



SECTION III

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MEDIATION MECHANISMS



Andean people protest against Newmont Mining's Conga gold project during a march near the Cortada lagoon in Peru's region of Cajamarca November 24, 2011. Peru, 2011 ©REUTERS/Enrique Castro-Mendivi

SECTION III

MEDIATION MECHANISMS

PART I

OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development (OECD) is an international economic organisation with a mission to “promote policies that will improve the economic and social well-being of people around the world”, and a “commitment to market economies backed by democratic institutions”.¹ The organisation collects and analyses data in many fields of economic cooperation and development,² and provides a forum for the member countries to discuss common problems and develop policies.

The OECD was founded in 1960 by 18 European states along with the United States and Canada, and grew out of the Organisation for European Economic Co-operation (OEEC), originally charged with administering the Marshall plan in post-war Europe. Its 34 members,³ which are among the world’s most advanced economies today, are mainly Western states.

In 1976 the OECD adopted the OECD Guidelines for Multinational Enterprises (the Guidelines), which constitute **recommendations addressed by governments to companies operating in or from the adhering countries**.⁴ In addition to the 34 member countries of the OECD the following twelve countries adhere to the Guidelines: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

The Guidelines aspire to be “a leading international instrument for the promotion of responsible business conduct”,⁵ and are composed of **a non-binding set of**

1 About the OECD, www.oecd.org/about/

2 The OECD deals with numerous topics, some of which are: Agriculture, Education, Competition, Corporate Governance, Insurance, Bribery and corruption, Regulatory Reform and Social and Welfare systems. For a complete overview see “Topics” www.oecd.org/

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

4 OECD Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/text/>

5 OECD, *Corporate Responsibility: Reinforcing a Unique Instrument - 2010 Annual Report on the OECD Guidelines for Multinational Enterprises*, available at www.oecd.org

principles and standards for responsible business conduct in the following areas: employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interest, science and technology, competition, and taxation. Despite their non-binding nature, the Guidelines are backed up by a complaint mechanism, called **National Contact Points (NCPs), which are tasked with their implementation and handling cases of alleged breaches of the Guidelines by companies operating from or in these countries (see chapter II of this section).**

In 2011, the Guidelines were updated for the fifth time. A key achievement of the 2011 update was the inclusion of a new chapter on human rights based on **the corporate responsibility to respect human rights** as set out in the UN Guiding Principles on Business and Human Rights⁶.

The Guidelines are composed of two parts: the Recommendations themselves, hereunder presented in Chapter 1, and their implementation procedures, dealt with in Chapter 2.



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⁶ Section 1, Part 1, Chapter 1 of this Guide.

CHAPTER I

Content and Scope of the OECD Guidelines

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Part 1 of the Guidelines consists of eleven chapters covering the following topics:

- I. Concepts and Principles
- II. General Policies
- III. Disclosure
- IV. Human Rights
- V. Employment and Industrial Relations
- VI. Environment
- VII. Combating Bribery, Bribe Solicitation and Extortion
- VIII. Consumer Interests
- IX. Science and Technology
- X. Competition
- XI. Taxation

Below follows a general description of the rights and obligations referred to in the Guidelines. For a detailed overview, see the original document and the commentaries, which are placed after each chapter.⁷

This chapter will firstly look at 6 specific areas covered by the Guidelines (A) (Human Rights, Fundamental Labour Rights, Disclosure, Environmental Protection, Bribery and Consumer Protection), before discussing the scope of the Guidelines (B).

A. Main areas covered by the Guidelines relevant to the respect and protection of human rights

1. Human rights

Chapter II, “General Policies”, contains one specific recommendation on human rights and other general provisions relevant to the respect and protection of human rights by multinational enterprises in their operations. The Guidelines also include a Chapter IV on Human Rights that reaffirms and details the content of these norms.

The content of Chapter IV is based on Pillar II of the UN Guiding Principles on Business and Human Rights.⁸

⁷ OECD Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/text/>

⁸ See Section 1, Part 1, Chapter 1 of this Guide.

Chapter II provides for broad General Policies, demanding business to take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.⁹ More specifically, they demand enterprises to [...]:

- “ 2. **Respect the internationally recognised human rights** of those affected by their activities.
10. Carry out risk-based **due diligence**, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...].
11. **Avoid causing or contributing to adverse impacts on matters covered by the *Guidelines***, through their own activities, and **address such impacts when they occur**.
12. **Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship**. [...]
13. **Encourage**, where practicable, business partners, including **suppliers and sub-contractors**, to apply principles of responsible business conduct compatible with the *Guidelines*.
14. **Engage with relevant stakeholders** in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.”

Chapter IV, dealing specifically with human rights, affirms that enterprises should:

- “ 1. **Respect human rights**, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. **Within the context of their own activities, avoid causing or contributing to adverse human rights impacts** and address such impacts when they occur.
3. **Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship**, even if they do not contribute to those impacts.

⁹ For a full overview, see OECD *Guidelines for Multinational Enterprises*, *op. cit.*

4. **Have a policy commitment** to respect human rights.
5. **Carry out human rights due diligence** as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. **Provide for or co-operate through legitimate processes in the remediation** of adverse human rights impacts where they identify that they have caused or contributed to these impacts.



Commentary on General Policies

The Guidelines makes clear that the respect for human rights by businesses is understood “**within the framework of internationally recognised human rights**, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations (...)”.¹⁰ The Guidelines’ “specific instance” grievance mechanism can thus be used to address violations of **civil and political rights as well as economic, social and cultural rights**.

The OECD Guidelines’ grievance mechanism has previously been used to address violations of the following rights:

- Right to form or join a trade union
- Right to collective bargaining
- Right to enjoy just and favourable conditions at work
- Right to non-discrimination in employment and occupation
- Right to an adequate standard of living
- Right to safe and healthy conditions at work
- Right to health
- Right to life and prohibition of torture and arbitrary arrests¹¹
- Right to health, food, housing, education and standard of living¹²
- Right to receive and share information and freedom of expression¹³
- Right to non-discrimination, rights of indigenous peoples and prohibition of forced evictions¹⁴
- Prohibition of child labour, elimination of forced labour, right to education and non-discrimination¹⁵

¹⁰ *Ibid.*, Chapter IV, Chapeau.

¹¹ NCP Norway, *Aker Kvaerner ASA*, 2005.

¹² NCP Belgium, *George Forrest International Belgium and OM Group*, USA, 2004. See also NCP Belgium, *ACIDH et al vs Compagnie Minière de Sud Katanga*, 2012.

¹³ NCP Canada, *Ascendant Copper*, 2005.

¹⁴ NCP Norway, *Framtiden i våre hender vs Intex Resources*, 2009.

¹⁵ NCP France, *Germany and Switerland, ECCHR, Sherpa & UGF vs ICT Cotton*, 2010.

- Children’s rights, prohibition of arbitrary detention and rights of asylum seekers¹⁶
- Access to effective remedies¹⁷
- Crimes against humanity and war crimes committed by a private security company¹⁸

With regard to **human rights due diligence**, the Commentary on Chapter IV, explains that “the process entails **assessing** actual and potential human rights impacts, **integrating** and **acting** upon the findings, **tracking** responses as well as **communicating** how impacts are addressed”¹⁹. It is also established that “human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise, recognising that human rights risks may change over time as the enterprise’s operations and operating context evolve”²⁰.

The introduction of Chapter IV on Human Rights is a major improvement to the Guidelines, however some NGOs, including FIDH, have expressed their concerns on several aspects.²¹ The text remains weak with regard to consultation of affected communities in particular of indigenous peoples and no explicit reference is made to indigenous peoples’ right to free, prior and informed consent. However, the commentary to Chapter II does refer to other “UN instruments” when dealing with indigenous peoples’ rights. UN instruments could be interpreted as including the UN Declaration on the rights of indigenous peoples and ILO Convention no.169.

2. Fundamental labour rights

Labour rights are covered by Chapter IV on Human Rights. Respect for the human rights of workers is also addressed in Chapter V on Employment and Industrial Relations.

In accordance with the obligations specified by the relevant ILO conventions, Chapter V establishes four basic obligations toward workers:

- the right to form or join a trade union, **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

¹⁶ NCP Australia, *Human Rights Law Centre and Raid vs. G4S*, 2014.

¹⁷ NCP Netherlands, *CEDHA et al. vs Nidera*, 2011.

¹⁸ NCP United Kingdom, *Avient Ltd.*, 2004.

¹⁹ OECD Guidelines, *op. cit.*, Chapter IV, Commentary on Human Rights, para 5.

