Guidelines at the national level.⁶⁹ This is

⁶⁴ OECD Guidelines, op. cit, Preface 7.

⁶⁵ OECD Guidelines, op.cit., I concepts and Principles.

⁶⁶ See OECD Doc DAFFE/IME (98)12 (France) and OECD DOC DAFFE/IME(97)16 (U.K).

⁶⁷ See Letter dated 28 April 1999 from Lamborghini B., BIAC MNEs Committee Chairman to H.E.Baldi M. OECD CIME Chairman, OECD Doc Daffe/IME(99)13.

⁶⁸ OECD, Review of the OECD Guidelines for Multinational Enterprises: Aide-Memoire of the Informal Consultation between Non-Members and the Extended CIME Bureau, 23 February 2000, para 11.

⁶⁹ Decision of OECD Council, 27 June 2000 - C(2000)96/FINAL, para 1. The current NCP structures consist of: 20 NCP single government departments; 7 NCP multiple government departments; 1 bipartite NCP (involving government and business); 9 tripartite NCPs (involving governments, business, and trade unions); and 2

a binding obligation, as illustrated by the OECD Council's decision which reads as follows: 'adhering countries shall set up National Contact Points...'⁷⁰ In this sense, the Procedural Guidance requires NCPs to provide a 'forum for discussion' so as to 'contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances'.⁷¹ The NCP is thus a governmental department of each State Party responsible for promotion of the Guidelines at a national level.⁷² The Swedish National Contact Point, for example, includes representatives from Swedish government, business and labor⁷³; whereas the UK NCP includes representatives of the Department of Trade and Industry, the Department for International Development, and the Foreign and Commonwealth Office.⁷⁴ Corporations are responsible for observing the Guidelines on the quotidian basis, whereas governments can contribute to improving the effectiveness of the implementation procedures. They operate on the basis of four criteria for functional equivalence in the activities of NCPs, which are the following: visibility, accessibility, transparency and accountability. The composition of the Guidelines should be that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines. States are responsible for promoting the Guidelines, whereas other persons or legal persons (corporations, trade unions, and others) may question their application to the particular circumstances. NCPs often co-operate with relevant authorities, and/or representatives of the business community, employee organizations, non-governmental organizations, and relevant experts; or consult the NCP in the other country or countries concerned. The Procedural Guidance outlines functions pertaining to NCPs in four parts: institutional arrangements; information and promotion; implementation in specific instances; and reporting.⁷⁵ The NCPs have a role to collect information on the experiences with the Guidelines, to promote them, to deal with enquiries, to discuss matters related to the Guidelines and to assist in solving problems that may arise in matters covered by Guidelines.⁷⁶ The enforcement procedure of the OECD Guidelines consists of 'follow-up' procedures such as consultation, good offices, mediation, and conciliation, though none of these procedures qualify as judicial or even a quasi-judicial. An NCP handles all enquiries and matters related to the Guidelines in the relevant country.

2. The procedure of National Contact Points

The right to a remedy for victims of human rights violations is a tenet of every functioning judicial system. The effectiveness of all other rights rests on access to effective legal remedy. In this light, this section considers if the OECD Guidelines provide access to effective remedy. Since the most recent revision of the Guidelines, adopted in 2000, any legal or natural person is allowed to submit complaint to the respective NCP under the

quadrupartite NCPs (involving governments, business, trade unions and NGOs), Report by the Chair, 2007 Annual Meeting of the National Contact Points, 4.

⁷⁰ *Ibid.* I.

⁷¹ Procedural Guidance, I, C.

⁷² 21 NCPs consist of a single government department, 6 NCPs include multiple governmental departments, 8 are tripartite and 2 are quadrupartite. <<http://www.oecdwatch.org>>, accessed 8 June, 2006.

⁷³ See European Commission, Employment & Social Affairs, Corporate social responsibility, Sweden, <http://ec.europa.eu/employment_social/soc-dial/csr/country/sweden1.htm>, accessed 25 august 2008.

⁷⁴ See UK OECD National Contact Point, <<http://www.csr.gov.uk/oecd1.htm>>, accessed 25 august 2008.

⁷⁵ Para 7. Commentary on the Implementation Procedures of the OECD Guidelines for multinational enterprises.

⁷⁶ Procedural Guidance, Section B., C. in D.

Specific Instance Procedure of the OECD Guidelines. The NCPs contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. Complaints can be submitted directly against multinationals which operate in or from those countries and which violate the Guidelines. When a special issue arises on the implementation of the Guidelines in the specific instances, the NCP is expected to resolve them. The Procedural Guidance of OECD Guidelines indicates that when the NCP receives complaint, it has to 'make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them' and where 'the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues.'⁷⁷ The Procedural Guidance does not, however offer explanation on when issues raised in complaint merit further examination.

In initially deciding whether the issue merits further investigation, the NCP is required to determine whether the issue is relevant to the implementation of the Guidelines. In this context, the NCP will have to consider the following criteria: the parties concerned and its interest in the matter; whether the issue is material and sustained; the relevance of applicable law and procedures; the procedural status and relevant results with respect to the treatment of similar or identical issues in other proceedings at the domestic and international level; and finally, whether the considerations of the specific issues will contribute to the purposes and effectiveness of the Guidelines.⁷⁸

If a NCP decides to proceed with the complaint, and provided that the parties involved consent, it plays a mediation role in bringing parties together to resolve the issue. This stage could include consulting relevant authorities, employer representatives, labor organizations, and other non-governmental organizations, and experts.⁷⁹ Some NCPs are using diplomatic embassies as a source of information for consideration of 'specific instances'.⁸⁰ Several NCP have trained their country's embassy and consular staff in compliance and application of the Guidelines.⁸¹ The entire procedure is confidential. In this context, the NCP can offer assistance in dealing with issues, particularly conciliation and mediation. If the parties involved do not reach an agreement on the issues raised, the NCP issues a statement to the parties on how to implement the Guidelines.⁸² It appears that the NCP will decide to accept the case where the allegations appear to reflect a breach of the Guidelines or the issues are serious enough to pursue the case, even if there is uncertainty on whether a breach may have occurred. In this regard, the OECD Watch argues that the initial assessment should be carried out within a specified time scale and according to clear rules on process and the acceptance or rejection of each part of a complaint should be made against a set of transparent criteria.⁸³ Results of procedure are to be made public, but only after consultation

⁷⁷ OECD, OECD Guidelines for Multinational Enterprises, Procedural Guidance on National Contact Points, A.1, 46.

