SECTION III

MEDIATION MECHANISMS

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MEDIATION MECHANISMS

PART I

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the Guidelines) are part of the OECD Declaration on International Investment and Multinational Enterprises dating from June 21st, 1976.[1] They were drafted at a time of rapid change in the structure and operation of multinational enterprises, which were diversifying their activities and investing directly abroad whilst expanding into developing countries.

The Guidelines, by way of the voluntary and non-binding rules that they encompass, were presented as a necessary counterbalance to the protection of the rights of investors by the Organisation for Economic Co-operation and Development (OECD).[2] Given the growing impact of economic globalisation the Guidelines were revised in June 2000, notably so as to include references to the requirement of multinational enterprises to respect **human rights** and **combat bribery**.

The Guidelines constitute recommendations addressed to companies by the OECD member countries and other states having signed up to the principles. They are intended to act only as a 'benchmark' for multinational enterprises: compliance is not, therefore, obligatory.

The **31 member countries of the OECD**[3] adhere to the Guidelines, as do an **additional 11 other countries**: Argentina, Brazil, Egypt, Estonia, Israel, Latvia, Lithuania, Peru, Romania and Slovenia. Of the EU Member States only Bulgaria, Cyprus and Malta have yet to join. Egypt remains the only African nation to

1 Following the adoption of the revised OECD Guidelines for Multinational Enterprises on June 27th, 2000, the OECD published a booklet containing the revised text of the Guidelines and commentaries, the procedures for their implementation, and the Declaration on International Investment and Multinational Enterprises. The official text is available in English and French, as well as in Arabic, German, Chinese, Korean, Spanish, Hungarian, Polish, Slovak, Swedish, Czech and Turkish. Other translations are available on the websites of adhering states. www.oecd.org/dataoecd/56/36/1922428.pdf

2 J. Karl, "The OECD Guidelines for Multinational Enterprises", in, *Human Rights Standards and the Responsibility of Transnational Corporations*, (ed). M.K. Addo, Kluwer Law International, The Hague, 1999, p. 89.

3 Australia, Austria, Belgium, Canada, Chile, Korea, Denmark, Spain, USA, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, South Africa Netherlands, Poland, Portugal, Czech Republic, Slovakia, United Kingdom, Sweden, Switzerland, Turkey.

have signed up to the Guidelines. **Companies present in all adhering states, operating in or from their territories, are covered by the Guidelines (including, furthermore, their operations in countries that have not adhered to the Guidelines).**[4] According to an OECD study in 2005, the territories of adhering states account for around 90% of foreign direct investment and host 97 of the top 100 largest multinational enterprises.[5]

The Guidelines have been translated into 24 languages; moreover, 22% of executives at multinationals cite them directly as the international benchmark.[6]

While the Guidelines are aimed at companies, the acceding states bear the ultimate responsibility to promote their application and ensure that they influence the behaviour of companies operating either internally, or directly out of, their territory.

Governments adhering to the Guidelines should not use them for protectionist purposes, nor exploit them in a way that calls into question their comparative advantage over other countries where multinational enterprises invest.[7] This last point expresses the ambiguity of the Guidelines, touching on the complexity of the OECD's predicament in having to 'contribute to development' just as much in industrialized countries as in the developing economies.

The Guidelines are divided into three parts: the Guidelines themselves (Part I), their procedures for implementation (Part II) and the commentaries of the Investment Committee that relate to the Guidelines and their implementation (Part III).

The first part of the Guidelines focuses on ten chapters covering the following topics:
– I. Concepts and Principles
– II. General Principles
– III. Disclosure
– IV. Employment and Industrial Relations
– V. Environment
– VI. Combating Bribery
– VII. Consumer Interests
– VIII. Science and Technology
– IX. Competition
– X. Taxation

4 OECD, OECD *Guidelines for Multinational Enterprises*, June 27, 2000, Chapter I, § 2, p. 14.
5 OECD, OECD *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2005 - Report of the President, meeting 15-16 June 2005*, 2005 (Note: At that point in time the Guidelines counted 39 states as adherents).
6 OECD, *Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises*, p.7, www.oecd.org/dataoecd/54/17/34896809.pdf
7 OECD, *Guidelines ..., op. cit.*, Chapter I, § 8, p.13.

The second part focuses on the procedures for implementing the Guidelines. In particular, it establishes a mechanism for the resolution of issues pertaining to “specific instances” for any interested party that considers a company has failed to respect the Guidelines within the context of its activities.

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CHAPTER I

Content and Scope of the OECD Guidelines

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What are the rights and requirements set by the Guidelines?

1. Human rights

Chapter II focuses on the "General Principles". Since the Guidelines' revision in June 2000, chapter II focuses particularly on the **respect and protection of human rights by multinational enterprises** in their operations. It confirms the importance for multinational corporations to consider fundamental rights of those impacted by their activities.

MAIN RECOMMENDATIONS RELATING TO THE RESPECT AND PROTECTION OF HUMAN RIGHTS BY MULTINATIONAL ENTERPRISES:

"Enterprises should take fully into account the established policies in the countries in which they operate, and consider the views of other stakeholders. Therefore, enterprises should: [...]

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments. [...]
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues. [...]
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines. [...]"

The scope of the application of the recommendations on human rights is potentially broad. Allegations of human rights violations under the "specific instances" mechanism concern both civil and political rights and economic, social and cultural rights.

Amongst the violations examined have been the following concerns:
– Right to life and prohibition of torture and arbitrary arrests[8]
– Right to health, nutrition, housing, education and standard of living[9]
– Right to receive and share information and freedom of expression[10]
– Right to non-discrimination, rights of indigenous peoples and prohibition of forced evictions[11]
– Prohibition of child labour, elimination of forced labour, right to education and non-discrimination[12]
– Children's rights, prohibition of arbitrary detention and rights of asylum seekers[13]
– Access to effective remedies[14]
– Crimes against humanity and war crimes committed by a private security company[15]

Regrettable, though, are the use of conditional forms and the lack of specific principles relating to respect for human rights by companies beyond the sphere of employment and labour (covered in Chapter IV).

One of the weaknesses of the Guidelines is that they enjoin enterprises to respect human rights in conformity with the international obligations and commitments of the host country, **without mentioning the obligations that derive from the company's country of origin.**

2. Fundamental labour rights

Respect for the human rights of those impacted by the activities of companies is framed principally in terms of employment and industrial relations. These rights are **addressed in Chapter IV of the Guidelines separately from the issues of human rights**.

8 NCP Norway, *Aker Kvaerner ASA*, 2005.
9 NCP Belgium, *George Forrest International Belgium and OM Group*, USA, 2004.
10 NCP Canada, *Ascendant Copper*, 2005.
11 NCP France, *Electricité de France (EDF)*, 2004.
12 NCP Germany, *Bayer AG*, 2004.
13 NCP Australia, *Global Solutions (GSL)*, 2006.
14 NCP Netherlands, *G-Star,* 2007.
15 NCP United Kingdom, *Avient Ltd.*, 2004.

In compliance with the obligations specified by the relevant ILO conventions, the Guidelines establish **four basic obligations toward workers**:[16]

- **Freedom of association, the right to collective bargaining** and the right to the participation and consultation of workers (including those practices which facilitate the exercise of those rights, such as: encouraging the negotiation of collective agreements, the provision of information as to the conditions of employment, and a guarantee against the use of employee transfer as a threat, etc[17])
- **Abolition of child labour**[18]
- **Elimination of all forms of forced or compulsory labour**[19]
- **Non-discrimination** in employment and occupations (notably in hiring, dismissal, remuneration, promotion, training and retirement)[20]

In addition, companies are called upon to take the necessary measures to ensure that the health and safety standards of the workplace are "not less favourable than those observed by comparable employers in the host country."[21]

Another set of provisions invites businesses to employ local personnel and provide, without discrimination, training with a view to improving skill levels.[22]

3. Recommendations relating to disclosure

The issue of multinational enterprises publishing information to be made available to employees, local communities, special interest groups, and the public at large has been highlighted in the Guidelines on the basis of its financial value (Chapter III).

- *Financial disclosure* – accurate and relevant information should be disclosed in a timely manner on all material matters regarding the corporation, including the "financial situation, performance, ownership, and governance of the company."[23]

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16 OECD, *Guidelines ..., op. cit.,* Commentaries, § § 21-25, p. 44-45.

17 *Ibid*., Chapter IV, § § 2, 7 and 8, p. 17-18.

18 See ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, adopted in 1998; ILO, *Convention No. 182 on the Worst Forms of Child Labour*, adopted on 17 June 1999, entered into force in 2000.

19 See ILO, *Convention No. 29 on Forced Labour,* adopted in 1930, entered into force in 1932; ILO, *Convention No. 105 Abolition of Forced Labour,* adopted in 1957, entered into force in 1959.

20 See ILO, *Convention No. 111 concerning Discrimination (Employment and Occupation)*, adopted in 1958, entered into force in 1960 (The text provides a non-exhaustive list of grounds including «race, color, sex, religion, political opinion, national extraction or social origin «), *OECD, Guidelines ..., op. cit.*, Commentaries, § 24, p.44 (The full list of grounds of discrimination such as «marriage, pregnancy, maternity or paternity), OECD, *Guidelines ..., op. cit.,* Chapter IV, § 1, p.17; ILO, *Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted in 1977, amended in 2000.

21 OECD, *Guidelines ..., op. cit.,* Chapter IV, § 4, p.17-18.

22 *Ibid*., Chapter IV, § 5, p.18.

23 *Ibid*., Commentaries, § 13, p.42.

– *Non-financial disclosure* – companies are also encouraged by the Guidelines to disseminate pertinent information of a non-financial nature, especially in areas where "reporting standards are still emerging."[24] This includes disclosure regarding:

- the company's aims;
- social, environmental and risk reporting;[25]
- risk management systems;
- other critical issues concerning employees and other stakeholders connected to the company.

This may include, for example, "information on the activities of subcontractors and suppliers or of joint venture partners."[26] Companies are also encouraged to **publicly state principles or rules of conduct**, including information on their social, ethical and environmental policies and other codes of conduct to which the company subscribes (with respect to the countries or entities to which they apply). Companies are also encouraged to report on their performance measured against these standards.

Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Enterprises may take special steps to make information available to communities that do not have access to printed media, especially "**poorer communities that are directly affected by the enterprise's activities**."[27]

As regards disclosures specifically intended for workers (see Chapter IV), companies are encouraged to inform workers when they envisage making changes to their operations that may have a significant impact on the livelihoods of their employees (for example, in the case of closure of an entity involving collective redundancies). In particular, they should provide reasonable notice to representatives of employees and, where appropriate, to the relevant government authorities; co-operating with them "so as to mitigate to the maximum extent practicable adverse effects"[28] and, ideally, giving stakeholders prior notice before a final decision is taken.[29]

24 OECD, *Guidelines ..., op. cit.*, Commentaries, § 14, p.42.
25 *Ibid*.
26 *Ibid*.
27 OECD, *Guidelines ..., op. cit.*, Commentaries, § 17, p. 43.
28 *Ibid*., Chapter IV, § 6, p. 18.
29 *Ibid*., Commentaries, § 29, p. 46.

4. Environmental protection

Three distinct axes structure the principles in the field of environmental protection (Chapter V of the Guidelines):[30]

Environmental management system

The Guidelines adopt a three-pronged approach that encourages multinational enterprises to establish an environmental management system, which should feature:[31]
– Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
– Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives;
– Regular monitoring and verification of progress toward environmental, health and safety objectives.

Additionally, companies are encouraged to continually seek to improve corporate environmental performance[32] with regard to both operating procedures and in the development and provision of products or services. In a similar vein, they should research ways to improve environmental performance and promote higher levels of awareness among customers as to the implications of using the company's products or services.

Companies are requested to provide adequate education and training to employees in environmental health and safety matters.[33] Enterprises are also encouraged to work to raise the level of environmental performance in all parts of their operations, even where "this may not be formally required by existing practice in the countries in which they operate."[34]

Communications on environmental matters

Companies are also required to be transparent in their communication of information[35] regarding:
– Providing the public at large and employees with adequate information concerning **the environmental, health and safety impacts of their activities**;

30 OECD, *Guidelines ..., op. cit.*, Commentaries, § 30, p. 46.
31 *Ibid.*, Chapter V, § 1, p. 19.
32 *Ibid.*, Chapter V, § 6, p. 20.
33 *Ibid.*, Chapter V, § 7, p. 20.
34 *Ibid.*, Commentaries, § 40, p. 48
35 *Ibid.*, Chapter V, § 2, p. 19.