²⁰ *Ibid.*, Chapter IV, Commentary on Human Rights.

²¹ For more information, see: FIDH, *Open Letter to OECD Investment Committee on the review process of the OECD guidelines for Multinational Enterprises*, 28 April 2011, www.fidh.org; Amnesty International, Public Statement, *The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation*, 23 May 2011, www.amnesty.org

- conditions of employment, and a guarantee against the use of employee transfer as a threat, etc.)²²
- **Abolition of child labour**²³
 - **Elimination of all forms of forced or compulsory labour**²⁴
 - **Non-discrimination** in employment and occupations (notably in hiring, dismissal, remuneration, promotion, training and retirement)²⁵

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.”²⁶ Under another set of provisions businesses are expected to employ local personnel and provide, without discrimination, training with a view to improving skill levels.²⁷ They should also work with trade unions and government representatives to mitigate the adverse impacts of closures and other changes in operations which have major employment effects and refrain from threatening to transfer production or workers in order to hinder the right to organise.

3. Disclosure

The Guidelines request that multinational enterprises publish “timely and accurate information”, which shall be made available to **employees, local communities, special interest groups, and the public at large**. However, this disclosure “should be tailored to the nature, size and location of the enterprise, with due regard of costs, business confidentiality and other competitive concerns.”

- *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.²⁸

22 OECD Guidelines, *op. cit.*, Chapter V, §§ 1 a) and b); 2 a), b) and c); 6; 7 and 8.

23 *Ibid.*, Chapter V, § 1 c. See also 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.

24 OECD Guidelines, *op. cit.*, Chapter V, § 1 d). See also 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.

25 OECD Guidelines, *op. cit.*, Chapter V, § 1 e). 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.*, Chapter V, Commentary on Employment and Industrial Relations. (The text includes the full list of grounds of discrimination such as “marriage, pregnancy, maternity or paternity”); ILO, Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977, amended in 2000.

26 OECD Guidelines, *op. cit.*, Chapter V, § 4 a) and Commentary.

27 *Ibid.*, Chapter V, § 5.

28 *Ibid.*, Chapter III, § 1 and Commentary 28.

- *Non-financial disclosure*: companies are also expected under the Guidelines to report issues of a non-financial nature, especially in areas where “reporting standards are still emerging”.²⁹ This includes disclosures regarding:
- the company’s aims;
 - social, environmental and risk reporting;
 - 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**.”³⁰ 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).³¹

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**.”³²

With regard to corporate transparency, the Guidelines unfortunately do not include recommendations on country-by-country reporting and social and environmental disclosure requirements in line with international best practice.³³

Companies are encouraged to inform workers (Chapter V, §6) 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”³⁴ and, ideally, giving stakeholders prior notice before a final decision is taken.

²⁹ *Ibid.*, Chapter III, § 3 and Commentary.

³⁰ *Ibid.*, Chapter III and Commentary, p.30.

³¹ *Ibid.*, Chapter V, § 4.

³² *Ibid.*, Chapter III and Commentaries, p. 31.

³³ OECD Watch, *Statement on the update of the OECD Guidelines for MNEs*, 25 May 2011, <http://oecdwatch.org>

³⁴ OECD Guidelines, *op. cit.*, Chapter V, § 6

4. Environmental protection

Three distinct axes structure the principles in the field of environmental protection (Chapter VI):³⁵

Environmental management system

The Guidelines adopt a three-pronged approach that encourages multinational enterprises to establish an environmental management system, which should feature:³⁶

- 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 requested to **provide adequate education and training to employees in environmental health and safety matters**. 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.”³⁷

Communications on environmental matters

Companies are also required to be transparent in their communication of information including:³⁸

- Providing the public at large and employees with adequate **information concerning the environmental, health and safety impacts of their activities**;
- **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.³⁹

³⁵ *Ibid.*, Chapter VI.

³⁶ *Ibid.*, Chapter VI, § 1.

³⁷ *Ibid.*, Chapter VI, Commentary.

³⁸ *Ibid.*, Chapter VI, § 2.

³⁹ *Ibid.*, Chapter VI, Commentary.

The precautionary principle

Invoking the precautionary principle that emerged from the Rio Declaration⁴⁰ in 1992, the Guidelines call on companies to:

- assess and address in decision-making, the environmental, security and health impacts of the proposed activities, where appropriate via the preparation of a suitable **environmental impact assessment**;⁴¹
- 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);⁴²
- 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.⁴³

5. Combating bribery

The chapeau of chapter VII states that “enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion”⁴⁴. The Guidelines refer to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its commentary as well as the UN Convention against Corruption.⁴⁵ The Guidelines’ commentary draws recommendations regarding anti-bribery policies and good governance practices.⁴⁶

6. Consumer protection

Companies are encouraged in this area to comply with fair and honest practices⁴⁷ in their commercial business, marketing and advertising activities, and to take all

⁴⁰ 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.”

⁴¹ OECD Guidelines, *op. cit.*, Chapter VI, § 3.

⁴² *Ibid.*, Chapter VI, § 3.

⁴³ *Ibid.*, Chapter VI, § 5.

⁴⁴ *Ibid.*, Chapter VII, Chapeau.

⁴⁵ *Ibid.*, Chapter VII, Commentary; OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, entered into force 15 February 1999, www.oecd.org; UN Convention against Corruption entered into force on 14 December 2009, www.unodc.org

⁴⁶ OECD Guidelines, *op. cit.* Chapter VII and Commentary on Combating Bribery, Bribe Solicitation and Extortion.

⁴⁷ OECD Guidelines, *op. cit.*, Chapter VIII, § 4.

reasonable steps to ensure the safety and quality of goods or services they provide.⁴⁸ Enterprises are urged to develop honest business practices⁴⁹ and respect the right of consumers to privacy and the protection of their personal data.⁵⁰

More specifically, the Guidelines develop the obligation to inform consumers, and to make available transparent and effective means⁵¹ to ensure the health and safety of consumers so as to allow them to make informed decisions.

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

B. The implementation of the Guidelines

One of the main challenges when discussing the implementation of the Guidelines is that they can be interpreted in different manners according to the institution (NCP, see following chapter) tasked with their implementation. That is to say, a similar factual case brought to two different NCPs may give very different results. The following section should therefore be seen as a reference to concepts and issues that may arise when submitting a complaint, which may differ depending on where the complaint is brought. For example, an interpretation made by the Swedish NCP does not oblige the UK NCP to come to the same conclusion, and vice versa. It is however expected that an NCP will respect its own interpretation. Civil society organisations are calling on the harmonisation of the Guidelines' interpretation.

For a helpful updated analysis and overview of recent NGO cases submitted under the OECD Guidelines, please visit the website of the international network of civil society organisations called OECD Watch.⁵² The Trade Union Advisory Committee to the OECD (TUAC) also maintains a list of trade union cases submitted to NCPs together with profiles of the National Contact Point.⁵³

Whilst they are addressed to multinational enterprises, the Guidelines **do not provide a precise definition of the term**.⁵⁴ Chapter I, section 4 merely states that in general these usually comprise: “Companies or other entities established in more than one

48 *Ibid.*, Chapter VIII, Preamble.

49 *Ibid.*, Chapter VIII, § 4.

50 *Ibid.*, Chapter VIII, § 6.

51 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.

52 OECD Watch: www.oecdwatch.org. OECD Watch maintains a database of cases filed by NGOs, as well as information regarding reviews of NCPs, briefing papers, and steps required to file an OECD Guidelines complaint. See next chapter on implementation.

53 See TUAC's list of trade union cases submitted under the OECD Guidelines: www.tuacoecdmgneguidelines.org/cases.asp. TUAC also maintains profiles of NCPs and key information sources on the Guidelines.

54 OECD Guidelines, *op. cit.*, Chapter I, § 4.

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).⁵⁵ The OECD secretariat has also clarified that the Guidelines also apply to government entities such as central banks, sovereign wealth funds, and export credit agencies if and when these entities operate in the commercial arena.

1. The Guidelines and supply chains

The Guidelines include a far-reaching approach to due diligence and responsible value chain management. The Guidelines require multinational enterprises to “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”⁵⁶ As per the Commentary of the Guidelines, the term ‘business relationship’ includes “relationships with business partners, **entities in the supply chain** and any other non-State or State entities directly linked to its business operations, products or services.” Multinational enterprises are therefore responsible for avoiding and addressing adverse impacts in their activities, including in their value chains. The requirement to undertake due diligence to identify, prevent and (in some cases⁵⁷) remedy actual and potential adverse impacts also applies to a company’s value chain.