⁷⁸ See R. Blanpain; *Multinational Enterprises and Codes of Conduct, The OECD Guidelines for MNEs in Perspective*, in R. Blanpain: *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International 2004, 209.

⁷⁹ *Ibid.*

⁸⁰ See Donald J. Johnston 'Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises' *International Investment Perspectives* (2004). See also Swedish Business Service provision in Ghana's Gold Sector, Swedish NCP.

⁸¹ OECD Guidelines for Multinational Enterprises: 2007 Annual Meeting of the National Contact Points, Report by the Chair, 8.

⁸² Procedural Guidance, Implementation in Specific Instances.

⁸³ See Guide to OECD Guidelines for Multinational Complaints Procedure, Lesson from past NGO complaints, OECD Watch, at point 2.6, p. 16. The reasons for the NCP's decision and that initial assessment should be

with the relevant parties and ‘unless preserving confidentiality would be in best interest of effective implementation of the guidelines’.⁸⁴ In this regard, some NCPs, however, will offer to facilitate a dialogue without ever making any kind of judgment on whether the company has breached the Guidelines at any point in the process.⁸⁵ Statements will detail the nature of the allegations, the parties involved and the results of the investigation and include recommendations to businesses in respect of their future conduct, if this is appropriate. With respect to fact-finding powers, the Commentary to the Guidelines states: ‘While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities’.⁸⁶ It is to be noted that some NCPs, such as the British NCP’s approach has so far been inconsistent with this statement. In the Avient⁸⁷ and Oryx⁸⁸ cases, the NCP failed to make proper use of its fact-finding powers, while, in other cases, the NCP has sought expert advice from those with specialist knowledge of a situation and has conducted its own fact-finding, including field visits.⁸⁹ In this regard, it may appear that recommendations should be drafted as to what fact-finding activities the parties can expect the NCP to undertake once a specific instance has been deemed admissible.⁹⁰

i. Do complaints against multinational corporations require investment nexus?

Complaints against multinational corporations under OECD Guidelines must have nexus with investments. The latest version of the Guidelines from 2003 includes a statement on companies’ supply chain responsibilities in Chapter 2, Paragraph 9, which obliges State parties: ‘Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines’.⁹¹ However, in 2003, the Investment Committee issued a statement on supply chain cases that greatly reduced the Guidelines’ scope. The statement argued that since the Guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises*, the Guidelines only apply to investments or when an ‘investment nexus’ exists. According to a June 2003 statement, an investment nexus exists when the multinational enterprise has some degree of influence with their business partners or has an investment-like relationship with its suppliers. However, the Investment Committee has not provided any basic criteria to determine when an investment nexus exists. NCPs are supposed to consider supply chain complaints on a case-by-case basis, though in practice, NCPs have cited the lack of an investment nexus to reject many complaints. OECD Watch is challenging this practice and

published.

⁸⁴ Procedural Guidance, Implementation in Specific Instances, 4(b)

⁸⁵ Guide to OECD Guidelines, 2.6.

⁸⁶ OECD Guidelines Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, paragraph 20.

⁸⁷ Statement by the UK NCP on Avient, 8 September 2004, <<http://www.oecd.org/dataoecd/5/20/38034511.pdf>>, accessed 17 July 2007.

⁸⁸ Statement by the UK NCP on Oryx Natural Resources and Annex 2, 14 June 2005, <<http://www.oecd.org/dataoecd/5/17/38033885.pdf>>, accessed 17 July 2007.

⁸⁹ The UK National Contact Point’s Promotion and Implementation of the OECD Guidelines for Multinational Enterprises - Response to the Stakeholder Consultation - 12 January 2006, The Corner House and Raid, 21.

⁹⁰ *Ibid.*

⁹¹ OECD Guidelines, Chapter 2, Paragraph 9.

is calling for a broad and flexible interpretation of companies' supply chain responsibilities.

3. The Legal status of National Contact Points

This section examines whether the determination should be judicial in nature or whether a determination by quasi-judicial bodies is sufficient.⁹² This section argues that quasi-judicial bodies play a role in providing right to effective remedy to human rights violations by or involving corporations. The term judicial body refers to 'an independent and impartial body, competent to give, on the basis of the facts determined by due process, legally binding judgments'.⁹³ A quasi-judicial body is not a judicial body, which nonetheless carries out some judicial functions. They are, however, not always completely independent and their decisions are of a non-binding nature, often not enforced by sanctions. It appears, however, that the justiciability has an evolving character. Moreover, it varies from country to a country and also from one decision-making body to another. Even though some argue that only a court of law is competent to review complaints in relation to human rights violations⁹⁴, quasi-judicial mechanisms have a role to play. Brigit Toebes argues that the effectiveness of a decision does not always depend on its (non-)binding nature, so the impact of the some decisions may be equal or similar to that of judicial bodies' decisions.⁹⁵ As at present there are not many judicial bodies at international level for corporate responsibility for human rights, quasi-judicial bodies such as NCPs or Inspection Panel of the World Bank may play an important role in filling the vacuum of protection against human rights violations.⁹⁶ The issues of whether the OECD Guidelines provisions may be invoked for corporate responsibility (or its employees) cannot be answered by a simple yes or no. To attempt to answer this question it is more likely, that the both answers may hold true in some respect. With this premise in mind it appears fruitful to analyze the relevant case law of NCPs.

4. Case law of the National Contact Points

A few cases relating to human rights from different NCPs are instrumental in illustrating the functioning of the complaints procedure, under the OECD Guidelines. The NCPs have meanwhile frequently addressed alleged violations of the Guidelines in relation to human rights. Thus, their decisions provide certain guidelines for the analysis of specific situations. The present section attempts to filter out some principles, which may be applied to specific situations under OECD Norms. In this regard, an increasing number of NGOs have therefore decided to file complaints as a means of testing the effectiveness of the Guidelines.⁹⁷ However, it is noted that NCPs' jurisprudence is inconclusive. 156 requests to consider specific instances have been filed with NCPs and accepted since the June 2000

⁹² See B. Toebes, *The Right to Health as a Human Right in International Law*, Hart, 1999, 168.