– **Consulting**, in a timely manner, the **relevant stakeholders** (employees, clients, suppliers, contractors, local communities and the public at large) as regards the company's policies on the environment, health and safety.[36]

The precautionary principle

Invoking the precautionary principle that emerged from the Rio Declaration[37] in 1992, the Guidelines call on companies to:

– **Assess**, and address in decision-making (where appropriate via the **preparation of a suitable environmental impact assessment**) the environmental, security and health impacts of the proposed activities;[38]

– **Adopt effective measures** to prevent or reduce the threat of serious harm to the environment and to health and safety (noting that the lack of full scientific certainty should not be a reason for postponing cost-effective measures to prevent or minimise such damage);[39]

– **Maintain contingency plans** to prevent, mitigate and control serious environmental and health damage from their operations, and adopt mechanisms facilitating prompt reporting to the competent authorities.[40]

5. Combating bribery

Companies are encouraged to participate in the fight against corruption and are referred to the OECD Convention on Action against Corruption or Foreign Public Officials in International Business Transactions and its commentary.[41]

6. Consumer protection

Companies are encouraged in this area to comply with fair and honest practices[42] in their commercial business, marketing and advertising activities, and to take all reasonable steps to ensure the safety and quality of goods or services they provide.[43]

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36 OECD, *Guidelines ..., op. cit.*, Commentaries, § 35, p. 52.

37 UN, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 3-14 June 1992. Principle 15 of Rio Declaration states: "To protect the environment, precautionary measures should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be an excuse for postponing the adoption of effective measures to prevent environmental degradation."

38 OECD, *Guidelines ..., op. cit.,* Chapter V, § 3, p.19.

39 *Ibid.*, Chapter V, § 3, p.20.

40 *Ibid.*, Chapter V, § 5, p. 20.

41 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, www.oecd.org/dataoecd/4/18/38028044.pdf

42 OECD, *Guidelines ..., op. cit.,* Chapter VII, § 4, p. 22.

43 *Ibid.*, Chapter VII, Preamble, p. 22.

Enterprises are urged to develop **honest business practices**[44] and respect the **right of consumers** to privacy and the protection of their personal data.[45]
More specifically, the Guidelines develop the obligation to inform consumers, and to make available transparent and effective means[46] to ensure the health and safety of consumers so as to allow them to make informed decisions.

For more information regarding the use of legislation protecting consumers, see section V on the use of voluntary commitments for greater accountability.

The scope of the Guidelines: how far does corporate responsibility extend?

Whilst they are addressed to multinational enterprises, the Guidelines do not in fact provide a precise definition of this term.[47] Chapter I, section 3 merely states that in general these usually comprise:"Companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities)."[48]

Several criteria, stemming from both the Guidelines and the practice of NCPs and the committees, define the extent of a company's responsibilities.

44 *Ibid.*, Chapter VII, § 4, p. 22.
45 OECD, *Guidelines ..., op. cit.*, Chapter VII, § 5, p. 26. In terms of privacy, section 52 of the Commentaries suggests that companies refer to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.
46 See also, United Nations, *Guidelines for Consumer Protection*, New York, adopted in 1999, revised in 2003 ; OECD, *Guidelines for Consumer Protection in the Context of Electronic Commerce*, adopted in 1999; *OECD Guidelines ..., op. cit.*, Commentaries,§ 50, p. 50.
47 OECD, *Guidelines ..., op. cit.*, Chapter I, § 3, p. 12.
48 *Ibid.*, Chapter I, § 3, p. 12, OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, October 31, 2001 (DAFFE / IME / WPG (2000) 15/FINAL): the clarifications provided on Chapter 1, Concepts and Principles, in October 2001 follows this approach in stating that: "These arrangements can include traditional international direct investment based on equity participation, or other means which do not necessarily include an equity capital element. Majority ownership is not the exclusive form of linkage between two companies in different countries which allows one to exercise a significant influence over activities of others. Accordingly, an entity may be considered part of a multinational enterprise without necessarily being a majority owned subsidiary. The sharing of knowledge and resources among companies or other entities does not in itself indicate that such companies or entities constitute a multinational enterprise." www.olis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF

1. The "sphere of influence" and supply chains

Multinational enterprises are required to respect the Guidelines **across their operations worldwide**. Different criteria are applied to determine the extent of an enterprise's responsibilities toward its subsidiaries or other entities overseas.

The recommendation of Chapter II, section 10 of the Guidelines addresses the issue of supply chains. It articulates the aspiration that the principles of the Guidelines proliferate through a **viral effect** by engaging enterprises so as to "**encourage, where practicable, business partners, including suppliers and sub-contractors**, to apply principles of corporate conduct compatible with the Guidelines."[49] The Commentary pertaining to this recommendation does however recognises **practical limitations in the capacity of enterprises to influence the conduct of their business partners**:[50]
"[The influence]… is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners… Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships."[51]

Thus, the **sphere of influence** an enterprise exercises over another is the **determining factor** in establishing the extent of its responsibility vis-à-vis the Guidelines. This influence can assume several forms:
- Through direct influence, expressed via command: this concept affirms that an enterprise bears a responsibility to ensure that every entity which it either *de jure* or *de facto* controls respects the Guidelines to the same extent as the enterprise itself;
- Stemming from other business practices, namely those pertaining to structural characteristics: such as leveraging market power[52] or other market arrangements (for example, accreditation programmes and product tracing systems that ensure supplier accountability for particular aspects of their performance).[53]

The Sphere of Influence
In relation to the case of *ANZ Bank* funding the logging company RH in Papua, New Guinea, the NGOs noted that the NCP only undertook a formal analysis as to the bank's capacity to influence its client noting that the bank did not hold any position in the organs of the company RH.[54]

49 OECD, *Guidelines ..., op. cit.*, Chapter II, § 10, p.14.
50 *Ibid.*, Commentaries, § 10, p.41.
51 *Ibid.*
52 Companies having market power vis-à-vis their suppliers may be able to influence business partners' behaviour even in the absence of investment giving rise to formal corporate control.
53 OECD, *Report by the Chair of the Annual Meeting of National Contact Points*, 2003, p. 26. www.oecd.org/dataoecd/3/47/15941397.pdf
54 Y. Queinnec, *Les principes directeurs de l'OCDE à l'intention des entreprises multinationales. Un statut juridique en mutation*, Sherpa, June 2007, p. 31.

NGOs and trade unions contend that a restrictive interpretation is contrary to the Guidelines' commentary, believing that it is the **capacity to influence business partners** in **practice**, in contrast to mere formal duties, that must be taken into account. A company should be held responsible in situations "where it is reasonable to expect the business in question to engineer its processes and to structure its relations with business partners and suppliers in such a way as to be able to influence them."[55]

At the annual meeting of the NCPs in 2008 John G. Ruggie (Special Representative of the Secretary General of the United Nations on Human Rights and Transnational Corporations) stressed the need for companies to take into account **human rights performance of both current and potential business partners,** and also to consider the **possible adverse impacts of their own purchasing practices.**[56] These requirements stem from the standard due diligence process that a company should implement.

Assessments may vary between NCPs and are established on a case-by-case basis that "takes account of all factors relevant to the nature of the relationship and the degree of influence."[57]

2. The principle of the "investment nexus"

In 2003 CIME issued a declarative statement that introduces a new criterion in the application of the Guidelines: the **investment nexus** (referring to the capacity of enterprises to influence the conduct of commercial partners vis-à-vis conditions under which they are considered investors). This proposition relates uniquely to those associations resembling that of an investment like relationship.[58]

The introduction of the concept of an "investment nexus" by CIME has been strongly criticised.[59] In practice, NCPs frequently use the requirement of an investment link rather than apply the concept of an influential relationship. Several specific instances cases have been rejected as they could not demonstrate that the company had an "investment relationship" with its suppliers.[60]

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55 OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points*, 2003 - *op. cit.* p. 27.

56 John Ruggie, Special Representative of the Speech of Secretary General of the United Nations on Human Rights and Transnational Corporations: Keynote Presentation, Annual Meeting of National Contact Points for the OECD, Paris, June 24, 2008, www.oecd.org/dataoecd/9/63/40933850.pdf

57 CIME, «The scope of the Guidelines and the investment nexus», 2003, www.oecd.org/document/3/0,3343,en_2649_34889_37356074_1_1_1_1,00.html

58 *Ibid.*

59 See note Sherpa, www.asso-sherpa.org

60 OECD Watch, C. Freeman, C. Heydenreich and S. Lillywhite, Guide to the OECD *Guidelines for Multinational Enterprises' Complaint Procedure – Lessons from Past NGO Complaints*, June 2006, p. 12, http://oecdwatch.org/publications-en/Publication_1664/at_download/fullfile

➧ The Concept of an Investment Nexus as interpreted by the Dutch NCP – Chemie Pharmacie Holland BV

In 2003, the Institute for South Africa in the Netherlands (Niza & Co.) brought together a number of NGOs, including Milieudefensie and Oxfam Novib, to file a complaint with the Dutch NCP against the company Chemie Pharmacie Holland BV (CPH). It was accused of having contributed, via its US business partner Eagle Wings Resources International (EWRI), to illegally exploiting mineral resources at the time of the conflict in eastern Democratic Republic of the Congo between 1998 and 2002. Several principles of the Guidelines had alledegely been violated by CPH; namely Chapter II, sections 10 and 11; Chapter IV, sections 1(b) (c) and 4 (b) and Chapter V, sections 2 and 3.

The Relationship between CPH and EWRI

The offices of EWRI were situated in Bukavu (in eastern DRC), Bujumbura (Burundi) and in Kigali (Rwanda). Suppliers were paid following confirmation of small shipments of minerals made to the offices of EWRI. EWRI then sent the shipments to Kigali. CPH then took over the transportation of the minerals from Kigali to their final destinations via Rotterdam. CPH was also responsible for financing the transactions: the money transfer from Kigali to Bujumbura being made by order of EWRI, who then proceeded to pay the suppliers. EWRI retained sole ownership over the goods as well as entrepreneurial risk over the commodities. CPH hired a controller agency to inspect the shipments at the request of EWRI. The relationship between EWRI and CPH lasted from October 1999 until March 2002.

In May 2004 the NCP published its decision. According to the NCP, there existed no investment like relationship between CPH and EWRI, nor between CPH and EWRI's suppliers. The reasons given were:

– The duration of the partnership between EWRI and CPH: 2 1/2 years
– The nature of the influence exercised by CPH over EWRI: even if CPH had acted as a facilitator of EWRI's operations by way of logistics and through financing, it was never the owner of the goods in question and had worked only on a commission basis. The controller responsible for inspecting shipments had been hired by CPH by order of EWRI.

Novib and Niza expressed their displeasure with the findings in a press release on June 15th, 2004.[61] If, as had been claimed by the NCP, the business relationship between CPH and EWRI could only be regarded as a trade relationship and not as an investment relationship, this would reflect a misinterpretation of the Guidelines in respect of the provisions relating to supply chains. The NGOs stated that there should be a distinction drawn between the relationship between a parent company and its subsidiary and a relationship linking a company with its suppliers. In the latter case, the Guidelines may still be applicable in cases where there exists no direct influence (i.e. in the absence of a direct investment nexus). Furthermore, the NCP recognised that CPH could have done more to get information on the conditions under which mineral resources were being sourced, and yet it refused to apply the Guidelines in this respect. For Novib and Niza the sheer fact of embarking, over an

61 NOVIB & Niza, Press Release, 15 June 2004, http://oecdwatch.org/cases/Case_33/74/at_download/file

extended period, upon a regular stream of business transactions (as was the case between CPH and its partners) should constitute a conscious investment in the commercial relations between them. By relying only on their services, CPH explicitly assumed the risk of becoming dependent on its suppliers. All these factors should have led the NCP to acknowledge the existence of an investment nexus between these trading partners.

The Dutch NCP conducts reviews on a case-by-case basis. It has very carefully formulated the indicators that it takes into account to determine the degree of influence a Dutch company has on its foreign business partner. In cases where the Dutch company is not a shareholder, it focuses on:

– the duration of the commercial relationship between the buyer and the supplier;
– the percentage of the supplier's annual production that the buyer purchases;
– whether the products are labelled by the Dutch buyer (whether the product is sold as the buyer's own product);
– specific requirements of the buyer as to the methods of production, working conditions or environmental standards;whether the buyer supplies product designs, specifications or semi-manufactured goods and;
– the degree of contact between the Dutch company and local stakeholders (the government, trade unions, etc.).