Paragraph 13 of Chapter II of the Guidelines addresses the issue of supply chains, and demands enterprises to “**encourage, where practicable, business partners, including suppliers and sub-contractors**, to apply principles of corporate conduct compatible with the Guidelines.”⁵⁸

The Commentary pertaining to this recommendation does however recognise practical limitations in the capacity of enterprises to influence the conduct of their business partners: these limitations are “related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.”⁵⁹

⁵⁵ *Ibid.*, Chapter I, § 4.

⁵⁶ OECD Guidelines, *op. cit.* Chapter I, § 3.

⁵⁷ Remedy will be required only if the company is causing or contributing to the impact (not if it is “directly linked” to their operations, products or services.)

⁵⁸ OECD Guidelines, *op. cit.*, Chapter II, § 13.

⁵⁹ *Ibid.*, Commentary on General Principles, § 21.

However, the Commentary specifies that “enterprises can also **influence suppliers** through contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements”⁶⁰.

Thus, the responsibility of an enterprise will be determined by its relationship to an adverse impact: to meet its responsibility to prevent or mitigate adverse human rights impacts, the enterprise is expected to **use its leverage** – alone or in co-operation with other entities- to **influence the entity causing the adverse human rights impact**⁶¹.

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 power⁶² or other market arrangements (for example, accreditation programmes and product tracing systems that ensure supplier accountability for particular aspects of their performance).⁶³

Assessments may vary between NCPs and are established on a case-by-case basis. Consult the website of OECD Watch, who publishes case updates and analysis of different NCPs, in order to get an updated overview over recent cases.⁶⁴

2. Guidance on application of the guidelines to specific industrial sectors

The Guidelines state explicitly that they apply to all sectors of the economy, including the financial sector.⁶⁵ The OECD has recently started sector-specific projects to clarify and elaborate on how exactly the Guidelines apply to specific industrial sectors. One of the first projects concerns due diligence in the financial sector. As part of this project, the OECD Working Party on Responsible Business Conduct confirmed that the Guidelines apply to minority shareholders in companies and/or projects that may be causing adverse impacts.⁶⁶

⁶⁰ *Ibid.*

⁶¹ Commentary on Human Rights, §43.

⁶² 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.

⁶³ OECD, Report by the Chair of the Annual Meeting of National Contact Points, 2003, p. 26, www.oecd.org

⁶⁴ See OECD Watch, www.oecdwatch.org

⁶⁵ Part I on Concepts and Principles states that “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy.” The Commentary on the General principles (§ 12) also refers to the financial sector.

⁶⁶ See OECD, *Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises*, June 2014.

Sector-specific guidance

Sector-specific initiatives based on the Guidelines are being developed and used to promote, in specific sectors, what the OECD refers to as “responsible business conduct” (RBC). The OECD has developed or is in the process of developing sector specific due diligence guidance for agricultural supply chains, garment and footwear supply chains, meaningful stakeholder engagement in the extractive sector, and the financial sector. The OECD also completed Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas providing recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices.



➤ Demonstration on the occasion of the World Social Forum in Nairobi, 2008.

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CHAPTER II

The mechanism for implementing the Guidelines

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A. What bodies are involved in the implementation of the Guidelines?

The institutional mechanisms set up to promote respect for the Guidelines is based on two main organs: the National Contact Points (1) and the Investment Committee and the Working Party on Responsible Business Conduct (2).

In addition to these organs, the Business and Industry Advisory Committee (BIAC) (3), the Trade Union Advisory Committee to the OECD (TUAC) (4), as well as the international NGO network OECD Watch (5) play important advisory roles and are explicitly mentioned in the Guidelines.

1. The National Contact Points

Under the Guidelines, each adhering government has the formal obligation to establish a **National Contact Point (NCP)**.

NCPs have various duties. Specifically, they must **ensure the promotion of the Guidelines, 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 instance” procedure, constitutes the **most important competency** of the NCPs with respect to multinational enterprises’ responsibilities as regards human rights. It allows for trade unions, affected communities and other interested parties to refer a case to the NCP in the country where a company has failed to comply with the Guidelines or – if that country does not have an NCP – to the NCP in the country where the company is headquartered (see below).

Structure of the NCPs

According to the Guidelines, States enjoy a certain degree of flexibility to determine the structure and organisation of their NCP. Their composition and organisation should enable them to operate in an impartial manner while maintaining an adequate level of accountability vis-à-vis the adhering government.

NCPs are **governmental agencies organised in various 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.⁶⁷ 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 one or several public agencies; 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 in what is known as a quadripartite structure.

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 board composed of various government officials and four external members appointed by the Trades Union Congress, the Confederation of British Industry, and NGOs.⁶⁸

In the **Netherlands**, the NCP⁶⁹ consists of four individuals of different (non-governmental) backgrounds that operate and handle complaints independently from the government. In addition, four government representatives of various ministries have an advisory function to the independent NCP members. The Secretariat of the Dutch NCP is based at the Ministry of Foreign Affairs.

Despite the innovative nature of this mechanism, the fact that each adhering state establishes its own NCP means that the **functioning, efficiency and independence of the NCPs vary considerably**, and indeed remain the subject of much criticism. Certain NCPs have adopted effective practices and have demonstrated their concern to promote the principles of “responsible business conduct”.

NGOs have often stressed the importance of strengthening the NCP mechanism to ensure the credibility and effectiveness of the Guidelines. By encouraging NCPs to adopt common rules and standards across the different countries, it would enable them to establish minimal criteria and guidance with regard to the specific instance procedure.

To guarantee their impartiality, NCPs’ composition should include different stakeholders, including independent experts, steering committees or consultative committees which could assist the NCPs in their work. The Guidelines’ Procedural Guidance for NCPs contains core criteria for NCP functional equivalence⁷⁰ such as

⁶⁷ OECD Guidelines, *op. cit.*, Procedural Guidelines. For an overview of the institutional arrangements of the various NCPs, see: OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007 - Corporate responsibility in the financial sector*, *op. cit.*

⁶⁸ UK Department for Business, Innovation & Skills, The UK National Contact Point for the OECD Guidelines for Multinational Enterprises, www.gov.uk

⁶⁹ NCP Netherlands, www.oecdguidelines.nl/ncp

⁷⁰ OECD Guidelines *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Core Criteria for Functional Equivalence in the Activities of NCPs.

visibility, accessibility, transparency and accountability, but civil society organisations believe it remains insufficient since it does not require NCPs to be independent, multi-stakeholder or at a minimum to be overseen by a steering committee.

Lack of financial resources and permanent staff is a recurrent problem for most NCPs that seriously hampers their effectiveness.⁷¹

NCPs are required to prepare an annual report to the Investment Committee that communicates both the nature and results of the NCP's activities (including those relating to the procedures for 'specific instances').⁷² These reports are submitted to the Investment Committee in the run-up to the annual meeting of the NCPs in Paris each June.⁷³

Concerns related to the functioning and effectiveness of the NCPs are discussed at the end of this chapter.

2. The Investment committee and the Working Party on Responsible Business Conduct

The Investment Committee

The Investment Committee was created in 2004 and is the OECD body that oversees the functioning of the Declaration on International Investment and Multinational Enterprises.⁷⁴

The Investment Committee is composed of government representatives of OECD member countries, adhering countries and observers. It has been assigned five specific tasks in relation to the Guidelines:⁷⁵

- 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 only be requested by member countries, TUAC, BIAC, and OECD Watch);

71 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

72 OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprise.

73 OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, available at: www.oecd.org

74 In 2004 the CIME (Committee on International Investment and Multinational Enterprises) and CMIT (Committee on Capital Movements and Invisible Transactions) merged to form the Investment Committee.

75 OECD, OECD Guidelines for Multinational Enterprises: Frequently asked questions, www.oecd.org

- To review the Guidelines and procedures of implementation in order to ensure their relevance and effectiveness;
- To provide reports to the OECD Council on the Guidelines.

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.⁷⁶

OECD Watch believes that the Investment Committee has thus far taken an insufficiently proactive role in facilitating the effective functioning of NCPs and ensuring genuine functional equivalence among NCPs. In its 2015 report *Remedy Remains Rare*, OECD Watch called on the Investment committee to do so by institutionalizing and managing a system of mandatory NCP peer reviews and initiating a process to revise the Guidelines' Procedural Guidance to strengthen NCP structure and functioning.⁷⁷

The Working Party on Responsible Business Conduct

The Working Party on Responsible Business Conduct is a subsidiary body of the OECD Investment Committee. It is an inter-governmental body inaugurated in 2013 and tasked with assisting in “furthering the effectiveness of the Guidelines, fostering NCP functional equivalence, pursuing the proactive agenda, promoting engagement with non-adhering countries, partner organisations, and stakeholders, and serving as central point of information on the Guidelines”⁷⁸.