⁹³ G.J.H. Van Hoof and K. De Vey Mestdagh, "Mechanism of International Supervision" in: P. van Dijk (ed.), *Supervisory Mechanism in International Economic Organizations*, Deventer etc.: Kluwer/T.M.C. Asser Instituut, 1984.

⁹⁴ *Ibid.*

⁹⁵ B. Toebes, 1999, 168.

⁹⁶ See Van Hoof, De Vey Mestdagh, 1984, pp. 33-35, cited in B. Toebes, *The Right to Health as a Human Right in International Law*, Hart, 1999.

⁹⁷ *Ibid.*

review.⁹⁸ From this number, 84 of them have been concluded.⁹⁹ Several complaints deal with Chapter IV (Employment and Industrial Relations), many of which include allegations that a multinational enterprise employed forced or child labour. Lesser, but still a substantial number, deal with alleged violation of OECD Guidelines Chapter on general policies, including human rights. The remainder of this section examines cases from different NCPs for OECD Guidelines violations. Only cases concerning alleged violations of human rights are considered in present section.

In *ForUM v Aker Kvaerner*, the complaint was brought before the Norwegian NCP against the Norwegian company Aker Kvaerner. This company had carried out work for the US Department of Defense at the American Marine Base at Guantanamo Bay by means of its wholly owned US subsidiary Kvaerner Process Services Inc. (KPSI). The complaint alleged that Aker Kvaerner through KPSI's activities at Guantanamo Bay violated the prohibition against torture and other forms of cruel, inhuman and degrading treatment or punishment. In this regard, the Norwegian NCP held that Aker Kvaerner should 'respect the human rights of those affected by its activities'.¹⁰⁰ It urged the company to draw up ethical guidelines and apply them in all the countries in which it operates and emphasized that norms under the General Policy's chapter are internationally accepted norms.¹⁰¹ This case clearly suggests that a company had to comply with fundamental human rights of freedom from torture.

The French NCP noted in its recommendations to *Companies on the Issue of Forced Labor in Burma*¹⁰² that corporations doing business in Burma 'should do everything possible in order to avoid direct or indirect recourse to forced labor in the normal course of their operations, and also in their relations with sub-contractors or through future investments, particularly in zones with a strong military presence and in activities controlled by the army'.¹⁰³ It then lists the practices which can contribute to the elimination of forced labor (co-operation with International Labor Organization, external monitoring; promoting legislation against forced labor). From that case it follows that the Guidelines are not just set of half empty glasses but they can also contribute to prevention of human rights violations. In others words, the French NCP attempted to encourage corporations to take measures to prevent human rights violations

The Swedish NCP noted in *Attac Sweden/Friends of the Earth Sweden v. Sandvik and Atlas Copco* that personnel of those corporations did not have adequate knowledge of the contents of the OECD Guidelines and therefore encouraged these enterprises to enhance knowledge on the Guidelines.¹⁰⁴ In similar vein, a complaint was brought in 2004 against Bayer concerning its cotton seed production in India. On 11 October 2004 three German NGOs presented a complaint against the Bayer CropScience corporations to the German National Contact Point.¹⁰⁵ They alleged that suppliers of Bayer CropScience in the Indian

⁹⁸ OECD Guidelines for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points, Report by the Chair, Meeting held on 20-21, OECD, p. 14.

⁹⁹ *Ibid.* 15.

¹⁰⁰ Statement by the Norwegian National Contact Point, 29 November 2005, p. 2.

¹⁰¹ *Ibid.* p. 3

¹⁰² Recommandations du Point de contact national français à l'intention des entreprises au sujet de la question du travail forcé en Birmanie, 28 mars 2002.

¹⁰³ *Ibid.*

¹⁰⁴ Swedish National Contact Point Statement, June 2003.

¹⁰⁵ Statement by the German National Contact Point for the "OECD Guidelines for Multinational Enterprises" on the Complaint Filed against Bayer CropScience by German Watch, Global March, and Coordination gegen Bayer-

state of Andhra Pradesh employed children in cotton cultivation and that Bayer CropScience had not taken adequate measures to hamper such policies.¹⁰⁶ By contrast Bayer CropScience argued that 'all reasonable means had been taken to prevent the practice'.¹⁰⁷ The German NCP held a total of four rounds of talks between the complainants and representatives of Bayer CropScience and mediation was conducted with each party separately. At the end of the consultations, no joint formal statement was issued by the parties even though Bayer CropScience issued a declaration of voluntary commitment. The NCP closed the proceeding with the following sentence: 'the National Contact Point herewith closes the complaint proceedings, and refers to Bayer CropScience's Declaration of Voluntary Commitment for any individual question that might arise.' In other words, the German NCP did not take any further steps to enforce the OECD Guidelines in relation to conduct of Bayer CropScience.

Further, In *Global Witness v Afrimex*, a complaint was¹⁰⁸ submitted to the UK NCP against British company Afrimex alleging that Afrimex paid taxes to rebel forces in the Democratic Republic of Congo and employed insufficient due diligence on the supply chain, sourcing minerals from mines that use child and forced labour. The UK NCP held that Afrimex failed to comply with the human rights requirement of the OECD Guidelines for Multinational Enterprises.¹⁰⁹ The case is at the moment pending but the UK NCP has decided that the issues raised in Global Witness submissions do merit further consideration and has decided to accept the specific instance for further investigation.¹¹⁰ In the *ANZ case*¹¹¹, several community groups from Australia and Papua New Guinea raised a complaint with Australian NCP against the ANZ Bank submitting that latter has violated the Guidelines because of its financial support of logging companies, including Rimbunan Hijau's companies that are allegedly committing human rights violations and environmental destruction in Papua New Guinea. The Australian NCP dismissed the complaint since there was a lack of an investment nexus between ANZ and logging companies engaged in human rights abuses and environmental destruction in Papua New Guinea.¹¹²

In *Raid v. De Beers*, the specific complaint was brought against Diamond Ltd., subsidiary of De Beers Corporation. In October 2003, the UN panel named De Beers in Annex III of its Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (DRC) published in October 2002 on the basis of information and documentation received by the panel indicating that De Beers purchased rough diamonds from the Diamond Trading Company and hence indirectly provided support to entities that have been directly or indirectly involved in stirring up the conflict in DRC.¹¹³ The UK NCP noted in its statement without explanation that the 'action of De Beers' sight holders' are outside the remit of the UK NCP acting under the OECD

Gefahren Berlin, 30 August 2007.