In the ANZ case of October 2006 the Australian NCP also rejected the application on the grounds that "**an investment nexus presumes an acceptance of the risk**," which was not the case, according to the NCP, where a bank offers to guarantee the operations of its client. Whilst CIME has referred to the concept of "an investment like relationship", the Australian NCP determines there need exist a tangible investment link.

These restrictive interpretations appear to contradict the spirit of the Guidelines. Not only does the formulation of the Guidelines suggest that some "**flexibility be allowed when evaluating the influence of multinational enterprises**,"[62] but the Guidelines also explicitly address the **commercial dimension of activities** of multinational enterprises in which: "Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources" and promote sustainable development where "trade and investment are conducted in a context of open, competitive and appropriately regulated markets."[63]

62 The preface of the Guidelines states in paragraph 2 that "multinational companies designate a wide range of industrial and commercial procedures and organizational forms in which strategic alliances and closer links with suppliers and subcontractors tend to blur the boundaries of the enterprise." See also the paper of the Working Group of the OECD on the OECD Declaration on International Investment and Multinational Enterprises, quoted in RAID & SOMO, *OECD Watch Review of National Contacts Points for the OECD Guidelines 2003/2004*, p. 7-8, http://oecdwatch.org

63 OECD, *Guidelines ..., op. cit.*, Preface, §§ 4 and 5, p. 12.

3. The nature of business activities

Aside from the issues concerning the extent of a multinational enterprise's reach in respect of the criteria thus far discussed, analysing 'specific instances' cases reveals that within NCPs there remain questions as to the nature of business activities covered by the Guidelines.

In the specific instance case relating to BOTNIA, the Finnish NCP declined to apply the Guidelines in the context of **company export credits**. The NCP determined that the activities in question were regulated nationally by special legislation, rather than at the level of the OECD, and that the CIME commentary on investment nexus did not infer that the Guidelines be applied to special financing activities.[64]

This decision was strongly criticized by some organisations, who felt that the Finnish NCP had disregarded both the meaning and spirit of the Guidelines on the following grounds:[65]

– While the concerned companies' activity may fall within the remit of national laws, this should not preclude the Guidelines' application.

– The commentary provided by CIME "does not expressly (or implicitly) exclude export credit activity, rather, quite the opposite." It mentions that several governments (including that of Finland) refer in various ways to the Guidelines with regard to export credits or programmes involving promotion or guarantee of investments.[66]

In the specific instance case relating to ANZ, the Australian NCP adopted a narrow definition of business activities covered by the Guidelines. The NCP considered **that financial services** are not part of the supply chain, although financial services can be seen to be a clear feature of supply chains.

However, the Guidelines appear both pertinent and applicable in respect of the financial sector, as has indeed been highlighted in an OECD report.[67] The report stresses that the Guidelines can support the actions of financial institutions as regards corporate responsibility, in particular "with respect to relationships with suppliers and interactions with business partners." The Swedish NCP also confirmed the applicability of the Guidelines to the financial sector in the Nordea case of 2006 (see table at the end of this part).

64 OECD, Finland's NCP statement on the specific instance concerning the Orion paper mill factory project (Uruguay, Botnia SA) and Finnvera Oyj, 2006, www.oecd.org/dataoecd/28/27/39202146.pdf

65 Y. Queinnec, *op. cit.*, p. 32.

66 OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2003 – op. cit.,* p. 5. For a table showing country-by-country links between the OECD Guidelines and programs of export credit, foreign investment guarantees and investment promotions, see: Annual Report on the OECD Guidelines for Multinational Enterprises - 2006 Edition Conducting Business in Weak Governance Zones, Ed. OECD, 2006, p. 17

67 OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007 - Corporate Responsibility in the Financial Sector*, Ed. OECD, 2007, p. 123 s. www.oecd.org/publications

CHAPTER II

The mechanism for implementing the Guidelines

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What bodies are involved in the implementation of the Guidelines?

The **institutional mechanism** set up to promote respect for the Guidelines' principles is based on three main organs:
– The National Contact Points
– The Advisory Committees of employers federations and trade unions (BIAC and TUAC)
– The Investment Committee (formerly the Committee on International Investment and Multinational Enterprises - CIME).

1. The National Contact Points

The revision of the Guidelines in June 2000 introduced a new obligation for each adhering country to create a **National Contact Point** (NCP) according to the criteria that it be visible and accessible, while operating transparently and with accountability in its procedures.

NCPs have various duties. Specifically, they must **ensure the promotion of the Guidelines** at the national level, **resolve issues prompted by their implementation (via the 'specific instances' procedure)**, and assist civil society in contributing to the interpretation of the texts. The NCPs are also encouraged to collaborate with each other when needed.

The process of examining distinct issues, the so-called "specific instances" procedure, constitutes the **most important competency of the NCPs** with respect to multinational enterprises' responsibilities as regards human rights. It allows for trade unions and other interested parties to refer a case to the NCP where a company has failed to comply with the Guidelines (see below).

Structure of the NCPs

NCPs are **governmental agencies organised in various different forms**. They may, for example, be structured around a senior official; an administrative office headed by a senior officer, or be formed through the co-operation of representatives of various public agencies.[68] The Canadian NCP is an example of an inter-ministerial structure presided over by the Ministry of Foreign Affairs and International Trade, while the Italian NCP is established solely within the Ministry of Economic Development. Furthermore, NCPs can be comprised of just one public agency, or several; or they may be of a tripartite nature (formed by government, employees and companies), and might also formally include NGOs as stakeholders in their structure.

The NCP of the United Kingdom
In the United Kingdom the NCP is composed of officials from the Department for Business, Innovation and Skills (BIS) and is overseen by a steering committee composed of various government officials and four external members appointed by the Trades Union Congress, the Confederation of British Industry, the All-Party Parliamentary Group on the Great Lakes Region of Africa as well as NGOs.[69]

Despite the innovative nature this model of establishing NCPs by each adhering state represents, the functioning, efficiency and independence of the NCPs vary considerably, and indeed remain the subject of much criticism. Certain NCPs have adopted interesting practices and have demonstrated their concern to promote the principles of corporate social responsibility.

The British and Dutch initiatives stem from a desire to give greater transparency, independence and responsibility to the NCPs. This can be achieved through the involvement of stakeholders involved in the processes, allowing for the avoidance of conflicts of interest that arise within a governmental structure whose priorities can sometimes appear contradictory.

The NCP of the Netherlands
In 2007 the Dutch government undertook to restructure its NCP as a multipartite group, consisting of four individuals of different (non-governmental) backgrounds in addition to four government representatives of various ministries, charged with reviewing complaints. The curricula vitae of the independent members is available online.[70]

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68 OECD, *Guidelines ..., op. cit.*, Procedural Guidelines, Chapter IA, p. 37; For an overview of recent developments in the institutional arrangements of the various NPCs, see: OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007 - Corporate responsibility in the financial sector, op. cit*.

69 UK Department for Business, Innovation & Skills, The UK National Contact Point for the OECD Guidelines for Multinational Enterprises, October 2009, www.berr.gov.uk/files/file53566.pdf

70 NCP Netherlands, www.oecdguidelines.nl/ncp/organisation

Monitoring the function of the NCP via a steering committee incorporating stakeholders has become a priority for the United Kingdom.[71]

Lack of financial resources and permanent staff, hampering the proper functioning of a National Contact Point, is a recurrent problem for most NCPs.[72]

NCPs are required to prepare an annual report to the Investment Committee that communicates both the nature and results of its activities (including those relating to the procedures for 'specific instances').[73] These reports are submitted to the Investment Committee at the annual meeting of the NCPs.[74]

2. The Business and Industry Advisory Committee (BIAC)

The Business and Industry Advisory Committee is an independent body officially recognised by the OECD as **the representative body of business and industry**.[75] Composed of the main employers' organisations of member countries of the OECD, BIAC's mandate is to advise and counsel the business community and to make recommendations on policy matters pertaining to the OECD's work.

3. The Trade Union Advisory Committee (TUAC)

The TUAC (Trade Union Advisory Committee) is an international trade union organisation with consultative status to the OECD and its committees. It brings together 55 trade union affiliates in 30 countries and represents approximately 70 million workers.[76] As an international association, TUAC is the interface between trade unions and the OECD.

TUAC's main role is to hold regular consultations with the various OECD committees and member countries, **representing the position of the various trade unions** affiliated to the organisation.

TUAC is also charged with encouraging observance of the OECD Guidelines.

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71 Rights and Accountability in Development (RAID), The Corporate Responsaibility (CORE) Coalition and the Trades Union Congress (TUC), *Fit for Purpose? A Review of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises*, 2008.

72 ILO-OECD Conference on Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy, 23-24 June 2008, Paris, France, p. 11. www.oecd.org

73 OECD, *Guidelines ..., op. cit*., Procedural Guidelines, Chapter I-D, p. 35.

74 OECD, «OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points» www.oecd.org/document

75 BIAC, www.biac.org/

76 TUAC, *Users' Guide for Trade Unionists to the OECD Guidelines for Multinational Enterprises*, p.2 http://old.tuac.org/publicat/guidelines-EN.pdf

TUAC is required to **formulate recommendations** in a number of different areas, including with regard to the Guidelines. The organisation was prominent in calling for the reform of the National Contact Points and establishing a process for monitoring compliance with the Guidelines.

TUAC's Assistance to the Trade Unions
In 1997 TUAC intervened in the closure of Renault's Vilvoorde plant in Belgium, providing support to the company's workers to safeguard their rights. On this occasion TUAC was clear in its denunciation of the violation of the Guidelines by Renault management at Vilvoorde (notably, both on matters concerning the parent company-subsidiary relationship, and as regards giving sufficient notice to employees prior to the plant's impending closure).[78]

At the annual meeting of NCPs, TUAC presents an annual report based on consultations with trade unions as to their experience of the implementation of the Guidelines.[77]

Finally, TUAC plays an **important role in relation to the different trade unions of the member countries of the OECD**, both advising and intervening when the causes it promotes are challenged.

4. The Investment Committee

The Investment Committee was created in April 2004 following the merger of CIME (Committee on International Investment and Multinational Enterprises) and CMIT (Committee on Capital Movements and Invisible Transactions). The Investment Committee is the OECD body that **oversees the execution of the Guidelines**. It is also charged with both **promoting and improving the effectiveness** of these principles. The Investment Committee is composed of government representatives of member countries of the OECD. It has been assigned five specific tasks in relation to the Guidelines:[79]
– To respond to the questions concerning the interpretation of the Guidelines;
– Organising consultations with civil society representatives and states not adhering to the Guidelines;
– To publish clarifications regarding the interpretation of the Guidelines to ensure uniform understanding between the different countries (noting that such clarifications may be requested by member countries, TUAC and BIAC – though not by NGOs);
– Reviewing the Guidelines and procedures of implementation in order to ensure their relevance and effectiveness;
– To provide reports to the OECD Committee.

77 TUAC, *Users' Guide ..., op. cit.*, p. 5.
78 TUAC, "TUAC Statement on Renault and the OECD Guidelines for Multinational Enterprises", May 1997, http://old.tuac.org/statemen/communiq/psreno3.htm
79 OECD, "OECD Guidelines for Multinational Enterprises: Frequently asked questions", www.oecd.org

The Investment Committee may opt to **invite experts** (from the OECD, other international organisations, NGOs or from academia) to examine and report on either general topics or specific issues in particular areas of concern, such as child labour or human rights.[80]

However, the actual efficacy of the Investment Committee's actions in promoting respect of the Guidelines is **firmly in doubt**, where the clarifications it has been called upon to provide have often been formulated in such a way as to impart insufficient guidance to litigants.

The "Specific Instances" Procedure

The "specific instances" procedure establishes the means by which various concerned parties can **engage with the relevant NCP** where a particular company has failed to respect the Guidelines (see The scope of the Guidelines: how far does corporate responsibility extend?).

Who can file a complaint?

Any interested party – representatives of employers' organisations, trade unions, NGOs and individuals – can file a complaint with an NCP.