3. 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**.⁷⁹ 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.

4. 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 59 trade union affiliates in 34 countries and represents approximately

⁷⁶ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures

⁷⁷ OECD Watch, *Remedy Remains Rare*, June 2015, pp. 14-19, <http://oecdwatch.org>

⁷⁸ OECD, “About the OECD Guidelines for Multinational Enterprises”, <http://mneguidelines.oecd.org/about/>

⁷⁹ BIAC, www.biac.org

70 million workers.⁸⁰ As an international trade union, TUAC is the interface between trade unions and the OECD. Its 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 the lead trade union organisation on the OECD Guidelines. It provides policy input to the work of the OECD and supports trade unions around the world to use the Guidelines. TUAC maintains a web site of trade union cases submitted under the OECD Guidelines together with key information sources.

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. 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.

5. OECD Watch

OECD Watch is an international network of over 100 civil society organisations promoting corporate accountability.⁸¹ FIDH is a member of OECD Watch. OECD Watch aims to ensure that business activity contributes to sustainable development and poverty eradication and that corporations are held accountable for their impacts around the globe. Members of OECD Watch share a common goal to improve corporate accountability mechanisms in order to achieve sustainable development and enhance the social and environmental performance of corporations worldwide.

OECD Watch is committed to the following aims:

1. Ensure effective access to remedy for communities, workers and individuals negatively affected by business conduct.
2. Increase the effectiveness and reach of the OECD Guidelines for Multinational Enterprises as a tool to ensure corporate accountability and access to remedy.
3. Build capacity of civil society organisations to use the OECD Guidelines complaint mechanism to address cases of corporate misconduct.

If you are considering submitting a case before an NCP, it is recommended to familiarise yourself with the OECD Watch website, which provides detailed and updated information about procedures for submitting cases, NCP's decisions on admissibility and merits, and recent analysis on scope and interpretation of the Guidelines. OECD Watch is also a focal point to put forward civil society's views in the OECD Investment Committee and Working Party on Responsible Business Conduct. It is recommended that anyone interested in filing an OECD Guidelines

⁸⁰ TUAC, "Affiliates", www.tuac.org/en/public/tuac/affiliates.phtml

⁸¹ OECD Watch, <http://oecdwatch.org>

complaint with an NCP get in contact with OECD Watch (info@oecdwatch.org) before doing so.

C. The “Specific Instances” Procedures

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 chapter 1 of this section on the content and scope of the Guidelines).

🕒 Who can file a complaint?

Any “interested party” – representatives of employers’ organisations, trade unions, NGOs and individuals – can file a complaint with an NCP if it can demonstrate it has an interest in the issues. Any individual or group of people from, for example, a village or community, or an employee, could therefore file a complaint with the NCP, either directly or through an NGO or trade union.

🕒 To which NCP should a “specific instance” be filed: home or host country?

The case should be submitted to the NCP in the country where the alleged violation occurred (if an NCP exists in that country). This practice has the benefit of encouraging a local resolution among local actors directly responsible for and/or affected by a violation. However, it also often allows parent companies and home country governments to shirk their responsibility by transferring the case to the local NCP.

NGOs have sought to highlight the issue of parent company responsibility by simultaneously filing cases before both the host and home country NCPs and calling on both NCPs to collaborate and contribute equally to resolving the case. If a case is filed simultaneously in several countries, NCPs are expected to collaborate with each other to handle the issues raised.

In 2011, in an attempt to highlight the responsibility of the Dutch agricultural company Nidera for violations of the Guidelines in Argentina, a group of Argentine and Dutch NGOs filed a case with the Dutch NCP (rather than the Argentine NCP) and emphasised the necessity of handling the complaint in the Netherlands, arguing that local violations of the OECD Guidelines were the direct result of strategic policy decisions made by the parent company⁸².

⁸² See *CEDHA et al. vs Nidera*, http://oecdwatch.org/cases/Case_220. See also Joseph Wilde-Ramsing, *Toward parent company and home country responsibility in OECD Guidelines cases*, 25 September 2009, <http://oecdwatch.org>

► NOTE TO TRADE UNIONS

A trade union wishing to file a complaint should contact either its national union and/or the relevant Global Union Federation. TUAC can also provide assistance as it has published a Trade Union Guide to the OECD Guidelines⁸³ which includes a check-list for filing a complaint. TUAC also publishes a list of trade union cases submitted under the Guidelines.

⊙ What might cause an NCP to reject a case?

Some of the 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**.⁸⁴
- Inadmissibility due to **ongoing judicial proceedings** in relation to the issue at hand. Despite the fact that the Guidelines state that “NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned”, NCPs do frequently reject cases on these grounds⁸⁵. If the NCP evaluates that it can bring a positive contribution to the issues raised (and not generate “any serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation”), it should offer its good offices.
- One of the most common frustrations that complainants face when bringing NCP cases is the application of an **unreasonably high burden of proof** to reject cases. NCPs have rejected 43 of the 250 (17%) cases filed by communities, individuals and NGOs because the NCP did not consider that the complainants had provided sufficient evidence of a breach of the Guidelines. The Procedural Guidance directs NCPs to determine whether a complaint raises a *bona fide* issue and to consider whether the issue is “material and substantiated.” The Procedural Guidance does not define “substantiated,” which has led to widely varying interpretations by different NCPs. While many NCPs apply an interpretation that leads them to accept complaints that raise credible claims, others have used this language to require a level of certainty that is inappropriate and often impossible for complainants to meet.⁸⁶

83 TUAC, *The OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, Trade Union Guide*, www.tuacoeedmguidelines.org

84 For an example, see *Bahrain Watch et al. vs. Dae Kwang*, http://oecdwatch.org/cases/Case_315

85 OECD Guidelines, *op. cited*, Commentary on the Implementation Procedures, Initiative assessment, §26, p 83.

86 For an example, see http://oecdwatch.org/cases/Case_251 and *Privacy International et al. vs. Trovicor*, http://oecdwatch.org/cases/Case_287.

② Process and outcome

Initial Assessment

The NCP will first conduct an initial examination as to whether issues raised are relevant to the implementation of the Guidelines; 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.

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.

If the NCP's decision to dismiss the case is based on a flawed interpretation of the Guidelines, or if the NCP has failed to follow the Procedural Guidance in its dismissal, a request for clarification may be referred to the Investment Committee by government authorities or by TUAC, BIAC, or OECD Watch.

Declare the complaint admissible

In this situation the NCP should offer its good offices to the parties to facilitate a resolution to the **issues raised**.

The NCP shall then consult the parties and, where appropriate, it will:

- 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;
- 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);⁸⁷
- 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.

When concluding the procedure, the NCP will issue a public statement. If the parties can reach an agreement the matter will be considered resolved.

⁸⁷ OECD Guidelines, *op. cit.*, Procedural guidance, I.C. § 2a.

If, however, no solution is found, the NCP is obliged to issue a public statement. The NCP may also make **recommendations** to the parties concerned. The Procedural Guidance allows for – but does not require – NCPs to make a determination on whether the Guidelines had been violated in cases where mediation fails.⁸⁸

The Duration of the Procedure

The Guidelines set out an indicative time frame on how long the different stages in the examination of a case should last⁸⁹. According to the Guidelines, the process should last for approximately 12 months. In many instances it has taken twice as long (even simply to decide on the admissibility of the case).

The Confidentiality of Proceedings

According to the Procedural Guidance, transparency is a core operating principle of NCPs. However, in facilitating resolution of the issues raised, the NCP will take the necessary steps to ensure that both the business' and other parties' sensitive material remains confidential.⁹⁰ 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.

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 both parties agree 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.”⁹¹ 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. NCPs are required to publish their final statements.

The confidentiality of the procedure remains an issue that is still debated. BIAC and certain NCPs⁹² 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

⁸⁸ See OECD Watch, *Statement on the update of the OECD Guidelines*, 25 May 2011, *op. cited*

⁸⁹ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Indicative Timeframe.

⁹⁰ OECD Guidelines, *op. cit.*, Procedural guidance, § I. C) 4.

⁹¹ OECD Guidelines, *op. cit.*, Procedural guidance, § I. C) 3.