¹⁰⁶ *Ibid.* 1

¹⁰⁷ *Ibid.* 1

¹⁰⁸ Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, 20 February 2007.

¹⁰⁹ See Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., 28 August 2008. Para. 61.

¹¹⁰ *Global Witness v Afrimex*, Initial assessment by the UK NCP for the OECD Guidelines for Multinational Enterprises, para 8.

¹¹¹ ANZ Bank's financing of logging in Papua New Guinea, Statement by the Australian National Contact Point: ANZ Specific Instance, 13. 10. 2006.

¹¹² *Ibid.* 13.

¹¹³ Reaction 29, written statement from de Beers to the panel, reproduced in UN panel, addendum, 20 June 2003

Guidelines for Multinational Enterprises'.¹¹⁴ In other words, the UK NCP interpreted the OECD guidelines as only applying to investment not trade relationship between corporations and its suppliers or subcontractors. In this regard, it appears necessary to consider how NCP compose its statement.

In many OECD countries major concerns have been expressed about the way NCPs arrive at the statement agreed by the company, the complainant and the NCP by first contacting the company not the complainant. However, this may appear to go against the official procedural guidance which stipulates that final statements are to be issued even when there is disagreement between parties. In 2004 RAID¹¹⁵, a British NGO, submitted a complaint against Oryx Natural Resources. This was after the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo named in 2001 Oryx in Annex 1— 'Companies on which the Panel recommends the placing of financial restrictions'—of its initial report, published in October 2002. Consider the following conclusion reached in RAID v. Oryx Natural Resources:

*The NCP is disappointed that the two parties were not able to join in a more constructive dialogue and by the absence of the prospect of an agreed settlement between the parties. The NCP is unable to form any further conclusion over the application of the Guidelines.*¹¹⁶

For instance, in the Avient Ltd case, the UN Panel alleged that Avient was contracted by the DRC government to organize bombing raids in eastern DRC in 1999 and 2000.¹¹⁷ In response, Avient admitted they had indeed provided crews for a Mig 23 Jet Fighter and a MI 24 attack helicopter and some flight training, but maintained they were not directly involved in any bombing raids. The final statement goes on to assert that Avient 'should carefully consider the recommendations of the Guidelines'¹¹⁸ and draws attention to the policies in Chapter II, which relate to sustainable development, human rights and improper involvement in local politics. To this end, it remains entirely unclear whether the NCP is of the view that Avient acted in a manner that was inconsistent with the Guidelines and if, implicitly, the NCP recommends that Avient should refrain from providing crews and training for jet fighters and attack helicopters to a party in a conflict in the future. Moreover, the final statement provides no analysis of the principal Panel allegation; namely, that Avient organized bombing raids in DRC.

Read together, the examined cases raise question as to the effectiveness of the complaints system under the OECD Guidelines. Such a reading follows from the recommendations contained, for example, in the Avient Ltd and Oryx Natural Resources final statements reiterate certain General Policies found in Chapter II of the Guidelines. For that reason it is difficult to see how they can offer any meaningful guidance. Although both Avient and Oryx may have been aware of the general policy on human rights after the consultation this does not help them to determine how they may need to change commercial practices in their particular business context to ensure compliance with the Guidelines. Additionally,

¹¹⁴ See OECD Guidelines for Multinational Enterprises: 2007 Annual Meeting of the National Contact Points, Report by the Chair, at p. 15. UK NCP statement on De Beers, <<http://www.dti.gov.uk/files/file23459.doc>>, accessed 11 May 2007.

¹¹⁵ Rights and Accountability in Development.

¹¹⁶ See NCP statement on Oryx Natural Resources, UK National Contact Point, June 2005, <<http://www.dti.gov.uk/files/file23454.doc>>, accessed 9 May 2007.

¹¹⁷ Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 16 October 2002, S/2002/1146, para 55.

¹¹⁸ See Statement on Avient, UK NCP, p. 3.

final statements of National Contact Points are often not clear. In our opinion, the NCP should issue a concrete recommendation and where appropriate declare a violation of the Guidelines or exonerate companies where there is no breach. As a report by the British Parliament notes:

It is clear that the cases are complex, but it is for that very reason that NCPs and the OECD must rise to the challenge of explaining how the Guidelines are to be implemented.

*Otherwise, they risk undermining the utility of the Guidelines in conflict situations.*¹¹⁹

It appears reasonable that if mediation attempts between parties are not successful the NCP should determine whether the allegations are true or false following a fact-finding inquiry, where both parties can contribute to achieving consensus. Each party should be given the opportunity to state and defend their case to the NCP in written submissions and at meetings convened between the parties. NCP offices need to operate outside the government system to ensure their impartiality and independence. Manfred Schekulin, the current chairman of the investment committee noted that: 'Despite this progress and [the NCPs] growing confidence that the Guidelines are a useful instrument for promoting appropriate conduct by international business, NCPs recognized the validity of some concerns. In particular, they underscored the need to speed up the handling of specific instances...'.¹²⁰ Similarly, Shirley van Buiren of Transparency International Germany notes that: 'presently the NCPs do more or less as they please, report what they choose; the Investment Committee's Annual Report in its own words is 'based on the individual NCP reports'. No wonder the Committee can only ascertain but not interpret much less overcome the 'significant and unexplained differences in practice'.¹²¹ It must be, recognized, however, that practice of the UK NCP has changed radically in 2007, when it substantially changed its methods of work.¹²²

In a recent development, the UK National Contact Point (NCP) held that DAS Air, a UK-based air cargo corporation, has violated the OECD Guidelines for multinational enterprises for its part in transporting minerals from rebel-held areas of the Eastern Democratic Republic of the Congo (DRC).¹²³ In this way, it dismissed the argument by DAS Air corporation's argument denying that it knew the coltan came from rebel areas:

*DAS Air did not try to establish the source of the minerals they were transporting from Kigali and Entebbe, stating they were unaware of the potential for the minerals to be sourced from the conflict zone in eastern DRC. The NCP finds it difficult to accept that an airline with a significant presence in Africa including a base in Entebbe would not have been aware of the conflict and the potential for the minerals to be sourced from Eastern DRC.*¹²⁴

The importance of this decision appears to be undermined by the fact that DAS Air

¹¹⁹ See All Party Parliamentary Group, dans la Région des Grands Lacs (APPG), les Principes directeurs de l'OCDE pour les Entreprises Multinationales et la RDC', Février 2005.