Complaints made by individuals still remain rather limited.[81] It is not a requirement that the complainant have a direct interest in the concern in order to be eligible to file a complaint with the NCP. Any individual or group of people from, for example, a village or community, or an employee, could therefore file a complaint through an NGO or trade union.

NOTE TO TRADE UNIONS

A trade union wishing to file a complaint should in the first instance contact its national body and the International Trade Secretariat and jointly explore what steps might prove helpful in resolving the dispute.[82] TUAC can then intervene at this point as an informal adviser to the parties.[83]

Depending on the outcome of these preliminary contacts, the trade union may then make contact with the **NCP of the country in which the breach of the Guidelines has occurred**. If the country in which the company is operating is not an adherent to the Guidelines nor an OECD member country, then the trade union should

80 OECD, *Guidelines ..., op. cit.*, Commentary on the procedures for implementation, §§ 27-28, p.60-61.

81 Complaints from individuals are still limited. See: OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2003, *op.cit.,* p.30.

82 TUAC, *User's Guide Guidelines ..., op. cit.*, p 6

83 *Ibid.*, p 8.

contact the NCP in the country in which the enterprise is based or has its subsidiary (if that state has signed up to the Guidelines).

Under what conditions?

The NCP can be engaged where there exists any question as to the compliance of a particular company operating within, or from, a state that is duty bound to ensure that the Guidelines are respected.[84]

Two reasons frequently given by NCPs for the **inadmissibility of complaints** are of particular note:
– The inadmissibility of a complaint based on the **definition of what constitutes a multinational enterprise**. Regarding this issue, please see the detailed discussion of the investment nexus and spheres of influence appearing earlier in this guide.
– Inadmissibility due to **ongoing judicial proceedings** in relation to the issue at hand. With increasing frequency NCPs are refusing to adjudicate a grievance where the matter is pending before a court. However, the text of the Guidelines does not stipulate that any parallel proceeding take precedence. The Investment Committee has allowed for some flexibility on this issue, while the NCPs generally handle the matter on a case-by-case basis, weighing up the advantages and disadvantages of a particular approach.[85]

Process and outcome

Process

The NCP will first conduct an initial examination as to the impact of the issues highlighted; it then determines whether they warrant further examination and responds to the parties responsible for raising them. The NCP will take into account, amongst other details, the identity of the party and their particular interest in the case; the relevance of the concern; the evidence provided to support the claims; and the manner in which similar issues have been handled at either a national or international level.[86]

84 Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises. A critical starterkit for NGOs*, August 2002, p. 9, www.milieudefensie.nl/globalisering/publicaties/ngotoolkit/OESO_toolkit_text_only.pdf
This document cites as an example the large number of legitimate complaints raised about the behaviour of transnational corporations established (or with branches) in OECD countries that operate in Burma (noting that Burma is neither an OECD member nor an adherent to the Guidelines).

85 For a study on the issue of "parallel proceedings", and a list of factors that might be considered by NCPs regarding specific instances subject to parallel proceedings (and related comments by BIAC, TUAC, RAID and The Corner House), see: OECD, OECD *Guidelines for Multinational Enterprises: Annual meeting of NCPs 2006 - Report of the President, meeting of 20-21 June 2006*, p. 16 and following and p. 74 and following.

86 Regarding the term "comprehensive review", see: OECD, *Guidelines ..., op. cit.*, Procedural Guidance, C-1, p. 34.

After examining the original submission, the NCP can take two courses of action:

Declare that the complaint is unfounded – a dismissal

Where the complaint is dismissed the NCP will inform the complainant/applicant as to the basis of the decision. In the case of a disagreement, and **where the party concerned is a trade union, it may contact the TUAC to determine whether the issue may be submitted to the Investment Committee**. If the Investment Committee considers that the complaint has merit, or if it believes that the NCP did not properly review the submission, it may either clarify the interpretation of the Guidelines and its procedures for implementation or make other recommendations to the NCP concerned. Unlike trade unions, **NGOs** unsatisfied with the decision **do not have recourse to lodging an 'appeal' with the Investment Committee**.[87] At best they can only ask the Investment Committee for further clarification on issues raised by the complaint. Several NGOs have indeed sought to invoke this right, though to date the Investment Committee has on each occasion refused these requests.[88]

Declare the complaint admissible

In this situation the **NCP should make every effort to ensure that the issues raised are resolved.**

If the matter raised merits more in-depth examination, or where, for example, issues arise in relation to countries not adhering to the Guidelines, the NCP will take steps to further its understanding of the points of concern. The NCP shall then consult the parties and, where appropriate, it will:
– Solicit advice from the relevant authorities and/or representatives from the business community, trade unions, NGOs and other experts (which may include either the appropriate authorities in non-adhering countries, or the management of the company in the home country).[89]
– Consult, as appropriate, the NCP in the other country (or countries) concerned.
– Seek the opinion of the Investment Committee when doubts exist as to the interpretation of the Guidelines with respect to the case.
– With the agreement of the concerned parties, offer to facilitate entry into non-adversarial and consensus-based dialogue, such as mediation or conciliation talks, to help resolve the issues of contention.

If the parties can reach an agreement the matter will be considered resolved.
If, however, no solution is found, the NCP will normally be obliged to issue a public statement.[90] The NCP may also make recommendations to the parties concerned.

87 C. Freeman et al, *op.cit.*, p. 21.
88 *Ibid.*, p. 22.
89 OECD, *Guidelines ..., op. cit.*, Commentary on the Implementation Procedures, § 20, p. 60.
90 TUAC, *Users' Guide..., op. cit.*, p 6.

The Duration of the Procedure

The time taken by the NCP to complete the procedure of investigating a specific instance case is on average 12 months, although in some instances the process has taken twice as long (even simply to decide as to the admissibility of the case).[91]

The Confidentiality of Proceedings

In general, in facilitating resolution of the issues raised, the NCP will take the necessary steps to ensure that both the business's and other party's sensitive material remains confidential.[92] While the procedures are under way, the confidentiality of the proceedings will be maintained. Following receipt of a complaint, any **information** or **documentation** received or exchanged between parties cannot normally be disclosed.[93]

At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain **confidential**, unless that other party agrees to their disclosure.

After consultation with the parties involved, the NCP will make publicly available the results of these procedures "unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines."[94] The publication of the results of inquiries varies according to the NCP. Some NCPs publish this information on their websites. Whilst some NCPs prefer not to divulge the name of companies involved in their reviews, others consider that such information need not remain confidential once the procedure has been completed. Furthermore, many of the complaints are never publicly communicated by the NCPs.

The confidentiality of the procedure remains an issue that is still debated. BIAC and certain NCPs[95] insist that the confidentiality rules be extended to all phases of the procedure (thus also including the initial filing of the complaint). They contend that statements made during the proceedings violate the Guidelines. The companies are of the view that the confidentiality of proceedings facilitates the mediation process.[96] On the other hand, publicity can be a useful means of applying pressure, helping ensure that the Guidelines are more effectively applied. According to the

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91 OECD Watch, OECD Watch - Five Years On: A review of the OECD Guidelines and National Contact Points, (ed.) P. Feeney, 2005, http://oecdwatch.org

92 OECD, *Guidelines ..., op. cit.*, Procedural Guidance, C-4, p. 34-35.

93 OECD Watch & SOMO, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, 2006, p.18, http://oecdwatch.org

94 OECD, *Guidelines ..., op. cit.*, Procedural Puidance, C-4 (b), p. 34.

95 Some NCPs advocate extending confidentiality to all phases of the procedure; see the Australian NCP's statements at : http://www.ausncp.gov.au/ and the British NCP's at: www.berr.gov.uk

96 OECD Watch, *The Confidentiality Principle, Transparency and Specific Instance Procedure*, 2006, p.3, www.raid-uk.org/docs/Guidelines/Trans_Conf_Brief.pdf

NGOs, the Guidelines do not impose a confidentiality that is absolute; rather they only explicitly protect sensitive company information relating to their business. The Guidelines' commentaries **require that a balance be struck between privacy and transparency**.[97] Whilst they stipulate that the procedure will normally remain confidential, the commentaries do not state that information of a secondary nature, such as the status of proceedings, cannot be disclosed.[98]

HOW TO FILE A COMPLAINT?

Legal representation is not required before the NCPs, therefore organisations can avoid financial expenses.[99] It is nonetheless important to note that companies are increasingly likely to engage legal counsel. Ironically, the companies have contributed toward this consensus-based mechanism attaining a quasi-judicial character.[100] Certain NCPs, such as the Dutch NCP, provide a prior advisory service to potential complainants: they can advise as to the likelihood of the filing being accepted, or may suggest how the submission might be improved.[101] This is what the Dutch NCP refers to as the optional preliminary consultation.

There is no definitive model for writing a complaint, though there exist certain essential elements that it must include:

- The identity of the complainant and their interest in the issue.
- The identity of the company concerned and a description of the activity forming the basis of the dispute.
- A reference to the Guidelines that the violation is said to breach.
- Information relevant to proving that the alleged violation of the Guidelines has occurred.
- The relevant laws and procedures relating to the case.
- An outline of how the case might be handled by national or international courts and the eventual fora in which parallel proceedings relating to the case might be heard.

97 OECD, *Guidelines* ..., 2000, § 19, p. 59, "Thus, although the C4 paragraph states that the work associated with implementation will normally remain confidential, the results will normally transparent." www.oecd.org/dataoecd/56/36/1922428.pdf

98 OECD, *Guidelines ..., op. cit.*, Commentary on the Implementation Procedures, § 19, p. 59.

99 It should be noted that many companies frequently employ legal counsel. Thus, for NGOs to refrain from doing so might contribute to an increasing inequality in terms of the legal resources available to the parties.

100 P. Feeney, "The Relevance of the OECD Guidelines for Multinational Enteprises to the Mining Sector and the Promotion of Sustainable Development", *The Center for Energy, Petroleum and Mineral Law Policy Journal 13*, vol.10, s.6, 2002, www.dundee.ac.uk/cepmlp/journal/html/vol10/article10-6.html

101 ILO-OECD Conference on Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy, op. cit., p. 11.

Elements extracted from a model complaint jointly composed by the NGOs Rights and Accountability in Development and Action Against Impunity for Human Rights, is shown below.[102] The guidance provided aims to group together all of the requirements the NCPs expect. To this list have been added some additional details and helpful clarifications. The greater the level of detail and precision within the complaint filed, the more likely its chance of both proving successful and being processed expeditiously.

1. Your details:

– Name of the person to be contacted
– Name of the organisation
– Address
– Telephone number/fax number
– Email address

2. Name and location of the National Contact Point (NCP)

3. Identify your organisation and state the basis for your complaint:

– Name of organisation; name of supporting parties and NGOs.
– Your petition to the NCP(s) of the country/countries in which the company is located.

4. List the paragraphs of the Guidelines that the company has violated:

– Read carefully the commentaries and the clarifications of the Guidelines so as to ensure you have a thorough understanding of the text.

5. Prepare a detailed and comprehensive presentation of your organisation and explain your interest in the case:

– Any person, whether an inhabitant, member of the community or employee affected by the activities of the company, may lodge a complaint against it through an NGO or a trade union.
– NGOs established in the same country as that of the parent company, and are representing people affected by the activities of the enterprise, may file a complaint directly against it.
– NCPs will not accept complaints where only the name of the filing organisation appears: they require more detailed information as to its role and the tasks it performs.

Example: 'The NGO has been working with communities affected by the activities of 'Company X' in ... since; the NGO is engaged in promoting ... for ...'

6. Provide relevant information relating to company location and structure:

Example: Company X has its headquarters in ... and operates in ... This company is owned by Y and Z, and is controlled by company W.

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102 ACIDH & RAID, *Guide to the OECD Guidelines for Multinational Enterprises and The Principles of the Extractive Industries Transparency Initiative (EITI) - Making a complaint against multinational companies in violation*, www.raid-uk.org/docs/Guidelines/Guide_to_Guidelines_FR.pdf

7. Provide relevant and detailed information on the alleged violations and their progression to date:

– Explain in detail the violations committed by the company: what, where, when, how - who is involved, and who is affected?
– The NGO must ensure that the information and evidence provided is both reliable and credible, and proves that the complainants understand 100% the problem they are experiencing.
– All information supporting the complaint must be attached.
– As best as is possible, you should also provide: precise details of the nature of the breach and the names of the parent company, subsidiary, supplier and location.[103]
– If the company's business involves a supply chain, provide and explain in detail the relationships and links.
– Do not hesitate to make a complaint even if all the information required cannot be provided, as it may be the case that it remains impossible to get all the necessary details.