⁹² Some NCPs advocate extending confidentiality to all phases of the procedure; see the Australian NCP's statements at: www.ausNCP.gov.au/ and the British NCP's at: www.berr.gov.uk

are of the view that the confidentiality of proceedings facilitates the mediation process.⁹³ On the other hand, publicity can be a useful means of applying pressure, helping ensure that the Guidelines are more effectively applied.⁹⁴

The Guidelines' commentaries require that a balance be struck between confidentiality and transparency.⁹⁵ 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.⁹⁶ OECD Watch has produced guidance for (potential) complainants as to how to navigate the transparency *versus* confidentiality issue during specific instance procedures.⁹⁷

Follow-up of the case

Though not all NCPs do so, the best performing NCPs develop concrete monitoring and follow-up procedures to ensure the implementation of the recommendations of final statements issued or commitments agreed to in joint statements resulting from NCP processes. NCPs such as the Dutch, UK, Norwegian and French generally require complainants to report back on implementation of the recommendations/agreements three months and one year after the closing of the case.⁹⁸

HOW TO FILE A COMPLAINT?

Legal representation is not required before the NCPs, and therefore the claimants can potentially avoid financial expenses. It is nonetheless important to note that companies are likely to engage legal counsel, and not doing so may therefore result in an inequality of legal resources available to the parties. 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.⁹⁹ This is what the Dutch NCP refers to as the optional preliminary consultation. Going a step further, the Norwegian NCP has actually provided complainants with a technical assistant (consultant) to equal out the power imbalance between the parties in some cases.¹⁰⁰

93 OECD Watch, *The Confidentiality Principle, Transparency and the specific instance procedure*, 2006, p.3. <http://oecdwatch.org>

94 For advices on transparency and confidentiality rules once a complaint is filed, see OECD Watch, *Transparency & Confidentiality*, <http://oecdwatch.org>

95 OECD Guidelines, *op. cit.*, Procedural Guidance, C.4, Commentary on the Implementation Procedure § 38.

96 *Ibid.*, Commentary on the Implementation Procedure.

97 See OECD Watch, *Transparency and Confidentiality*, *op. cited*

98 See, for example, the Nidera case handled by the Dutch NCP, http://oecdwatch.org/cases/Case_220

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

100 OECD Watch, Norwegian Support Committee for Western Sahara vs Sjovik, http://oecdwatch.org/cases/Case_247

There is no one model for writing a complaint. It is important to note that some NCPs list the information required or provide an on-line for filing complaints. The list of the different NCPs can be found here: <https://mneguidelines.oecd.org/ncps>

➤ **OECD Watch complaint template¹⁰¹**

COMPLAINT ELEMENT	DESCRIPTION
Date	Date the complaint will be submitted to the NCP and any other recipients.
Contact information of NCP receiving the complaint	This includes the full address of the NCP and, if known, the name of the chair or representative, email address and telephone number(s). If you are sending the complaint to other NCPs, the OECD, government officials, OECD Watch, TUAC, etc., you should also mention in this part of the letter here using 'cc'.
Subject line	OECD Watch recommends stating the name of the company, the issues raised, and the country where the problem is occurring.
Introduction	List at a minimum: name of the complainant, company name, the problem and the location of the violations. You can also briefly state the main request to the NCP and the chapters that are breached.
Explain your interest in the complaint/ who you represent	For example, an NGO's interest could stem from its mission or work with the affected union members or community.
Enterprise contact details	Contact details for the enterprises, include full company names, addresses, and any other relevant details that are known, such as contact names, telephone numbers, email addresses and website addresses.
Structure of the company	If the case involves more than one company, describe their structure and relationships. For example, parent-subsidiary relationship, supply chain relationship, enterprise-bank relationship, etc.
Context of the complaint	Include general information about the broader background, context or location of violations mentioned in the complaint before going into detail about the specific breaches.
List the chapter and paragraphs you believe the company has breached	This information should include the who, how, what, when, where and why for each allegation. In addition, you should provide detailed evidence and information that supports the allegations. You can make this section as short or long as you see fit, but make sure your argumentation is clear. The documents can be annexed to the complaint, but they should be mentioned and referenced in the text.
Other relevant international standards the NCP should take into account when considering the complaint	If applicable, other instruments can be highlighted to show the severity of the problem. Complainants will have to decide the most effective way of presenting this information.
Previous attempts at resolution	Explain whether you have sought to resolve the issues directly with the enterprise and if so, what was the enterprise's response?
Recipient NCP and justification (if necessary)	In some instances, the host and home countries both have NCPs. The complaint can be submitted to both NCPs. However, an explanation on why the case is being submitted to both NCPs is recommended.
Complaint goals	If it makes strategic sense, explain your demands and/or what you think the company should do to resolve the problem.
Request to the NCP	State what you expect from the NCP, e.g. mediation, a fact-finding mission, make a determination, etc.
Confidentiality request and justification (if necessary)	Indicate if the names of individuals, sources of evidence or any documentation have been anonymised, and why this is justified.

¹⁰¹ OECD Watch, *Calling for Corporate Accountability*, p 45-47, June 2013, available at: <http://oecdwatch.org>

Statement of 'good faith' to engage in the complaint procedure	Acknowledge your good intentions to engage in the process and what you will do to facilitate this. You can also reference how you will respect confidentiality in case you are, for example, pursuing other strategies such as media outreach, advocacy and campaigning.
Closing	The closing should state that a written confirmation of receipt is expected.
Signature	Add names and signatures of all of organisations who co-sign the complaint.
Attachments and/or appendices	Provide a list of attachments and/or appendices to the complaint.

Outcome

The NCPs perform mainly a role of conciliation and mediation, the quality of which tends to vary considerably between them. The NCP's findings are not legally enforceable 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 decisions, the mere fact that the NCP's conclusions are out in the public domain can have an influence on the conduct of the parties. Civil society organisations regret that the 2011 update failed to sufficiently establish states duties to protect human rights in cases of violations of the Guidelines. The main role of the NCP remains to reach a mediated outcome. One way in which the recommendations of the NCP could be given greater weight would be to **link certain recommendations to some sort of sanction** (see examples below), most notably in relation to export credit programmes, overseas investment guarantees and inward investment promotion programmes.

NCPs and financial consequences

In April 2015, the final statement of the **Canadian NCP** regarding a specific instance filed by the Canada Tibet Committee resulted in the withdrawal of the Canadian government's Trade Commissioner Services and/or Export Development Canada (EDC) financial services for the company China Gold International Resources for its operations in the Gyama Valley. The decision was taken following the company's refusal to cooperate with the NCP.¹⁰² The **Dutch government** has also pledged to ensure that consequences (such as barring companies from receiving export credits, participating in trade missions, and other forms of state support) are attached to a company's non-compliance with the Guidelines.

¹⁰² See *Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region*, www.international.gc.ca. See also: Canada Tibet Committee, *Government of Canada NCP releases final statement on China Gold International Resources in Tibet's Gyama Valley*, http://tibet.ca/en/library/media_releases/370

The NCPs in action in corporate-related human rights abuses

➔ **Lawyers for Palestinian Human Rights vs. G4S**¹⁰³

G4S and its Israeli subsidiaries provide, install, and maintain equipment that is used in military checkpoints in the Annexion Wall. The complaint alleges that G4S contributed to serious human rights abuses, including the detention and imprisonment of children in Israeli prison facilities, during which many allege being subject to torture and/or cruel and degrading treatment.

LPHR requests that G4S provide information about where and how its equipment is used and what due diligence checks have been conducted in providing it. The complaint also asks G4S to stop servicing the equipment, remove it, agree to an independent audit of these actions, and agree to identify ways to compensate the people who have suffered adverse impacts.

LPHR is represented by the London-based law firm Leigh Day.

On 22 May 2014, the NCP accepted the case; however, it rejected allegations relating to G4S's obligations to avoid causing or contributing to adverse human rights impacts and to conduct human rights due diligence.

The NCP offered the parties mediation, but G4S declined the offer, claiming it was legally bound to keep information relevant to the case confidentiality, and because it felt that LPHR did not have a mandate to negotiate and resolve the issues. Given this situation, the NCP informed the parties on 8 July 2014 that it would proceed to the next phase of the complaint process and conduct a further examination of the allegations in the complaint.

In March 2015, the NCP issued its final statement, finding that G4S's actions "are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship." As a result of this breach, the UK NCP found that G4S is also technically in breach of other Guidelines provisions related to respect for human rights, but that the company had not failed to respect human rights in regard to its own operations.