¹²⁰ See OECD Watch, Five years on: A review of OECD Guidelines and National Contact Points, <http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf>, accessed 10 January 2008, 27.

¹²¹ Shirley van Buiren, Speaking, Notes International OECD Watch Training and Strategy Seminar, Berlin 15 October 2004, cited in Manfred Schekulin, Presentation to OECD Watch Roundtable 1 April 2005, cited in OECD Watch, Five years on: A review of OECD Guidelines and National Contact Points, <http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf>, accessed 10 January 2008, 27.

¹²² The UK National Contact Point, <http://www.berr.gov.uk/sectors/sustainability/nationalcontactpoint/page45873.html#NCP_statement>.

¹²³ Statement by the UK National Contact Point (NCP) in DAS Air; <<http://www.csr.gov.uk/oecd1.htm>>. accessed 26 July 2008.

¹²⁴ NCP Statement, para. 49.

Corporation is now in liquidation.¹²⁵ It seems that the UK NCP has by holding that DAS Air corporation violated OECD Guidelines confirmed that the exploitation of natural resources in conflict zones by or involving corporations may result in continuation of the conflict and FHRs violations. Nonetheless, this development illustrates the changes in function of the UK NCP, which has effectively responded to a number of criticisms as outlined above.

One possible step to enhance the effectiveness of the NCP system would be submitting recommendations to the Investment Committee of the OECD concerning areas in which the Guidelines could be clarified or improved would be consistent with the NCP fulfilling its role as defined in the Commentary on the Guidelines, namely 'to further the effectiveness of the Guidelines'.¹²⁶ The Investment Committee has itself recognized the importance of drawing generic lessons from individual specific instances and it has been willing to consider such lessons, as it is empowered to do under part II.4 of the Procedural Guidance.¹²⁷ To this end, the following section examines the functioning of the Investment Committee. From these cases it follows that for more concrete measures, a revised version of the OECD Guidelines will have to be adopted. This aside, one can discern two different patterns. Quite clearly, practices between different NCPs differ. More particularly, it inquires whether international enforcement mechanisms complement or exclude national legal responses to corporate activities. Since the rules are not peremptory in character, nothing would stop States from opting for a different regime.

5. The functioning of the OECD Investment Committee

The second procedure includes submission of a complaint to the Committee on International Investment and Multinational Enterprises.¹²⁸ This is the Committee that represents governments of OECD State Parties. It organizes exchanges of views on matters relating to Guidelines and issues 'clarifications'. In this regard, the OECD Investment Committee¹²⁹ assists NCPs to carry out their activities and makes recommendations on how they can improve their performance. Consequently, only the NCPs can decide if a

¹²⁵ RAID, press release, *Government Condemns British Aviation Company for Fueling Congo's War.*, 21 July 2008.

¹²⁶ *Procedural Guidance*, I. National Contact Points, introductory paragraph.

¹²⁷ Writing in response to the Belgium NGO Proyecto Gato in relation to a Specific Instance on the Houay Ho dam in Laos, the Chair of the Investment Committee has stated: 'Under the Procedural Guidance for the Guidelines, the Investment Committee is not mandated to act as an appellate body on individual NCPs' decisions, nor is it asked to accept requests for clarification and submissions on an NCP's handling of specific instances from parties other than advisory bodies (see the text in parts II.3.c and b in the Procedural Guidance to the 2000 Council Decision). However, *in addressing generic issues before the committee that may have been revealed by individual specific instances*, the authority in II.4 of the procedural guidance provides that the Committee may seek expert advice in relation to its work on the Guidelines and the Committee has sought such advice in the past'.

¹²⁸ The OECD Investment Committee is responsible for the OECD liberalization instruments in the field of international investment and services. It interprets and implements the 1976 Declaration and Decisions on International Investment and Multinational Enterprises and is the guardian of the Codes of Liberalization of Capital Movements and Current Invisible Operations.

¹²⁹ In 1975, the OECD established the Committee on International Investment and Multinational Enterprises (CIME), as well as two subordinate Working Groups--one on International Investment Policies and the other on the Guidelines. These bodies provide a regular forum for discussion by OECD governments of a full range of international investment issues. The CIME and the Working Groups receive the views of business by way of the Business and Industry Advisory Committee (BIAC) and the views of labor through the Trade Union Advisory Committee (TUAC).

corporation has violated the guidelines after a complaint has been submitted. The Investment Committee is prohibited from 'reaching conclusion on the conduct of an individual enterprise' or reviewing the merits of a complaint, because both governments and business were opposed to it having 'a quasi-judicial role',¹³⁰ whereas the Commentary notes that the non-binding nature of the Guidelines precludes the Committee from acting as a judicial or quasi-judicial body.¹³¹ However, an NCP can ask the Investment Committee to examine whether another NCP has interpreted the guidelines correctly.¹³² The Investment Committee can then make clarification to the guidelines, if necessary. However, the Investment Committee seems not willing to honor responsibilities under the Procedural Guidance as it operates on the basis of consensus. Consequently, this means that it often involves accepting the lowest common denominator. Currently, individuals, communities, NGOs and multinational enterprises cannot ask the Investment Committee to provide clarification. To this end, the Committee may seek and consider advice from experts on any matters covered by the Guidelines.

6. Functions of Advisory Committees

Before the 2000 revision of the Guidelines, only trade unions could submit complaints. The Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee are the two advisory Committees to the OECD. The Investment Committee regularly consults them on matters relating to the Guidelines and on other issues concerning international investment and multinational enterprises. They are both official advisory bodies and have as their members business and labor federations in each of state parties. Both Committees have competence to request consultations with the National Contact Points on issues relating to the Guidelines and can also raise such issues directly with the Investment Committee. On the other hand, NGOs may only request consultations with the NCPs on issues related to the Guidelines. The Trade Union Advisory Committee to the OECD (TUAC) has so far received 63 trade union complaints.¹³³ About 50 complaints have been filed by NGOs.¹³⁴ It appears that the complaints received by BIAC and TUAC are given a far more superior role than those of representatives of NGOs in the context of NCPs as they cannot complain directly to the Investment Committee.

¹³⁰ OECD, Commentary to Procedural Guidance for the CIME, para. 24, p. 53.

¹³¹ See OECD, Commentary to Procedural Guidance for the CIME, para. 23, p. 53.