8. Describe your contact with the company or other actors or institutions involved:

– Keep a journal noting how the complaint is progressing: retain copies of letters and emails (both sent and received), and note when meetings are held.
– Include any information relating to the company's responses.

9. Specify what information should be kept confidential and should not be disclosed to the company:

– It is very important to keep the names of witnesses and sources of documents confidential to prevent any form of retaliation.
– Confidential information must be clearly identified and acknowledged by the NCP before the complaint is actioned.

10. Explain your request and the actions you require of the company to resolve the issue at hand:

– In certain cases it can be important to explain your ideas as to what the company needs to do to solve the problem your complaint raises.
– In other cases it is best to discuss your proposals with the NCP and the company after the complaint has been accepted.
– Sometimes it is better to wait for the reaction of the company to the violations you have accused it of.

11. Explain what you expect from the NCP:

– Explain that you expect the NCP to process the complaint appropriately in a manner that is both fair and transparent.

12. Provide a numbered list of appendices:

– The evidence you provide must be easily accessible.

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103 TUAC, *Users' Guide ..., op. cit.*, p.8.

13. Specify the names and addresses of all the other recipients of the complaint:
– Other recipients may include: officials of the host country and those in the company's country or origin; other institutions.
– Send a copy of your complaint to OECD Watch: info@oecdwatch.org
– If your complaint refers to employment or labour issues, send a copy of your complaint to TUAC: tuac@tuac.org

14. Translate the complaint:
– The complaint must be written in the language of the NCP who receives it.
– If the complaint is sent to various NCPs, it must be written in a language that each NCP can understand.
– You can, in return, ask the NCP and the company to translate their documents.
– If a translation is too difficult to obtain you can submit the complaint in your language, though this may delay processing of your complaint.

Where should your complaint be sent?
– Your file must be submitted to the NCP of the country where the company in question operates or, failing that, to the country of origin of the company concerned.
– The list of the different NCPs can be found at the following address: **www.oecd.org/dataoecd/17/44/1900962.pdf**

Outcome

The NCPs perform mainly a **role of consultation and mediation**, the quality of which tends to vary considerably between them. The NCP's findings are not coercive and their endeavours reflect an approach that is **non-contentious** in respect of alleged violations. As non-judicial organs, **they cannot grant financial compensation to complainants, nor impose pecuniary sanctions on companies.**

Although they lack the capacity to enforce their judgments, **the mere fact that the NCP's conclusions are out in the public domain can have an influence on the conduct of the parties.**

One way in which the recommendations of the NCP could be given greater weight would be to link certain recommendations to government sanctions, most notably in relation to export credit programmes, overseas investment guarantees and inward investment promotion programmes. The effectiveness of the Investment Committee's actions on this issue remains questionable, though. It has adopted rather weak stances on issues, and its authority remains uncertain.

The relationship between the Guidelines and export programmes [104]
In the **United States** export credits and investment guarantees are reviewed as part of a co-operative effort in which the NCP works with the Export-Import Bank and the Department of Commerce. They provide information on the Guidelines to companies wanting to participate in their programmes providing support to US businesses overseas.
In **Canada** Export Development Canada (EDC) promotes corporate social responsibility standards in addition to the principles of the Guidelines. The EDC has linked its website with that of Canada's NCP.
In **Finland** an export promotion programme, adopted in July 2001, introduces "environmental and other principles" for "export credit guarantees." It "calls applicants' attention" to the Guidelines.

The NCPs in action in corporate-related human rights abuses

First Quantum Minerals

The First Quantum Minerals case is frequently cited as one of the first major successes of an NGO filing a complaint with an NCP.

The Canadian company First Quantum Mineral owned a subsidiary in Zambia by the name of Mopani Copper Mines. The subsidiary intended to expel from its area of operations local inhabitants, including both residents and squatters, in order to open a copper mine.

The Canadian branch of the NGO Oxfam filed the complaint in July 2001 with both the Canadian and Swiss NCPs (as a Swiss company, Glencore Int. AG, was also implicated in the offending activities). It alleged that the subsidiary Mopani had violated Chapter II, paragraph 2 of the Guidelines, which affirms companies must: "respect the human rights of those affected by their activities" consistent "with the host government's international obligations and commitments"; Chapter II, paragraph 7, regarding the development of practices that foster a relationship of mutual trust between the enterprises and the societies in which they operate; and paragraph 2(b) of Chapter V, in respect of communications and consultations with communities in terms of policies on the environment, health and safety.

In February 2002 the company First Quantum Minerals **agreed to stop the threat of forced evictions** and immediately suspended such evictions; it offered land to farmers, lowered property taxes and established a resettlement plan for the population.[105]

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104 OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2006, op.cit.*, p.8

105 Social Responsibility and Sustainable Development Research Chair ESG UQAM (Univ. Quebec), "Le Forum social mondial 2007 à Nairobi: bilan mitigé et remise en question au sein du mouvement altermondialiste", Oeconomia Humana, Special Edition World Social Forum 2007, vol. 5, No.3, March 2007, www.crsdd.uqam.ca/Pages/docs/pdfBulletinsOH/OeconomiaHumanaMars07.pdf

The Canadian NCP sent a final communication to the Canadian company (a copy of which was also sent to the Canadian NGO): it **congratulated the two parties for the spirit of co-operatio**n they had shown. The NCP also invited the company to maintain an open dialogue with the NGO and other groups concerned with the welfare of those affected by the mining company in Zambia. Throughout the process the Canadian NCP kept the Swiss NCP informed of the progress of events.[106]

➧ The illegal exploitation of natural resources in the Democratic Republic of the Congo before the Belgian NCP

In November 2004 a coalition of NGOs in Belgium (including FIDH) set in motion the specific instances procedure following a violation of the Guidelines by four Belgian companies that the NGOs suspected of being involved in the illegal exploitation of resources in the Democratic Republic of the Congo (DRC). The illicit trade was considered one of the principle factors in the ongoing armed conflict and a major obstacle to the country's reconstruction and development.

Several **UN experts' reports** on the illegal exploitation of natural resources from within the DRC[107] and a report of the Commission of Inquiry established by the Belgian Senate supported the NGOs' claims.

The Belgian companies cited were Cogecom, Belgolaise, NamiGems, and the Belgian division of George Forest International. The Belgian company Cogecom (now bankrupt) was accused of violating Congolese law and breaching the Guidelines by importing coltan and cassiterite from the DRC to Belgium, via Rwanda, and **directly participating in the financing of the Goma rebel movement**.

The complaint against Banque Belgolaise (an affiliate of Fortis Banque, which maintained a strong presence in the DRC) condemned the firm for not having in place the necessary measures to prevent money laundering. This failure undermined efforts to achieve sustainable development, impeded the observance of the principles of good corporate governance and limited development and implementation of effective management systems that would foster mutual trust between the bank and the business group in which it was involved.

More specifically, Belgolaise was implicated in facilitating the financial transactions of the Ugandan and Rwandan elite, who were also involved in exploiting the natural resources and other riches of the DRC. Belgolaise, in its legal capacity as a corporation, was indicted in Belgium in June 2004 for money laundering. The enquiry being conducted by the Belgian NCP was subsequently suspended, as was the investigation regarding Cogecom.

106 NCP Canada, "Specific Instances", www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng

107 UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, reports, April 12, 2001, S/2001/357 and addenda dated 13 November 2001, S/2001/1072, May 22, 2002, S/2002/565, October 16, 2002, S/2002/1146, October 23, 2003.S/2003/1027.

As for the Belgian company NamiGems, which was actively involved in the diamond trade, it had allegedly breached both Article 10 of the DRC's Constitution (which states: "the surface and subsurface are, and remain, the property of the nation including mines, quarries, mineral springs and hydrocarbons") and Chapter 1, § 7 of the Guidelines affirming: "Governments have the right to prescribe the conditions under what multinational enterprises operate." NamiGems had alleged evaded tax, concealed income and smuggled diamonds from the DRC via Uganda to Belgium.[108] In violating established standards, NamiGems had used **unfair competitive practices** that disadvantaged law-abiding purchasers that properly declared the value of their goods. NamiGems was also accused of indirectly providing funds to the MLC rebel group.

Lastly, the NGOs heavily criticized the Belgian division of George Forrest International (GFI), which was actively involved in the exploitation of mineral resources. They denounced the following practices:
1) The failure to take action to ensure **workplace health and safety** in the plant at Lubumbashi (linked to the processing of radioactive minerals – in respect of Chapter IV, paragraph 4(b) of the Guidelines);
2) Alleged **conflict of interest**, where the company was improperly involved in political affairs.
3) Breach of contract, resulting in significant losses for the Congolese State;
4) The failure to **publicly disclose information**.

On November 18th, 2005, following five meetings with the NCP (including three with the parties involved), the Belgian NCP (comprising of representatives from the federal and regional public authorities, in addition to three business and trade union organisations) issued a public statement. The declaration affirmed: "Forrest Group, in both its direct and indirect investment in the country, as well as in its joint ventures with other companies in which it has a minority role, has followed the Guidelines as far as was possible." To reach this conclusion, the NCP noted that it had taken into account the discussions of the OECD on economic relations with countries with weak governance. The complaints against the other companies were all rejected. The filings against Belgolaise and Cogecom were rejected on the basis that the two companies were at the time subject to parallel proceedings.[109] The complaint against NamiGems was dismissed for the lack of an **investment nexus**; the Belgian NCP also noting that the facts relating to the situation had changed since the original filing.[110]

The NCP nonetheless recommended to Forrest Group International that it **provide 'reliable and accurate' information on environmental, social and financial matters** and that it work to promote and support the Guidelines with its suppliers. The NCP also recommended that Forrest Group International assist the political authorities of the DRC in putting in place

108 International Peace Information Service (IPIS), Supporting the War Economy in the Democratic Republic of Congo: European Companies and the Coltan Trade. Five case studies, an IPIS Report, Antwerp, Belgium, January 2002.
109 OECD Watch, "11.11.11 et al vs. Belgolaise", http://oecdwatch.org/cases/Case_67/ and "11.11.11. vs. et al. Cogemom", http://oecdwatch.org/cases/Case_65/
110 OECD Watch, "11.11.11. vs. et al. Nami Gems", http://oecdwatch.org/cases/Case_66/

economic and industrial frameworks that take into consideration impacts on populations close to industrial sites."

The NGOs, while welcoming the broadening of Forrest Group International's responsibilities toward the Guidelines to its subsidiaries and suppliers, regretted that the NCP had not taken up their recommendations to: "publish a list of the different suppliers to Forest Group International's various divisions; conduct environmental audits and studies of public health in the communities close to the cobalt processing plant at Lubumbashi; and mandate a review by an independent international body of the mining concession at Kamoto recently granted to Forest Group International in disputed circumstances."

The illegal exploitation of resources in the Democratic Republic of the Congo by the British Company Afrimex Ltd

On February 20th 2007, the non-governmental organisation Global Witness filed a complaint with the British NCP against the UK-registered company Afrimex. It cited its activities in the Democratic Republic of the Congo between 1998 and 2007 as violating the Guidelines. According to Global Witness, Afrimex had contributed to the conflict in the DRC not only by paying taxes to rebel forces (in Goma, DRC) but also in buying minerals (specifically, coltan and casserite) from mines in which both forced and child labour working under deplorable conditions of sanitation and safety existed. Afrimex could not furnish evidence of having conducted due diligence vis-à-vis its supply chain.

Global Witness relied on the reports of the UN experts on the illegal exploitation of natural resources in the DRC, which outlined the pivotal role of the private sector in the exploitation of these resources and the resulting impact in the continuation of the conflict. The experts' report of April 12th 2001[111] characterises the implicated companies as being "the engine of the conflict in the Democratic Republic of the Congo" having "prepared the field for illegal mining activities in the country." In October 2002, Afrimex appeared in Annex III of the UN experts' report, which listed those companies that were violating the Guidelines.

The NCP accepted the complaint filed under the specific instances procedure.