For other examples of cases, please refer to the table at the end of this chapter.

¹⁰³ Extract from OECD Watch, *Lawyers for Palestinian Human Rights vs. G4S*, 27 November 2013, http://oecdwatch.org/cases/Case_327

COMPLAINTS LODGED BY NGOS – OVERVIEW

As of June 2015 there had been 250 complaints¹⁰⁴ lodged with NCPs by civil society organisations, communities, and individuals.¹⁰⁵ Noting that a complaint may in fact concern breaches of multiple sections of the Guidelines, the violations the most invoked are, in decreasing order: the general principles; employment and industrial relations; human rights; disclosure; the protection of the environment; concepts and principles; bribery; competition; consumer interest; and taxation.

To date, 108 complaints have been rejected by the NCPs and 65 have been concluded. The others are either still pending or have been closed or blocked by the NCP without an explanation or withdrawn by the complainants.¹⁰⁶

The table at the end of this section features selected specific instances examined by the different NCPs.

For a preliminary indication whether the Guidelines apply to your complaint, you may find OECD Watch online “Case Check” tool helpful. Based on the information you fill in, this tool generates tailored advice to your potential complaint or situation. The answers you provide remain confidential. See www.oecdwatch.org/oecd-watch-case-check.

* * *

¹⁰⁴ In addition to 170 trade union cases.

¹⁰⁵ OECD Watch, Quarterly Case Update, June 2015, accessible on: <http://oecdwatch.org/publications-en>

¹⁰⁶ OECD Watch, Quarterly Case Update, December 2014, *op. cited*

Questionable effectiveness...

Whilst the 2011 update brought significant improvements to the Guidelines, some concerns remain, in particular regarding the effectiveness of the NCPs.

Advantages

- The **inclusion of a new chapter (IV) on human rights**;
- The integration of the **concept of due diligence** in particular with regard to human rights;
- An **extended scope of application** to all sectors, and including business relationships (in particular the supply chain as well as institutional shareholders¹⁰⁷);
- The broad nature of the principles and the **extraterritorial scope** of the Guidelines (where the parent company is based in an adhering state) make them a potentially powerful instrument, particularly regarding companies' activities, including in weak governance zones.¹⁰⁸ The Guidelines are increasingly becoming **more visible and widespread**, and recognised by States,¹⁰⁹ NCPs and companies.¹¹⁰ The Guidelines are increasingly utilised as a benchmark and constitute one of the principal measures by which companies' responsibilities are assessed;
- A recognised **mediation 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.

Other possible advantages:

- Possibility that NCPs will conduct fact-finding;
- Possibility that NCPs will issue strong final statements and determination of a breach of the Guidelines;
- Possibility of NCP monitoring;
- Opportunity to generate public and political attention;
- Less costly than court cases.

¹⁰⁷ See *Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises*, approved by the OECD Responsible Business Conduct Working Party at its meeting on 20 March 2014.

¹⁰⁸ OECD, *Promoting Corporate Responsibility*, *op. cit.*, p.9.

¹⁰⁹ States have made particular mention of the Guidelines at a meeting of G8 Summit in Eililgendam in 2007.

¹¹⁰ The Guidelines are directly cited by 22% of executives at multinational enterprises. OECD, *Promoting Corporate Responsibility*, *op. cit.*, p. 7.

Concerns

In the past 15 years, **only 3 of the 250 cases filed (1%) have resulted in directly improved conditions for victims of corporate abuse and no cases have led to compensation for the harms endured.**¹¹¹

The most frequent criticisms of the Guidelines refer to the NCPs:

- The **assessment of admissibility is too restrictive** in determining whether a complaint should be accepted;
- At times NCPs make **contradictory interpretations** of the concepts embodied in the Guidelines;
- There is **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;
- The specific instances procedures are being conducted in a **confidential** manner;
- The delay in examining complaints is still too important.

In addition, major concerns remain:

- The **proximity of the NCPs to the business community** and the unequal treatment given to NGOs regarding the structure of NCPs;
- The lack of willingness from the NCPs to **assume a monitoring role** once a case is concluded;
- The NCPs' **lack of an investigative will and/or capacity**. As a result, complainants often carry the burden of providing evidence to support the claims made against the business (running the risk that the complaint be dismissed where the information provided proves insufficient). It should be noted that some NCPs do undertake their own fact-finding missions as part of their examination of the case. Both the Dutch and the Norwegian NCPs have done this.¹¹² However, most NCPs refuse to do any investigation beyond the documentation provided directly to them by the parties and – should this documentation be inconclusive – simply say, “There’s no more we can do” and close the case without resolution.

¹¹¹ OECD Watch, *Remedy Remains Rare*, June 2015, pp. 14-19, *op. cited*

¹¹² See, for example, *CEDHA et al. vs Nidera* (Dutch NCP), http://oecdwatch.org/cases/Case_220, and *Future in Our Hands vs Intex Resources* (Norwegian NCP), http://oecdwatch.org/cases/Case_164

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. The lack of sanctions or “consequences” remains the main weakness of this mechanism and brings into question its effectiveness. However as is illustrated above, **some governments** and NCPs are starting to **link the violations of the Guidelines to sanctions**. NCPs are encouraged to inform other government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency’s policies and programmes which may lead to consequences for the company found to have violated the Guidelines¹¹³.

ADDITIONAL RESOURCES

- OECD, “Text of the OECD Guidelines for Multinational Enterprises”
www.oecd.org/daf/investment/guidelines
 - OECD, National Contact Points,
<https://mneguidelines.oecd.org/ncps/>
 - OECD WATCH
www.oecdwatch.org
 - OECD Watch Case Check:
<http://oecdwatch.org/oecd-watch-case-check>
 - OECD Watch Guide (in English, Spanish and French),
“Calling for Corporate Accountability: A Guide to the Guidelines”,
<http://oecdwatch.org/news-en/new-oecd-watch-guide-to-the-oecd-guidelines>
 - OECD Watch brochure on the Guidelines (in eight different languages)
http://oecdwatch.org/publications-en/Publication_3816
 - TUAC, “Trade Union Advisory Committee to the OECD”
www.tuacoecdmneguidelines.org/Home.asp
 - TUAC, Trade Union Cases
www.tuacoecdmneguidelines.org/cases.asp
-

¹¹³ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedure. § 37.

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
<p>Australia (agreement established with the UK's NCP in June 2005)</p>	<p>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)</p>	<p>- 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.</p>	<p>II. General Policies VIII. Consumer Interests</p>	
<p>Australia (with similar cases being filed with the UK and Swiss NCPs regarding British and Swiss firms also implicated).</p>	<p>Complainant: Mr Ralph Bleechmore, Adelaide barrister. Companies: - BHP Billiton - Cerrejon Coal Company</p>	<p>- Attempted depopulation and forced eviction of residents of the slums in Tabaco (five additional communities in the region were affected by the same policy).</p>	<p>II. General Policies III. Disclosure VI. Environment</p>	
<p>Canada</p>	<p>NGOs: Canada Tibet Committee Company: China Gold International Resources Corp. Ltd.</p>	<p>- Failure to protect the environment, public health and safety - Discriminatory hiring practices, forced evictions and expropriation of land, violations of the freedom of expression and to information, and inability to obtain remedy. - Failure to disclose accurate information about the environmental risks associated with the project, the full impact of the project to local communities; and failure to allow independent inspectors to ascertain the causes of the March 29, 2013 landslide disaster that took 83 lives.</p>	<p>II. General Policies III. Disclosure IV. Human Rights V. Employment and Industrial Relations VI. Environment</p>	
<p>Denmark</p>	<p>NGO: Mellempfolkeligt Samvirke (Action Aid Denmark) Company: Arla Foods</p>	<p>- Failure to conduct due diligence and to mitigate the impacts on the livelihood of local stakeholders of subsidized export of cheap milk powder (among other products) to international markets at low prices.</p>	<p>IX. Science and Technology</p>	