¹³² See The OECD Guidelines for Multinational Enterprises Under Procedural Guidelines on the OECD, the Committee will: (a) Consider the reports of NCPs. (b) Consider a substantiated submission by an adhering country or an advisory body on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances. (c) Consider issuing a clarification where an adhering country or an advisory body makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances. (d) Make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines.

¹³³ See *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: lessons from past NGO complaints*, OECD Watch: Freeman, C.; Heydenreich, C.; Lillywhite, S. / *Rights and Accountability in Development* (RAID), Jun 2006, 6.

¹³⁴ *Ibid.*

V. Shortcomings and Merits of the OECD Guidelines

1. Shortcomings

Many of the underlying weaknesses of the OECD Guidelines can be directly tied to the fact that they cannot be enforced by law. No coherent system exists, either in the domestic legal systems or at international level to enforce human rights violations by or involving corporations. Although human rights obligations of multinational enterprises under the Guidelines are not legally binding, States are obliged to establish NCPs to monitor the activities of multinational enterprises. It appears that there is considerable disparity among the endorsing governments' commitments to implementing the Guidelines. More importantly, since most of the NCPs are located within business or industry departments of governments, it appears that they are more inclined to support business activities. For example, the UK NCP until recently discussed the initial assessment of a complaint with the companies first and only later with the complainant.¹³⁵ There is no simultaneous discussion and companies have been given higher degree of access to the NCP. The major problems faced by the NCPs with the implementation of the guidelines can be summarized as following: a lack of due process (lack of clear procedure, lack of time limits for complaints); unequal treatment of parties: burden on complainants: unwillingness to investigate and lack of fact-finding capacity; lack of transparency, narrowing down the applicability of the guidelines; excluding company supplying chains; and an unwillingness to declare breaches of the guidelines.¹³⁶ All in all, it appears that the greatest shortcoming of the OECD Guidelines is a lack of sanctioning mechanisms.

The NCPs can not impose sanctions on multinational enterprises when they are found to be in violation of the Guidelines.¹³⁷ However, it appears that most of the problems in relation to the implementation of the Guidelines can be traced to the vague nature of the formulation in the Guidelines. For example, the NGO RAID indicates that the UK NCP has adopted the inconsistent treatment of different companies and that it has often even failed to determine whether or not certain conduct complies with the Guidelines.¹³⁸ Moreover, it has failed constantly to issue specific recommendation to companies to alter or guide their conduct.¹³⁹ Considering the possibility of reforming of the Guidelines in the future, revisions may be needed to tackle this inadequacy, which could potentially undermine the effectiveness of the OECD Guidelines. Consider for example the conclusive passage from UK NCP statement in *Raid v. Oryx Natural Resources*. The practice of a number of NCPs appears to suggest the limited competences of NCPs in sanctioning corporations for violations of the OECD Guidelines.¹⁴⁰ To be clear, the argument here is not that the NCP should be dissolved. As noted above, NCPs play a seminal role in monitoring the activities of

¹³⁵ See Corporate Responsibility Coalition (CORE), *Report on: Flagship or Failure?, The UK's implementation of the OECD Guidelines and approach and corporate responsibility*, 2006, <http://www.foe.co.uk/resource/reports/flagship_or_failure.pdf>, accessed 10 January 2008.

¹³⁶ *Ibid.*

¹³⁷ O. De Schutter, *Transnational Corporations and Human Rights*, *Global Law Working Paper* 01/05, at 6.

¹³⁸ See Lesson and options, *Implementation of OECD Guidelines in the UK, Rights and Accountability in Development (RAID)*, December 2005, p. 2-4.

¹³⁹ *Ibid.* See cases concerning BP and the Baku-Tbilisi-Ceyhan (BTC) pipeline and case concerning National Grid Transco in Zambia and case concerning Anglo-American Corporation in Zambia.

¹⁴⁰ See section V.C. See NCP statement on *Oryx Natural Resources*, UK National Contact Point, June 2005, <<http://www.dti.gov.uk/files/file23454.doc>>, accessed 9 May 2007.

multinational enterprises based in the OECD State Parties. The argument, rather, is that the system of NCPs could play a considerable role in setting up an advantageous and regulated framework for the activities of corporations provided that certain shortcomings were improved.

Having said that a number of NCPs deal more effectively and transparently with complaints under the OECD Guidelines than others. It appears that states are hesitant to implement the OECD Guidelines. The real problem is the vague wording of them, which itself can be traced to the way in which these are drafted. In this light, the OECD Guidelines leaves discretion to respective NCPs to define its working methods. The Norwegian NCP, for example, in *ForUM v Aker Kvaerner* urged the company to draw up such guidelines and to apply them in all countries in which it operates. For instance, the Dutch NCP has reached agreement with NGOs in relation to the question raised by the India Committee of the Netherlands (ICN) whether Adidas's behavior as an outsourcer and seller of footballs produced in India is in conformity with the Guidelines.¹⁴¹ The Dutch NCP noted that 'an important finding during the NCP procedure was this has been lacking in the past. According to ICN, an important contribution to improved communication will be the disclosure of future reporting by Fair Labor Association (as an external auditor) on the implementation of the Adidas's standards of engagement (SOE) at country and product level'.¹⁴² Not all NCPs are, however, as effective as for example Norwegian, French and Dutch NCPs. By a contrast, criticism has been expressed that the US NCP lacks transparency.¹⁴³ Similar concerns have been raised in relation to the Japanese NCP.¹⁴⁴ What is missing it appears are the clear Guidelines as to when NCPs should find against corporations. Possible guidelines would assist NCPs and would provide those who are regulated with some understanding of the basis on which institutions exercise its powers.