The relationship between the threes companies Afrimex, Kotecha and SOCOMI
Afrimex operates in the DRC through the Congolese company Kotecha, which in turn operates in conjunction with the Congolese business SOCOMI. The NCP noted in particular the link between the CEOs of the three companies. This link was both of a familial and commercial nature: two of them (the directors of Afrimex and Kotecha) were shareholders in Kotecha, whilst the director of Kotecha was also head of SOCOMI. A special commercial relationship existed between Afrimex and Kotecha - the latter being the main client of the former. According to the NCP, Afrimex had therefore the **potential to exert a decisive influence** on both Kotecha and SOCOMI in the DRC.

111 UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, report of April 12, 2001, S/2001/357, § 215.

Consideration of previous factors prior to the revision of the Guidelines

The current version of the Guidelines came into force in June 2000. Thus any injurious acts having occurred before that date should not, in theory, be referred before the NCP. However, the UK NCP accepts the retroactive application of the Guidelines provided that the parties have consented. This was not the case with Afrimex. Even so, the NCP still declared that on this occasion it would take into account prior conduct in determining and assessing injurious events occurring after June 2000.

The lack of due diligence and the principal ability of Afrimex to influence the actions of its commercial partners

The British NCP determined that Afrimex had not properly exercised its capacity to influence SOCOMI. SOCOMI had paid taxes and levies on licenses to extract minerals to the rebel forces, contributing to the continuation of the conflict (the funds being used to purchase weapons). Afrimex did not encourage its business partners and suppliers (SOCOMI – Kotecha) to behave responsibly in line with the Guidelines. The NCP concluded that Afrimex failed to conduct sufficient due diligence vis-à-vis the supply chain: it had not taken the necessary steps to ensure that minerals were extracted in accordance with international standards (i.e. that mining activities should not involve forced or child labour, and that acceptable working conditions include provisions for health and safety). However, the charges relating to corruption were not upheld.

Human rights impact assessments and the OECD Risk Awareness Tool

In its recommendations the NCP referred to the need for companies to conduct human rights impact assessments. These assessments should be covered by company policy, which itself should exist as an official document – a requirement that Afrimex has now undertaken to complete. The NCP also encouraged Afrimex to use the OECD's Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

The NCP's final declaration was at first greeted with enthusiasm. However, some six months later (in February 2009) Global Witness condemned Afrimex's failure to implement the NCP's recommendations; meanwhile it continued its mining activities in eastern DRC. In March 2009 the company responded in a letter addressed to the NCP in which it stated that this trade in minerals had ceased as of September 2008. Global Witness called on the NCP to ensure that its recommendations be implemented and that it investigates the new information provided by Afrimex.

COMPLAINTS LODGED BY NGOS - OVERVIEW

As of January 2010 there had been 90 complaints lodged by NGOs with NCPs in accordance with the specific instances procedure. Noting that a complaint may in fact concern breaches of multiple sections of the Guidelines, the statistics reveal that:
– 76 complaints concerned allegations of violations of the general principles (human rights and the supply chain, Chapter II)
– 48 complaints involved questions pertaining to the protection of the environment (Chapter V)
– 29 complaints involved issues relating to employment and industrial relations (Chapter IV)
– 30 complaints concerned the disclosure (Chapter III).

To date, 27 of the 90 complaints have been rejected by the NCPs and 26 have been concluded. The others are either being processed, are pending or have been withdrawn.[112]

The following table outlines features of selected specific instances cases examined by the different NCPs.

* * *

A questionable effectiveness...

In its review of the first five years of the implementation of the Guidelines following their revision in 2000, OECD Watch highlighted different causes of concern.[113]

The most frequent criticisms concern:
– The proximity of the NCPs to the business community and the unequal treatment given to NGOs regarding the structure of NCPs.
– The NCPs' lack of an investigatory capacity. Thus NGOs, whose resources are limited, carry the burden of providing evidence to support the claims made against the business[114] (running the risk that the complaint be dismissed where the infor-

112 OECD Watch, "Quarterly Case Update February 2010", February 2010, p. 12, http://oecdwatch.org
113 OECD Watch, *Five Years On: A review of the OECD Guidelines and National Contact Points, op. cit.*
114 *Ibid.*

mation provided proves insufficient).[115] The following example illustrates this concern:

➧ The complaint against the mining company Anvil before the Canadian NCP

The mining company Anvil was accused of having played a role in an incident that claimed over 100 victims during a military counter-offensive conducted by the Congolese army against the rebels in the Democratic Republic of the Congo in October 2004. Anvil acknowledged that it had provided logistical support to the Congolese armed forces but stated that it was forced to do so when its vehicles were requisitioned. The information contained in the report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo confirmed these allegations. However, in May 2006 the Canadian NCP declared itself unable to mediate the case. It also stated its incapacity to pursue the investigations demanded of it by the complainants.

Even when information is furnished by NGOs, the NCPs are not always willing to accept complaints favourably.

– **The assessment of admissibility is too restrictive** in determining whether a complaint should be accepted.
– **The NCPs prove reluctant to act, issue questionable statements and at times contradictory interpretations** of the concepts embodied in the Guidelines.
– There exists a **lack of interaction** amongst the different NCPs and between the NCPs and the other parties, especially the NGOs, as to the progress of the procedures.[116]
– The specific instances procedures are increasingly being **conducted in a confidential manner**.
– The **delay in examining complaints** is still too important.

Finally, the main limitation for the NCPs resides in the fact that, even where the company is found to have violated the guidelines, there exists **no enforcement mechanism** established by the states to ensure that the NCPs' recommendations are implemented.

115 In the case concerning the activities of mining companies in the DRC, the NCP of Belgium said that because of incomplete information produced by the Expert Group and the Belgian company SMC, "it was not in a position to pursue its consideration of SMC's activities in the DRC." The French NCP also decided to terminate consideration of the case "given the lack of information on the two companies." See: OECD, OECD *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2006, op. cit.*, p. 16.

116 However, there are efforts to improve coordination, see : OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2007, op. cit.*, p. 3.

... some steps forward

- The Guidelines are increasingly **becoming more visible and widespread,** as recognised by the States,[117] the NCPs and the companies.[118] The Guidelines are increasingly utilised as a benchmark and constitute one of the principal measures by which companies' responsibilities are assessed.
- **A recognised mediatory role**: due to their visibility and flexibility, the Guidelines are shaping consensus, to the extent that they can be considered a tool of social dialogue.[119]
- A wide scope of application: **the broad nature of the principles and extraterritorial scope of the Guidelines** (where the parent company is based in an adhering state) render them a potentially powerful instrument, regulating companies even in weak governance zones.[120]
- The development of the **Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones**.[121]

Regardless of their deficiencies, the Guidelines nonetheless retain an important role. Aside from their functioning as a means to judge and sanction activity, they also help forge public opinion and guide companies in acting more responsibly. In 2009 the NCPs recommended that member countries, under the auspices of the Investment Committee of the OECD, proceed with drafting terms of reference for a possible revision of the Guidelines. A consultation process involves civil society groups. Terms of reference were drafted and distributed in February 2010.[122] Various procedural and substantive issues have been raised that will be examined prior to the eventual revision.

At the procedural level:
- Include the concepts of visibility, accessibility, transparency and accountability in the functioning of NCPs: the aim being to avoid possible conflicts of interest and be more inclusive of the stakeholders.
- Provide greater oversight of the NCPs regarding the processing time of complaints.

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117 States have made particular mention of the Guidelines at a meeting of G8 Summit in Eiligendamm in 2007.

118 The Guidelines are directly cited by 22% of executives at multinational enterprises. OECD, *Promoting Corporate Responsibility ..., op. cit*., p. 7.

119 Global Union Research Network, *The OECD Guidelines for Multinational Enterprises*, p. 4, www.gurn.info

120 OECD, *Promoting Corporate Responsibility ..., op. cit*., p.9.

121 OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006, www.oecd.org/dataoecd/26/21/36885821.pdf; For a list of additional resources for businesses operating in these zones of weak governance (in the areas of human rights, humanitarian law, security forces, fighting corruption, and on budgetary matters), see: OECD, "Resources for companies working in zones of weak governance", www.oecd.org/document/7/0,3343,en_2649_34889_37523911_1_1_1_1,00.html; See also: Annual Report on the OECD Guidelines for Multinational Enterprises - Conducting business in weak governance zones, 2006, op. cit.

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– Consider the appropriateness of current arrangements in respect of confidentiality and transparency in proceedings.
– Clarify the role of the NCP in terms of its mediatory/quasi-judicial functions.
– Ascribe the NCPs the task of overseeing companies' implementation of the recommendations made within the final declarations.
– Enhance co-operation between the NCPs.
– Resolve the problems arising from the issue of parallel proceedings, which can result in the NCP dismissing or suspending proceedings.
– Draw learnings from NCPs experiences.

At the substantive level:
– Review the concept of appropriate due diligence, particularly in relation to finance and investment activity. Additionally, examine due diligence with regards to the relationship between companies and security forces, and between companies and local communities and indigenous peoples (in connection with the proposal made by the UN Special Rapporteur John G. Ruggie that the focus be shifted to the concept of appropriate due diligence in the supply chain, as opposed to the sphere of influence).
– Review the appropriateness of the concept of the 'investment nexus', which is frequently used by the NCPs when determining a company's influence over its supply chain.
– For further reference:
  - The Principles of Corporate Governance 2004 and the G3 Guidelines of the Global Reporting Initiative with regard to public disclosures. Specifically, initiatives such as the Extractive Industries Transparency Initiative (EITI) and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones in relation to investment-related taxes, commissions and other payments made to governments of host countries.
  - The ILO'S Decent Work Agenda and Declaration on Social Justice for a Fair Globalization in relation to employment and industrial relations.
  - The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (in relation to the revision of the chapter relating to the fight against corruption).

The revision of the Guidelines will get underway at the annual meeting of the NCPs in June 2010, and should be completed by June 2011 after extensive regional consultations where non-adhering countries will be invited to participate.

ADDITIONAL RESOURCES

- **OECD, "Text of the OECD Guidelines for Multinational Enterprises"**
  www.oecd.org/document/18/0,3343,en_2649_34889_2397532_1_1_1_1,00.html
- **OECD, National Contact Points, october 2009**
  www.oecd.org/dataoecd/17/44/1900962.pdf
- **OECD WATCH, International network of 47 civil society organisations, created to facilitate the implementation of the Guidelines by the civil society, and to involve NGOs in the work of the OECD Investment Committee**
  www.oecdwatch.org
- **TUAC, "Trade Union Advisory Committee to the OECD"**
  www.tuac.org/en/public/index.phtml
- **TUAC, A Users' Guide For Trade Unionists to the OECD Guidelines for Multinational Enterprises, 2007**
  www.tuac.org/en/public/e-docs/00/00/00/67/document_doc.phtml
- **C. Freeman, C. Heydenreich et S. Lillywhite, Guide to the OECD guidelines for multinationals enterprises' complaint procedure, Lessons from past NGO complaints, OECD Watch & SOMO, 2006**
  http://oecdwatch.org/publications-en/Publication_1664/view?set_language=en
- **N. Ascoly, The OECD Guidelines and Socially Responsible Investment, Factsheet 3 : Assessing Adherence to the OECD Guidelines' Human Rights provisions, OECD Watch and Eurosif, 2007**
  http://oecdwatch.org/publications-en/Publication_2402/at_download/fullfile
- **R. Blanpain, "Guidelines for Multinational Enterprises for ever ? The OECD Guidelines, 20 years later", The Ind. Journ. of Comp. Lab. Law and Ind. Relat., 1998, p. 337-348.**
- **S.C. Van Eyck, The OECD Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Schrew, Ars Aequi Libri, Nijmegen, 1995.**
- **J. Oldenziel, The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct?, SOMO, 2000**
  http://oecdwatch.org/publications-en/Publication_1870/at_download/fullfile
- **Joris Oldenziel, Joseph Wilde-Ramsing, Patricia Feeney, "10 years on: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct", OECD Watch, June 2010.**