FILING DATE	HOST COUNTRY	RESULT
2005	Australia	<ul style="list-style-type: none"> - 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	<ul style="list-style-type: none"> - Mediation - Statement adopted on June 12th, 2009, procedure closed: www.ausncp.gov.au
2014	China	<ul style="list-style-type: none"> - In a final statement, the NCP concluded to non-compliance with the OECD Guidelines, and took the unprecedented step of imposing sanctions on the company for failing to engage in the complaint process, including by withdrawing Trade Commissioner Services and other Canadian advocacy support abroad. - NCP recommendations with respect to human rights due diligence including undertaking human rights impact assessments and of disclosing any past or future reports). - Statement released on 1 April 2015: http://oecdwatch.org
2014	Global	<ul style="list-style-type: none"> - The parties were already engaged in constructive dialogue when the complaint was filed. The filing served to speed up the process, as 4 months after, the parties reached an agreement on 26 September 2014 by which Arla committed to implement a proactive human rights policy in its global operations, as well as to introduce due diligence procedures and engage in a more systematic identification, prevention and mitigation of actual and potential unintended consequences on local farmers' business prospects and rights that may be impacted by Arlas sales and operations. See http://oecdwatch.org

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
<p>France (case also filed with Belgium and Luxembourg NCPs)</p>	<p>NGOs: - Sherpa - CED - FOCARFE - MISEREOR</p> <p>Company: - Bolloré S.A - Financière du Champ de Mars - SOCFINAL - Intercultures</p>	<p>- failure to take action to prevent SOCAPALM's negative impact on the environment, local communities, and workers.</p>	<p>I. General Policies IV. Human Rights V. Employment and Industrial Relations</p>	
<p>Germany (case filed with UK NCP following German NCP's termination)</p>	<p>NGOs: - Bahrain Center for Human Rights - Bahrain Watch - European Center for Constitutional and Human Rights - Privacy International - Reporters Without Borders</p> <p>Company: - Trovicor GmbH - Gamma International UK Ltd</p>	<p>- Aiding and abetting the Bahraini government in its perpetration of human rights abuses (including violations of the right to privacy, freedom of expression and freedom of association, as well as arbitrary arrest and torture) through the selling and maintaining of surveillance technology.</p>	<p>II. General Policies IV. Human Rights</p>	
<p>Korea (simultaneously filed with Norway and Netherlands NCPs)</p>	<p>NGOs: - Fair Green Global Alliance - Korean Trans National Corporations Watch - Lok Shakti Abhiyan - Norwegian Forum for Environment and Development</p> <p>Company: - POSCO - Algemeen Burgerlijk Pensioenfonds - Norway Government Pension Fund Global</p>	<p>- Failure to seek to prevent human rights abuses (including physical and economic displacement of more than 20,000 people, including individuals with special legal protections under the Recognition of Forest Rights Act) and carry out comprehensive human rights and environmental impact assessment studies for iron mine, steel plant and associated infrastructure in the State of Odisha, India.</p> <p>- Failure to engage in meaningful stakeholder consultation with all affected communities and failure to conduct due diligence</p>	<p>II. General Policies IV. Human Rights V. Employment and Industrial Relations VI. Environment</p>	
<p>Norway</p>	<p>NGO: Framtiden i vare hender (The future in our hands)</p> <p>Company: Intex ressources (nickel mines)</p>	<p>- Infringement of the rights of affected indigenous people: right to property and right to water</p>	<p>II. General Policies V. Environment VII. Combating Bribery</p>	

FILING DATE	HOST COUNTRY	RESULT
2010	Cameroon	<ul style="list-style-type: none"> - Mediation between Sherpa and Bolloré started in 2013 (after nearly 2 years of Bolloré refusing to cooperate) leading to the creation of an action plan. - Final statement of June 2013 concluded that through their business relations with SOCAPALM, all four holding companies violated the Guidelines. <p>See http://oecdwatch.org</p> <ul style="list-style-type: none"> - Follow-up statement in March 2014 indicating appointment of an independent organisation to monitor the implementation of the action plan. - Follow-up communiqué in March 2015 to ask all parties to take responsibility for concrete implementation of the action plan. <p>See http://www.tresor.economie.gouv.fr</p> <ul style="list-style-type: none"> - The action plan is yet to be adequately implemented
2013	Bahrain	<ul style="list-style-type: none"> - The German NCP offered a mediation on Trovicor's management system, but declared the allegations were not substantiated as there was no sufficient evidence of Trovicor's business relationship with the Bahraini government. The German NCP issued its final statement "terminating" the case on 21 May 2014. - The UK NCP accepted the case against Gamma on 24 June 2013, and appointed an external mediator. The mediation process was flawed in several ways. The final NCP statement is pending. <p>See http://oecdwatch.org</p>
2012	India	<ul style="list-style-type: none"> - In June 2013 the Korean NCP rejected the complaint as it determined it could not play a role in resolving the dispute, which they consider to be the responsibility of the Indian authorities. See http://oecdwatch.org - NBIM refused to engage with the Norwegian NCP, which found it was in violation of the Guidelines. On 27 May 2013, the Norwegian NCP published its final statement reaffirming the Dutch NCPs assertion that the Guidelines apply to minority shareholders - The Dutch NCP facilitated mediation in relation to the Dutch pension fund ABP and the Norwegian Government Pension Fund Global 's investments in POSCO. ABP and APG committed to exercise their leverage to bring POSCOs business practices in line with international standards. Following the joint agreement, the Dutch NCP published a statement confirming that the OECD Guidelines apply to minority shareholdings. See http://oecdwatch.org
2009	The Philippines	<ul style="list-style-type: none"> - In March 2010, the NCP accepted the complaint and appointed an independent expert in charge to carry out research in situ. - The expert concluded in January 2011 that the activities of the company respected the domestic law but not the Guidelines due to a lack of consultation, environmental impact assessment and transparency. - Resolution, 30th November 2011: non-compliance with the Guidelines in terms of stakeholder consultation and environmental protection. The NCP called the company to act on the principle of due diligence particularly with regard to the indigenous population: www.regjeringen.no

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Norway (in consultation with the South Korean and Dutch NCPs)	NGO: Forum for Environment and Development (ForUM) Company: Norwegian Bank Investment Management (NBIM)	Failure to take the appropriate steps to prevent or mitigate negative human rights on forest dwellers and environmental impacts in connection with NBIM's investment in POSCO India Private Limited.	II. General Policies III. Disclosure IV. Human Rights VI. Environment	
Norway	NGO: Fivas Company: Norconsult	- Violation of indigenous peoples rights and internationally recognised guidelines - Lack of information regarding the potential risks resulting from the project, and a lack of consultation with local communities in the decision-making process. - Lack of due diligence	II General Policies III Disclosure IV Human Rights	
Netherlands	NGOs: - Center for Human Rights and Environment - Fundación Promoción Humana a través de su Instituto Internacional de Formación - Oxfam Novib - SOMO Company: Nidera	Inadequate living and working conditions and inadequate information for temporary workers at the corn seed plants.	II. General Policies V. Employment and Industrial Relations	
Switzerland	NGOs: Building and Wood Workers International (BWI) Company: FIFA	Failure to engage in due diligence concerning human rights violations of migrant workers related to the construction of facilities for the FIFA 2022 World Cup in Qatar	II. General Policies IV. Human Rights	
United Kingdom	NGO: Lawyers for Palestinian Human Rights (LPHR) Company: G4S PLC	- Human rights violations of Palestinians through its contracts to install, service, and maintain security systems at Israeli prisons and equipment at checkpoints	II. General Policies. IV. Human Rights.	

FILING DATE	HOST COUNTRY	RESULT
2012	India	<ul style="list-style-type: none"> - Violation of Guidelines due to NBIM's refusal to participate in the NCP process - Confirmed violation for lack of due diligence - Final statement released 27 May 2013: http://www.responsiblebusiness.no
2014	Malaysia	<ul style="list-style-type: none"> - Mediation - A joint agreement and commitment by Norconsult to respect the right to free, prior and informed consent (FPIC) of indigenous communities affected by projects to which it is linked (in accordance with ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)). Norconsult also committed to implementing human rights due diligence procedures in order to avoid and minimise the adverse impacts of major hydropower projects on human rights and the environment.
2011	Argentina	<ul style="list-style-type: none"> - Mediation which resulted in a joint agreement on 25 November 2011, through which Nidera strengthened its human rights policy, formalised human rights due diligence procedures for temporary rural workers, and allowed the NGOs to monitor its Argentine corn seed operations through field visits. - Final statement issued 5 March 2012. See http://oecdwatch.org - Complainants were satisfied with the implementation of the agreement and Nidera complied with its commitment to implement an operational-level grievance mechanism. In February 2013, the parties submitted a joint "One Year On", report to the NCP.
2015	Qatar	<ul style="list-style-type: none"> - Initial assessment issued on 13 October 2015: The Swiss NCP concluded that FIFA as a multinational organisation is bound by the OECD guidelines. http://business-humanrights.org
2013	Israel and the Occupied Palestinian Territory	<ul style="list-style-type: none"> - In March 2015, the NCP issued its final statement, finding that G4S's actions "are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship." As a result of this breach, the UK NCP found that G4S is also technically in breach of other Guidelines provisions related to respect for human rights, but that the company had not failed to respect human rights in regard to its own operations. See http://oecdwatch.org

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
United Kingdom	NGO: WWF International Company: SOCO	- Infringement of the DRC's legal commitment to preserve Virunga National Park as a World Heritage Site by conducting oil exploration and exploitation activities; and break on sustainable development. - Failure to conduct human rights due diligence and meaningfully consultations	II. General Policies. IV. Human Rights. VI. Environment	
United Kingdom	NGO: ADHRB Company: Formula One World Championship Ltd.	- Contribution, inadvertently or otherwise, to further human rights violations in Bahrain and the continuation of impunity for past violations (including arbitrary detention and torture), as a result of failure to conduct human rights to due diligence and lack of meaningful stakeholder engagement	II. General Policies. IV. Human Rights.	