It appears that there have been enough examples to determine taken the Guidelines are a useful tool to foster more corporate responsibility. Nonetheless, the complaint's mechanism under the Guidelines would need to be improved. Taken together, it appears that three major concerns exist in relation to the enforcement of the OECD guidelines. First, the expansion of global markets has not been matched with sufficient protection for the people and communities who are victims of corporate human rights abuses. Secondly, victims of corporate human rights abuses have limited access to justice either in their home country or in the country where the company in question is registered. States should be doing more to provide access to justice for victims. It appears that there is a lack of robust reporting or monitoring criteria to demonstrate compliance. This is combined with a lack of analysis of the patterns of corporate abuse and their impact on individuals and their communities. These first major concerns relates to the human rights system in general, which may have created a need for additional mechanism such as established by the Guidelines. Thirdly, common weaknesses in voluntary initiatives include their limited coverage in terms of companies and rights, lack of robust reporting or monitoring criteria to demonstrate compliance, and failure to address the problem of companies who persist in their unwillingness to respect human rights. By all accounts, it is therefore inevitable to conclude that the implementation procedure under OECD Guidelines must be strengthened

¹⁴¹ Dutch NCP, A joint statement by the NCP, Adidas and ICN. See <<http://www.oesorichtlijnen.nl/documenten/jointstatement.pdf>>, accessed 10 January 2008, 1.

¹⁴² *Ibid.*

¹⁴³ See OECD Watch, *Five years on*, 33.

¹⁴⁴ *Ibid.*

in order for the system of NCPs to effectively regulate activities of multinational enterprises.

2. Merits of the Guidelines

The OECD Guidelines represent a landmark in corporate responsibility for human rights, although only regional in scope, for a number of reasons. The OECD Guidelines are the only international document on corporate responsibility adopted by the state governments. Moreover, the geographical scope of the OECD Guidelines extends beyond territory of the State Parties of the OECD, as they apply to all corporations of nationality of the State Parties, even when they operate in non-state Parties. The OECD Guidelines also add some weight to the emerging regulation of corporate responsibility at the international level. In addition, the States parties are obliged to establish NCPs, which offer anyone possibility to submit complaint for the violation of the OECD Guidelines. The complaints procedure offers the real *fait accompli* of the Convention. In doing so, the NCPs contribute to the fulfillment of the objective of multinational enterprises to respect the human rights of those affected by their activities.

There is growing evidence that the Guidelines are becoming and important, and indeed the only one, international tool for corporate responsibility for FHRs. First of all, the complaints mechanism under OECD Guidelines is the only existing international mechanisms for regulating corporations. Needless to say, it does not have a judicial character and some would also argue that it does not have quasi-judicial character. More importantly corporate responsibility for fundamental human rights is not part of reality of international society. It appears that approach relating to facts is therefore possible. In this regard, OECD Watch members in non-adhering countries dismiss the view, often put forward by business groups in OECD countries, that the Guidelines' principles and standards are inherently inappropriate for developing countries. Indeed, they have expressed interest in using the Guidelines as a potential tool of empowerment to help strengthen their ability to address corporate social and environmental responsibility issues with companies and their own governments.

3. Proposals

The present article has argued that the problems are all surmountable by strengthening the existing system of the NCPs. In this regard, four proposals can be made towards enhancing implementations mechanism under Guidelines. First, it would appear possible to translate complaints mechanism under the OECD Guidelines into quasi-legal employment tribunal to deal with complaints. A proposal along these lines has been submitted for a model NCP.¹⁴⁵ To this end, an independent and impartial supervisory mechanism within the framework of the OECD Guidelines should be developed at the national level, possibly in the form of national ombudsman for business and human rights.¹⁴⁶ This ombudsman would represent the interest of the public by investigating and addressing complaints by anyone against the work of respective NCPs. The Ombudsman offers an alternative means for holding them to

¹⁴⁵ Tim Steinweg and Joris Oldenziel, The OECD Guidelines for Multinational Enterprises: A modest proposal, *The Ethical Corporation*, 7 August 2007. <<http://www.ethicalcorp.com/content.asp?ContentID=5299&ContTypeID=2>>. Accessed 10 January 2008.

¹⁴⁶ See OECD Watch, *Five years on*, 47.

account, since NCPs are part of the public administrations and therefore within its jurisdiction. On the other hand, such proposal may also seem over bureaucratic when it would perhaps be better to change the internal workings of the NCPs rather than adding an extra layer.

Secondly, NCPs will have to ensure that the company actively participates in the complaint process. Good administration requires compliance with legal rules and principles, including fundamental rights. It is important to recognise that NCPs are there to serve also to the victims and that such service may contribute to good administration. Another important part of such service would be to acknowledge mistakes where they occur and to put matters right if possible. The NCPs must do a better job encouraging victims and corporations to find solutions to the conflict (this seems to be a repetition). An alternative proposal has been to make NCPs responsible to national parliaments.

Thirdly, the NCPs should have a better role in promoting the content of Guidelines and, finally, ensuring transparency and accessibility. Finally, irrespective of the structure adopted, for the instrument to work, the NCPs has to be informed, authoritative and command the confidence of all parties. That said the revision of the text of the Guidelines and the Procedural Guidance would be the most appropriate solution. It is in the interest of all of actors to do so. More importantly, it is the responsibility of OECD Member States to do so. As to the discussion of the status the OECD Guidelines and NCPs as a forum to hear complaints against multinational enterprises, it appears that any such right is, at best, emerging.

Many criticize the OECD Guidelines for its vague wording and grand ambitions which have proved difficult to implement effectively. A good way to remedy this drawback would be to seriously reform the OECD Guidelines so as to be clear about what effect new provisions would have, and how such provisions would be interpreted and given effect in various common and civil law jurisdictions. The global business is international. To effectively limit its scope, an international framework is essential. At present, one of the best means to enforce obligations of corporations at international level is to comply with OECD Guidelines. Another proposal would be to turn the OECD Guidelines in a proper international treaty along the line of the OECD Convention on Bribery and Corruption. This Convention requires each party in Article 2 'to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official'.¹⁴⁷ This passage could be translated in the human rights context in the following way: each state party is obliged to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for human rights violations by or involving corporations. In this light, possible sanctions which might be imposed upon legal persons for human rights violations by or involving corporations would be the following: a judicial winding-up order, exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities and placing under judicial supervision.

It is important that victims have a wide range of complaints mechanisms at their disposal. Secondly, the jurisprudence of respective NCPs does not provide conclusive guidance. What is more, the limited guidance on human rights appears to point in different directions.

¹⁴⁷ OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions, 1997. Opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999).