↘ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Argentina	**Trade Union:** Union Obrera Molinera Argentina **Company:** CARGILL	- Violation of several sections of the Guidelines relating to human rights, transparency and industrial relations.	II. General Policies III. Disclosure IV. Employment and Industrial Relations	
Australia (agreement established with the UK's NCP in June 2005)	**NGOs:** - Brotherhood of St Laurence, - ChilOut, - Human Rights Council of Australia, - International Commission of Jurists - Rights and Accountability in Development **Company:** GSL Australia Pty Ltd, a 100% subsidiary of the parent company Global Solutions Ltd (UK-registered company)	- Having concluded a contract with the Australian Department of Immigration and Citizenship under which it was charged with managing immigration detention centres, the allegations were: - practice of arbitrary and indefinite detention of asylum seekers; - detention of children (also for indefinite periods). The company was accused of not having respected its commitments to respect human rights.	II.2 General Policies VII.4 Consumer Interests	
Australia (with similar cases being filed with the UK and Swiss NCPs regarding British and Swiss firms also implicated).	**Complainant:** Mr Ralph Bleechmore, Adelaide barrister. **Companies:** - BHP Billiton - Cerrejon Coal Company	- Attempted depopulation and forced expulsion of residents of the slums in Tabaco (five additional communities in the region were affected by the same policy).	II. General Policies III. Disclosure V. Environment	
Chile	**NGO:** - Ecoceanos - Milieudefensie (Friehds of the Earth) **Companies:** Marine Harvest (Chile), subsidiary of Nutreco	- Infringement of the right to collective bargaining. - Failure to respect the 5-mile zone reserved to local fishers, and infringement of boundaries relating to the aquaculture industry. - Non-respect of the precautionary principle with regard to the intensive exploitation of natural resources (inadequate environmental impact assessments).	IV. Employment and Industrial Relations. V.Environment	
France	**NGO:** Friends of the Earth-France **Companies:** Consortium Nam Theun Power Company (EDF – Electricité de France, is the largest shareholder)	- Negative impact of the hydroelectric dam project on the environment and local communities.	II. General Policies IV. Employment and Industrial Relations V. Environment IX.Competition	

FILING DATE	HOST COUNTRY	RESULT
2006	Argentina	- Mediation. - Mutual agreement between the concerned parties (the terms of which remain confidential) - Statement issued 31st July, 2007: www.oecd.org/dataoecd/28/25/39201998.pdf
2005	Australia	- Mediation: the parties approved 34 recommendations made to GSL concerning its conduct in relation to detainees. - Statement issued April 6th, 2006 and confirmed on October 13th, 2006. - Further information available at: http://oecdwatch.org/cases/Case_73
2007	Colombia	- Mediation - Statement adopted on June 12th, 2009, procedure closed: www.oecd.org/dataoecd/4/35/43175359.pdf
2002	Chile	- Mediation. - NCP Recommendations (notably relating to the respect of workers' rights by subcontractors and suppliers). - Statement released on November 6th, 2003: www.oecd.org/dataoecd/42/13/32429072.pdf
2004	Laos	- No proof of violation of the Guidelines. - Recommendations adopted on May 26th, 2005 (compliance with environmental and social standards by companies, valid in their country of origin, with regard to their activities abroad): www.oecd.org/dataoecd/5/34/38032866.pdf

↘ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Germany	**NGOs:** Germanwatch, Global March, and Coordination gegen Bayer-Gefahren **Company:** Bayer CropScience	- Bayer CropScience accused of ignoring the use of child labour in cotton cultivation by suppliers. - Failure to take steps to influence the activities of sub-contractors.	II. General Policies. IV. Employment and Industrial Relations	
Mexico (in consultation with the German NCP)	**Trade union:** Sindicato Nacional Revolucionario de Trabajadores of the company Euzkadi **Company:** Euzkadi, a subsidiary of the German multinational Continental Tire.	- Closure of the Euzkadi plant by Continental Tire without consultation or notification of the workers. - Deplorable working conditions (in particular, relating to the use of dangerous chemicals such as ammonia).	IV. Employment and Industrial Relations	
Norway	**NGO:** Forum for Environment and Development (ForUM) – a network of over 50 NGOs. **Company:** Aker Kværner ASA	- Provision of support and maintenance services at the detention centre in Guantanamo Bay through its subsidiary Kværner Process Services Inc., including electricity and water supply and pipes operations; thereby abetting human rights violations and perpetuating deplorable conditions at the centre.	II.2. General Policies	
Netherlands	**NGO:** Netherlands Institute for Southern Africa (Niza) & Co. (Milieudefensie Pax Christi, Novib, the NC-IUCN, CENADEP, RECORE et PAL) **Company:** Chemie Pharmacie Holland BV (CPH)	- CPH, a partner of the American company Eagle Wings Resources International (EWRI), was condemned for its role in the DRC's mineral trade between 1998 and 2002. It was alleged to have contributed to the continuation of the DRC's conflict through its minerals trading activities and illegal exploitation of natural resources.	II.10. General Policies IV.1(b)(c) 4.(b) Employment and Industrial Relations V.2.3 Environment	
Netherlands	NGOs: - Fenceline Community for Human Safety and Environmental Protection - Milieudefensie - Friends of the Earth International Company: Pilipinas Shell Petroleum Corporation	- Contamination of soil by petroleum products and detrimental impacts on the inhabitants of Pandacan. - Accusations of corruption: the involvement of Shell in local political activities and the manipulation of public authorities. - Lack of information regarding the potential risks resulting from the project, and a lack of consultation with local communities in the decision-making process. - Failure to educate and prepare local people for potential industrial accidents. - Failure to improve infrastructure.	II.5.11. General Policies III.4(e) Disclosure V.2.5.6 Environment VI. Combating Bribery	

	FILING DATE	HOST COUNTRY	RESULT
	2004	India	- Claims processed separately; a joint statement could not be adopted. - Adoption by Bayer CropScience of a voluntary declaration of commitments to combat the use of child labour in the supply chain. - Closure of the specific instance procedures following the company's adoption of a voluntary declaration. - Statement issued August 30th, 2007: www.oecd.org/dataoecd/60/45/39311489.pdf
	2002	Mexico	- After a three-year strike, an agreement was reached between the trade union Euzkadi and Continental Tire (January 17th , 2005) : Continental Tire withdrawal; compensation of $12 million to the 600 remaining employees; granting workers a 50% stake in the factory (with the remaining 50% being acquired by the Mexican company Llanta Systems); creation of a co-operative for former employees (*Travailleurs démocratiques d'Occident,* or 'Tradoc'); assistance of Continental Tire to Euzkadi as a production adviser.
	2005	United States	- No communication of information by Aker Kværner – subsequently limited examination by the NCP. - The NCP outlined the failure to consider the Guidelines in the company's evaluation of the ethical aspects of its decision-making. - Aker Kværner was requested to develop and adhere to an ethical code of conduct. - Press release issued on November 29th, 2005 : www.oecd.org/dataoecd/5/48/38038283.pdf
	2003	Democratic Republic of the Congo (DRC)	- Lack of an investment nexus (based on the duration of the partnership between CPH and EWRI – 2½ years). CPH had facilitated, in terms of logistics and financial transactions, EWRI activities – however it did not take ownership of the goods concerned, receiving only a contractually agreed sum plus commissions. - Statement released May 2004: www.oecd.org/dataoecd/5/1/38031157.pdf
	2003	Philippines	- Confirmation of the violation of the Guidelines in relation to the disclosure of non-financial information (referring to environmental reporting) and failure to comply with the highest safety and environmental standards. The requirement to respect the practices and judicial processes of the OECD countries, rather than the weaker standards of some domestic jurisdictions, was highlighted. - Statement published July 14th, 2009 : www.oecd.org/dataoecd/2/12/43663730.pdf

↘ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
United Kingdom	**NGO:** RAID (Rights and Accountability in Development) **Company:** Das Air	- Lack of appropriate due diligence in relation to its mineral transportation activities (the trade being a contributory factor in the DRC's conflict). - Operation of flights in the DRC's conflict zone (violating the Chicago Convention) during the illegal occupation of the territory by Ugandan forces under which human rights violations were committed.	II. General Policies	
Sweden (in consultation with the Norwegian NCP, which received the same complaint). As Nordea's head office is in Stockholm, the matter was taken up by the Swedish NCP. Judicial proceedings were instigated in Argentina and Uruguay at the initiative of the NGO CEDHA.	**NGO:** - CEDHA (Centre for Human Rights and Environment - Argentina) - Bellona (Norway) **Company:** Nordea (a Sweden-registered company) had a stake in financing the construction of a pulp mill by Botnia (registered in Finland).	- Financing of a project adversely affecting the environment, and lack of consultation with stakeholders.	II.1.2.5.7. General Policies III.1.2. Disclosure V.1.6. Environment	
Switzerland	**Trade union:** - International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) - The Swiss Confederation of Trade Unions *(Union Syndicale Suisse)* Company: Nestlé Korea (a subsidiary of Nestlé) val International	- Restructuring, layoffs and threatened relocations.	IV.7 (3) Employment and Industrial Relations	
United Kingdom	**NGO:** Survival International **Company:** Vedanta Resources	- Lack of consultation of the indigenous people (the Dongria Kondh) affected by the construction of a mine.	II.2.7. General Policies V.2.b. Environment	

	FILING DATE	HOST COUNTRY	RESULT
	2005	Democratic Republic of the Congo (DRC)	- Reference to the reports of the UN Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC. - Allegations confirmed: violation of the Chicago Convention – lack of appropriate due diligence in relation to the supply chain. The NCP examined the degree of influence of Das Air on its suppliers: While Das Air did not have a monopoly, it nonetheless had significant market share in the export of minerals from Kigali; Das Air failed to inform itself of the provenance of the minerals: with most of Das Air's activities being based in Africa, it should have known of the likely impact of its actions on the conflict. - Statement released July 18th, 2008: www.oecd.org/dataoecd/11/31/44479531.pdf
	2006	Uruguay	- Applicability of the Guidelines to the financial services sector, notably with regard to disclosure and transparency: "The NCP states that the Guidelines can and should be applied to the financial sector as well as to other multinational enterprises." - Statement issued January 24th, 2008 (in accordance with the statement released by the Finnish NCP concerning Botnia): no violation of the Guidelines. www.oecd.org/dataoecd/39/23/40016775.pdf
	2003	South Korea	- Mediation. - A new collective bargaining agreement was signed: it gave workers a 5.5% increase in salaries, created a commission composed of union representatives and management to review any restructuring of work conditions and terminated the threat of legal action against strikers and the trade union. - Press release published November 21st, 2003: www.oecd.org/dataoecd/5/15/38033610.pdf
	2003	India	- Allegations confirmed: lack of an appropriate mechanism for consulting the indigenous people regarding both health and safety and environmental issues relating to the project (notably, the failure to conduct a human rights impact assessment). Violation of the rights and freedoms of the indigenous peoples recognised by India as a signatory to international conventions. - The NCP made recommendations to Vedanta to aid its conformity with the Guidelines (the conduct of impact assessments on human rights and the indigenous peoples; integration of a human rights-based approach within company management). - Final statement adopted September 25th, 2009: www.oecd.org/dataoecd/49/16/43884129.pdf

PART II
National Human Rights Institutions (NHRIs)

National Human Rights Institutions[123] are independent public bodies established under the 1993 UN Paris Principles[124]. Their main functions include monitoring and advising home governments, raising awareness through human rights education activities and coordinating local initiatives with international bodies. More than 100 countries have established NHRIs, with 63 maintaining an 'A-level' accreditation.[125]

Some national institutions have a mandate to deal with complaints from individuals or groups of individuals, victims of violations of human rights. These institutions generally make reviews and recommendations to the attention of States. The recommendations they issue vary in scope depending on the mandate of the institution. Although not legally binding, the recommendations have, however, a certain authority and are often seen as serving "authoritative interpretation". They can sometimes be enforceable by national judicial bodies.[126]

NHRIS and corporate accountability

Out of 43 national institutions that responded to a survey conducted in 2008 by the High Commissioner for Human Rights[127] upon request from the UN Special Representative on the issue of business and human rights:

– 14 have no complaint mechanism for business-related abuses;[128]
– 10 have a mechanism for receiving complaints of violations of all rights but can only target certain types of companies, that is to say mainly companies owned or controlled by State;[129]

123 A full list of NHRIs and their accreditation: www.nhri.net/2009/Chart_of_the_Status_of_NIs__January_2010.pdf

124 OHCHR, Paris Principles, www2.ohchr.org/english/law/parisprinciples.htm

125 Rules of Procedure for the ICC Sub-Committee on Accreditation, www.nhri.net/pdf/RP_ICC%20_Sub-Com_%20Acc_140904_en.pdf

126 For example, decisions of the Hearing Panel of the Kenyan Human Rights Commission are enforceable by the High Court. See OHCHR survey.