The OECD Guidelines do refer to human rights obligations of corporations; however, it appears that NCPs do not consider such obligations as legally binding. In this regard, the text of the Guidelines should be framed in more mandatory terms in the next revision of the Guidelines. Thirdly, it appears that the role of the Guidelines must be qualified in relation to the existing legal, regulatory or administrative procedures of the host countries. In the light of these considerations, proposals have been submitted arguing for transformation of the existing NCPs in a quasi-judicial panel in the form of an employment tribunal. Fourthly, given that now already more than forty countries adhere to the OECD Guidelines, in future national courts may have to pay heed to their contents when determining issues of public interest in litigation involving multinational enterprises. Finally, to be sure, full potential of OECD Guidelines has yet to be realized. It is however necessary to look beyond OECD Guidelines to other mechanism for regulation of corporate behavior.

Adoption of such international convention would surely be a difficult task, but the alternative is the current system which leaves victims of human rights violations by or involving corporations empty-handed. Perhaps the greatest obstacle to progress has been the pessimism the problem presents. No national jurisdiction has so far been able to satisfactorily solve the problems at the national level though some excellent headway has been made on the problem. The difficulties are very real, but the law can do a much better job of protecting human rights of individuals, and increasing their access to justice. A new regulatory framework seems an aggressive strategy, and one that, if implemented effectively, could positively impact the regulation of corporation.

4. Towards a Model National Contact Point?

NCPs play a seminal role in the implementation of the OECD Guidelines. They are national organs where problems are dealt with on a quotidian basis and most visible sign of state commitment. There are, however, huge discrepancies between different government commitments. Whereas the Dutch government, for example, funds its NCP with substantial financial resources,¹⁴⁸ in other OECD member states NCP obligations are performed within daily operations of public administrations.

A seminal dimension of NCPs is its structure. It may appear that NCPs perform two conflicting functions: firstly, promotion the interests of corporations and, secondly, independent examination of complainants submitted against the companies. Neither of the two functions of NCPs can stand in isolation from the other. It appears that the NCPs should be modeled along the examples of the structures and procedures, which were recently introduced by the Dutch and British NCPs. In this context, the UK NCP has in 2007 undergone significant changes. First, the NCP has been transformed into a multi-department unit, consisting of officials from the Foreign and Commonwealth Office, Department for International Development and Department of Trade and Industry, which function as Secretariat for the NCP.¹⁴⁹ More importantly, the UK government established a Steering Board to monitor the work of the NCP. In this context, a senior official of the

¹⁴⁸ OECD Watch Report notes that Dutch National Contact Point receives 900,000 EUR for three years plus two full time staff. See OECD Watch, *The Model National Contact Point (MNCP): Proposals for improving and harmonizing the procedures of the National Contact Points for the OECD Guidelines for Multinational Enterprises*, October 2007, 8.

¹⁴⁹ See UK government, Corporate social responsibility, < <http://www.csr.gov.uk/oecd1.htm>>, accessed 8 Feb 2008.

Department of Trade and Industry heads the Steering Board, which also includes external members drawn from NGOs, business, employee relations.¹⁵⁰ Internal representatives of several governmental departments are also represented.¹⁵¹ In this light, the Dutch NCP model may offer an alternative solution. The Dutch NCP works independently, whereas governmental officials provide guidance and support.¹⁵² OECD Watch suggests that a long-term objective is that 'the Model NCP is an expert quasi-legal panel with sufficient autonomy to reach decisions and make recommendations, chaired by a senior judge'.¹⁵³ Such mechanisms set up to secure compliance and oversights with the OECD Guidelines represent a novel approach for NCPs and may be developed throughout the countries. For more serious cases, parties involved in a specific instance (at least in common law systems) can seek a judicial review of NCP decisions. OECD Watch suggests that experience has shown that parliamentary scrutiny of the performance of NCPs has been effective.¹⁵⁴

VI. Conclusion

The regulatory framework for corporate responsibility on the international level remains unclear. Implementation procedures of the OECD Guidelines embody the difficulties that arise from this lack of clarity. First, although the Guidelines are not free from some ambiguity, the possibility of potential international enforcement mechanism must be welcomed.

Each of examined frameworks has its own strengths and weaknesses. In this regard, the only inter-state legal instrument directly addressing corporations and human rights are the OECD Guidelines for Multinational Enterprises, which stipulates that multinational enterprises have to respect host governments' international legal obligations. All international documents employ indirect methods of enforcement concerning corporate obligations and it has, however, also become clear that international initiatives are a far cry from establishing a conclusive test in identifying corporate human rights obligations. As noted, most of the international documents require corporations to respect human rights. In contrast, it would be highly controversial to claim that there is that the only solution is the establishment of a World Court for Human Rights, which could also hear claims against corporations. Such development appears highly unlikely due to the current *real politik* of world powers. Because of lack of available alternative, enforcing the OECD Guidelines is a necessary tool for regulation of multinational enterprises in international arena.

Read together, these mechanisms leave much room for improvement. That said, even if all NCPs would operate excellently, it appears that their influence would still remain limited. The question therefore arises whether the content and the language of the Guidelines needs to be adjusted so that it remains credible to the problems of today and tomorrow and what could be done to ensure their efficient implementation. It appears that more needs to be done to increase public exposure of the Guidelines and emphasize that they can make a

¹⁵⁰ See *Report by the Chair, 2007 Annual Meeting of the National Contact Point*, 19-20 June 2007, p. 5.

¹⁵¹ *Ibid.* For example: Attorney General's Office, Department for Environment, Food and Rural Affairs, Department for Constitutional Affairs, Department for International Development, Department for Work and Pensions, Export Credit Guarantee Department, Foreign Office, UK Trade and Investment and the Scottish Executive.

¹⁵² See OECD Watch, *Five years on*, 8.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* 7.

substantial contribution to the protection and promotion of FHRs and also to the fair global economy.

The proposals made in this article are far from being radical and they do not require a major overhaul of regulation of corporations in relation to human rights. Most of the normative framework under OECD Guidelines is already in place. That is why the bulk of this article analyzed current normative framework. What appears to be required is clarification of existing functions of NCPs in respective states. However, until attempts are made to reform regulation of corporations at international level, a vital part of victim's access to justice will remain absent. The hope is expressed that the existing embryonic nature of legal responsibility for human rights violations by or involving corporations will be developed in forth-coming decades. The present situation may appear grim; however consensus does appear to be growing for meaningful and continued reform. Even in today's globalized world certain conduct by corporations, should not be tolerated. Human rights obligations delimit the minimum standards of corporate conduct. By showing that corporations have human rights obligations and responsibility to respect, protect and fulfill human rights, this work is a modest attempt to argue for better regulation of corporation in relation to human rights.