127 Business and Human Rights Practices: A Survey of NHRI Practices, Results from a survey distributed by the OHCHR, http://baseswiki.org/w/images/en/6/69/Upload--2008_Survey_of_NHRI_Practices.doc

128 Among them, Belgium, Finland, France, Germany, Norway, Switzerland.

129 Notably Argentina, Hungary, Peru, Spain.

– 9 have a mechanism for all types of companies but only certain rights (can only consider allegations of discrimination)[130] and,
– 10 have a mechanism for all human rights and all types of companies, private or public.[131]

The survey highlights a range of functions that NHRIs perform in monitoring and addressing human rights violations involving corporations, such as public inquiries, fact-finding missions, the dissemination of human rights educational tools, handling of complaints and dispute resolutions. The work on business and human rights greatly varies from a NRHI to another and some NHRIs such as in Kenya, Denmark and South Africa have been particularly active on these issues. Regarding the handling of complaints, some of them are already directly or indirectly been looking at corporate responsibility by examining complaints related to the discrimination in the workplace. Others such as the South African Human Rights Commission (SAHRC) have even dealt with complaints related to business and human rights on different issues ranging from discrimination, the impacts of the mining industry and price fixing in the food sector.[132]

THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS[133]

The Kenya National Commission on Human Rights is an autonomous National Human Rights Institution established by an Act of Parliament in 2002[134]. Its core mandate is to act as a watchdog over the Government in order to further the protection and promotion of human rights in Kenya.

Functions

According to the Act (art.16.1), the functions of the KNCHR include, in addition to raising awareness on human rights, make recommendations in respect of Parliament, and visit places of detention, to investigate on its own initiative or further to a complaint filed by any person or group of persons, on alleged violations of human rights. The KNHRC is one of the NHRIs competent to hear complaints concerning violations of human rights by all types of companies.[135]

The KNHRC's experience with business has been primarily through complaints related to employment issues (unemployment, discrimination, workers compensation). The commission made inquiries into violations of human rights involving

130 Among them, Australia, Canada, Denmark, Netherlands, New Zealand, Sweden.
131 Notably Egypt, Kenya, Nigeria, Philippines, Rwanda.
132 ICC and OHCHR, *Engaging NHRIs in securing the promotion and protection of human rights in business,* June 2009.
133 Kenya National Commission on Human Rights www.knchr.org
134 Kenyan National Commission on Human Rights Act, 2002: www.knchr.org/dmdocuments/knhcr_Act.pdf
135 See OHCHR survey, p18-19: http://baseswiki.org/w/images/en/6/69/Upload--2008_Survey_of_NHRI_Practices.doc

corporations such as an inquiry into salt mining companies and labour practices in Malindi, where communities as well as employees had filed complaints.[136]

HOW TO FILE A COMPLAINT?

Complaints investigated by the KNCHR include: complaints against security agencies (police, armed forces, prison wardens); complaints on discrimination on grounds such as race, class, gender; complaints relating to abuse or misuse of power by government officials; complaints on denial of rights recognized in national law and international treaties which Kenya has ratified.

The Commission shall not investigate (a) any matter which is pending before a court or a judicial tribunal, (b) a matter essentially involving the relations or dealings between the Government and the Government of a foreign state or international organization recognized as such under international law, or (c) a matter relating to the exercise of the prerogative of mercy.

Complaints can be sent to the Commission by **letter**, **email** or **telephone**. Petitioners may also make **physical** visits to the Commission's offices located in Nairobi and Wajir (regional office).
A complaint form is available on the Commission's website[137].

Kenyan National Human Rights Commission
1st floor CVS Plaza,
Lenana Road,
Nairobi, Kenya
Tel: +254-020-2717900/00/28/32
Mobile: +254-726-610159
Fax: +254-020- 2716160
email: haki@knchr.org
Wajir Office: Tel: (046)-421-512

Working Group on Business and Human Rights[138]

Following a roundtable on Human Rights and Business held in July 2008 and convened by the Danish Institute's Human Rights and Business Project, a thematic Working Group on the issue of Business and Human Rights was established by the International Coordination Committee of Nationals Institutions (ICC) in August 2009.

136 ICC and OHCHR, *Engaging NHRIs in securing the promotion and protection of human rights in business*, Report of the ICC and OHCHR Side event, Held during the Human Rights Council, 11th session, 2 to 18 June 2009, www.reports-and-materials.org/Official-report-NHRI-side-event-5-Jun-2009.doc

137 Kenya National Commission on Human Rights, "Legal Services", www.knchr.org/index.php?Itemid=79&id=39&option=com_content&task=view

138 The Danish Institute for Human Rights, "Human rights and business", www.humanrightsbusiness.org/?f=nhri_working_group

The Danish Institute for Human Rights has been elected Chair of the ICC Working Group on Business and Human Rights for the 2009-2011 term. The Working Group is composed of nine voting members drawn from across world regions (Kenya, Togo, Nicaragua, Venezuela, Jordan, Korea, Denmark, Scotland and Canada), and includes a representative of the current ICC Chair.

The Working Group's mission is to "'facilitate collaboration among National Human Rights Institutions in relation to strategic planning, joint capacity building and agenda-setting in the field of business and human rights, in order to assist National Human Rights Institutions in promoting corporate respect and support for international human rights principles; and in strengthening human rights protection and remediation of abuses in the corporate sector in collaboration with all relevant stakeholders at the domestic, regional and international levels."[139]
In October 2010, ICC will hold its biennial conference. It will focus on the theme of business and human rights. One of the main objectives will be to explore ways in which NHRIs can perform additional tasks to promote and protect human rights from abuses by companies.

* * *

To date, few NHRIs can receive complaints on violations committed by companies. The fact that NHRIs are beginning to pay attention to the issue of business and human rights represents an opportunity for civil society to demand that they be proactive in this field and that they benefit from the financial resources to do so. NHRIs have the potential to play an important role in complaint handling and could use the outcomes of complaints to monitor the conduct of TNCs. It would be interesting to explore the opportunity for NHRIs to consider complaints on the failure of states to ensure that companies based in their territory respect human rights in their overseas operations. Indeed, depending on how restrictive the mandate of each NHRI is, **it is not excluded that NHRIs can explore States' extraterritorial obligations.**

139 *Ibid*.

ADDITIONAL RESOURCES

- Asia Pacific Forum – The 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, ACJ Reference on human rights, corporate accountability and government responsibility, Kuala Lumpur, Malaysia, 27-31 July, 2008: www.asiapacificforum.net/acj/references/corporate-accountability/downloads/ACJ_Report_Corporate_Accountability.doc

- ICC, "Engaging NHRIs in securing the promotion and protection of human rights in business Report of the ICC and OHCHR Side event, Held during the Human Rights Council, 11th session, 2 to 18 June 2009, www.reports-and-materials.org/Official-report-NHRI-side-event-5-Jun-2009.doc

PART III
Ombudsmen

Ombudsman represent another type of mediation mechanism where victims can turn to. Although there is no clear and universally accepted definition of an Ombudsman, it is generally associated with an independent and objective investigator of complaints filed by individuals against government agencies and other organizations from both public and private sectors. After reviewing the complaint, the Ombudsman determines whether the complaint is justified and makes recommendations to the organization to resolve the problem.

An ombudsman may be appointed by a legislature, a professional regulatory organization or a local or municipal government, but may also be appointed directly by a company to handle complaints internally, or by an NGO. Depending on the type of ombudsmen and the appointment procedure, their independence is subject to various criticisms. Individuals can sometimes be sceptical vis-à-vis the Ombudsmen and their ability to handle their complaints impartially.

There are dozens of ombudsmen in many countries, mandated to hear complaints from individuals against public or private actors (industry, electricity and gas, banking, insurance, telecommunications, consumer, etc...), notably in places such as the United Kingdom[140], New Zealand[141] and India.[142]

A number of mediation mechanisms including ombudsmen are reviewed under other section of the present guide. In particular, section IV on financial institutions describes various mechanisms set up by multilateral banks (for example, Compliance Advisor Ombudsman of the International Financial Corporation) or that can be appealed in case the requester is not satisfied with the outcome of a grievance mehcanism set up by a public bank (a request may for instance be filed with the European Ombudsman in relation to the EIB), or another institution (for instance a complaint concerning the UK Export Credit Agency may be forwarded by the UK Parliamentary Ombusdan).

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140 British and Irish Ombudsman Association, "Members", www.bioa.org.uk/site2/list.php?navletter=P

141 Office of the Ombudsman, "Other complaints handling bodies", www.ombudsmen.parliament.nz/index.php?CID=100025#osh

142 The Central Vigilance Commission, http://cvc.nic.in

This chapter briefly illustrates one example of a singular Ombudsman created by civil society, the Mining Ombudsman, established by Oxfam Australia.

Oxfam Mining Ombudsman

In 2000, due to the numerous problems caused by mining activities on the environment and local people, Oxfam Australia established the mining ombudsman (MO). The role of the Mining Ombudsman[143] (MO) is to:
- Assist women and men from local and indigenous communities whose human rights are threatened by the operations of Australian-based mining companies.
- Assist women and men from communities that are, or might be affected, by a mining operation to understand their rights under international law.
- Help ensure that the Australian mining industry operates in such a way that the rights of women and men from local communities affected by mining are better protected.
- Demonstrate the need for an official complaints mechanism within Australia.
- Demonstrate the need for enforceable, transparent and binding extraterritorial controls that would require Australian mining companies to adhere to universal human rights standards wherever they operate.

Process and outcome

The **MO receives complaints** through Oxfam Australia networks throughout the world. The MO checks all claims through site investigations, a process involving extensive interviews with local community men, women and youth, civil society organisations and where possible, government and company officials.
The MO then submits the results of an **investigation** that is sent to all stakeholders for comment and action, and undertakes on-site progress evaluations every 18 months to two years.
After appropriate consultation with the community and community support groups, the MO makes formal **contact with the mining company**, highlighting the concerns raised and requesting remedial action.
The MO initiates and monitors the **process between parties** to address community requests (dialogue process or accountability). If the company does not adequately address grievances, the MO contacts the international media and generates pressure via popular campaigning with the public and partner organisations.

143 Oxfam Australia Mining Ombudsman Project: www.oxfam.org.au/explore/mining/our-work-with-communities

Marinduque Island (2002-2004)[144]

Marcopper Mining Corporation, a branch[145] of Placer Dome Inc., a Canadian company listed in Australia started mining copper on Marinduque Island in the Philippines in 1967. For the period up to 1996, Marcopper is accused of having dumped millions of tonnes of toxic mine waste into Marinduque's seas and polluted its rivers.

Oxfam Australia's Mining Ombudsman began investigating the Marinduque case in 2002 at the invitation of a local community support organisation, the Marinduque Council for Environmental Concerns (MACEC). In 2004, the Mining Ombudsman undertook two field investigations and funded scientific research. On 6 August 2004, Placer Dome advised the Mining Ombudsman that it was no longer the owner and operator of the Marcopper mine and that responsibility for any on-going problems at Marinduque should be directed to Marcopper Mining Corporation. In October 2005, Marcopper Mining Corp. had been bought by Barrick Gold Corporation.

While Placer Dome has left the country, the communities on Marinduque continue to live with the legacy of the Marcopper mine.

In 2005 the provincial government of Marinduque filed a complaint against Placer Dome before the State Court of Nevada (particularly given the fact that Placer Dome – then Barrick Gold - had activities in the United States and was listed on the New York Stock Exchange). The Court rejected the complainants' request on the basis of *forum non conveniens*, but in September 2009, the Court of Appeals for the District of Nevada reversed the decision of First instance.[146]

The role of the MO in the process was to gather requests from affected communities, conduct investigations and scientific studies and, even if he failed to manage to find a definitive solution, he helped give visibility to this situation.

ADDITIONAL RESOURCES

– **Business and Society Exploring Solutions: A dispute resolution community**
http://baseswiki.org

144 See *Mining Ombudsman Case Report: Marinduque Island*, Oxfam Australia 2005, www.oxfam.org.au/resources

145 Placer Dome possessed 40% of Marcopper, (the maximum authorized by Filipina laws); the rest (50%) was possessed by Ferdinand Marcos from 1969 to 1986, and by successive Filipinos governments, until the privatisation of Marcopper in 1994.

146 Provincial Gov't of Marinduque v. Placer Dome Inc., Case No. 07-16306 (C.A. 9, Sept. 29, 2009), www.ca9.uscourts.gov/datastore/opinions/2009/09/29/07-16306.pdf