FILING DATE	HOST COUNTRY	RESULT
2013	Democratic Republic of Congo (DRC)	- Mediation by the UK NCP, which led to a joint statement and agreement on 11 June 2014, in which SOCO agreed to cease its operations and committed never again to jeopardize the value of any other World Heritage Sites anywhere in the world, as well as to undertake environmental impact assessments and human rights due diligence in accordance to international norms and standards. Despite the agreement, however, SOCO has yet to relinquish its operating permits. See http://oecdwatch.org
2014	Bahrain	- Mediation, at the issue of which Formula One publicly committed to respecting internationally recognized human rights in all of its operations, including by committing to develop and implement a due diligence policy which analyzes and takes steps to mitigate any human rights impact in a host country, including on the human rights situation in Bahrain.

PART II

National Human Rights Institutions (NHRIs)

National Human Rights Institutions (NHRIs)¹¹⁴ are national independent public bodies established by states in accordance with the 1993 UN Paris Principles, which set out the criteria for a legitimate and credible NHRI.¹¹⁵ A NHRI's main role is to promote and protect human rights, and their functions include monitoring and advising home governments, raising awareness through human rights education activities and coordinating local initiatives with international bodies.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), an international association of NHRIs tasked with the coordination and promotion of the work of NHRIs, was established in 1993. The ICC also accredits NHRIs according to their degree of conformity with the Paris Principles. As of May 2014, 106 countries have established ICC accredited NHRIs, with 71 maintaining an “A-level” accreditation, which denotes full compliance with the Paris Principles.¹¹⁶

There are different models of NHRIs: human rights commissions, human rights ombudsman institutions, hybrid institutions, consultative and advisory bodies, institutes and centres, and multiple institutions. Core functions of NHRIs include complaint handling, human rights education and making recommendations on law reform.¹¹⁷ They are part of the State apparatus and are funded by the State. However, according to the Paris Principles, they should operate and function independently from governments. NHRIs can have formal and coercive powers of investigation, or powers to make binding recommendations without an adjudication function. For instance, some NHRIs have a mandate to deal with complaints from individuals or groups of individuals, who are victims of violations of human rights. Others

¹¹⁴ Information about NHRIs can be found on the website of the UN Office of the High Commissioner for Human Rights <http://www.ohchr.org>, quick link to “National Human Rights Institutions”, or directly at: <http://www.ohchr.org/EN/Countries/NHRI/>. A full list of NHRIs and their accreditation can be found on the website of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC): <http://nhri.ohchr.org>.

¹¹⁵ OHCHR, Paris Principles, <http://www.ohchr.org>

¹¹⁶ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *Rules of Procedure for the ICC Sub-Committee on Accreditation*, <http://nhri.ohchr.org>

¹¹⁷ ICC, *Role and types of NHRIs*, <http://nhri.ohchr.org/>

do not have direct adjudicatory functions concerning complaints of human rights violations and will rather focus on the detection and prevention of systemic human rights violations (this can include reviewing governmental policies and state compliance with human rights obligations) with powers including the conduct of inquiries and the possibility to provide legal advice and representation to persons to take legal action.

With a few exceptions, NHRIs generally do not have the power to make binding decisions¹¹⁸.

However, decisions can for instance serve as “authoritative interpretation” and can sometimes be enforceable by national judicial bodies.¹¹⁹

NHRIs and corporate accountability

In 2009, the ICC established the ICC Working Group on Business and Human Rights in order to support NHRIs with capacity building and strategy development in the field of Business and Human Rights.¹²⁰ The Working Group reports to the ICC Bureau twice a year. At the 10th international conference of NHRIs in Edinburg, Scotland in 2010, the ICC issued the Edinburg Declaration on Business and Human Rights, in which NHRIs agreed to promote and protect human rights related to business activities.

Regional networks of NHRIs have also adopted regional action plans on business and human rights, including in Africa,¹²¹ Asia-Pacific,¹²² Americas¹²³ and Europe.¹²⁴

Work on business and human rights greatly varies from one NHRI to another, and in accordance with recent developments on the international level, their expertise in this field has developed quickly over the last years. Some NHRIs, such as those in Australia, Denmark, Germany, Indonesia,¹²⁵ Kenya, Malaysia, Mexico, Morocco, South Africa and Thailand, have been particularly active on these issues. Regarding the handling of complaints, some of them are directly or indirectly looking at corporate responsibility by examining complaints related to the discrimination in the

118 Katrien Meuwissen, Working paper no. 154, *NHRIs and the State: new and independent actors in the multi-layered human rights system?* Leuven Centre for Global Governance Studies, KU Leuven, Institute for International Law, March 2015, available at: https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp154-meuwissen.pdf

119 For example, decisions of the Hearing Panel of the Kenyan Human Rights Commission are enforceable by the High Court. See OHCHR, *Business and Human Rights: A Survey of NHRI Practices, 2007* available at: www.ohchr.org

120 ICC, Themes, Business and Human Rights, <http://nhri.ohchr.org/>

121 Africa: Yaoundé plan of action, <http://nhri.ohchr.org>

122 Asia-pacific: <http://nhri.ohchr.org>

123 Americas: <http://nhri.ohchr.org>

124 Europe: Berlin Action Plan: <http://nhri.ohchr.org>

125 See for instance, Indonesian National Commission on Human Rights, <http://www.asiapacificforum.net>

workplace. Others, such as the South African Human Rights Commission (SAHRC), have 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. Comprehensive mapping has been undertaken, dealing in detail with the question of NHRI activities on human rights and business and what their complaints handling mandate is.¹²⁶ Such mapping also make references to public enquiries conducted by some NHRIs, such as in Kenya and Malawi.

HOW TO FILE A COMPLAINT?

NHRIs have different rules of procedure, and you should contact the NHRI in the country where the abuse has occurred in order to obtain up to date information about the specific procedure and the potential outcome of such a procedure. Although NHRIs are generally limited in their ability to deal with situations of human rights abuse in the territory of the state in which the NHRI is based, it may be worth contacting the NHRI of the home country of the company involved in human rights abuses. As some of the cases below illustrate, some NHRIs have investigated and confirmed human rights violations committed abroad by corporations based in their country. For an updated list of NHRIs see the website of ICC: <http://nhri.ohchr.org> under “About us” and “ICC Accreditation”.

🕒 Process and Outcome

As there is significant variety in the competences and resources allocated to the NHRIs, as well as their independence from the state, outcomes may vary to a great extent from country to country. The outcomes will vary depending on whether or not the NHRI has the ability to deal with complaints. You should consult with the NHRI relevant to the human rights situation (the state where the violation occurred, or potentially the state where the company is based) in order to learn of the potential outcome of a complaint and/or of engaging with an NHRIs. For an updated list of existing NHRIs see the website of ICC: <http://nhri.ohchr.org>.

NHRIs in action on corporate-related human rights abuses

Some, though not all NHRIs, have dealt with complaints related to violations involving companies (Australia, Canada, Indonesia, New-Zealand, Uganda, etc.), mainly related to employment issues. Ombudsman institutions also deal with a range of issues such as public sector employment, which could concern state-owned enterprises. The fact that NHRIs are increasingly paying attention to the issue of business and human rights represents an opportunity for civil society to

¹²⁶ Network of African National Human Rights Institutions, Report of the NANHRI mapping survey on business and human rights, 2013, www.nanhri.org. See also OHCHR, *Business and Human Rights: A Survey of NHRI Practices*, 2007, www.ohchr.org

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 further 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 explore states' extraterritorial obligations.

🕒 NHRIs in action in corporate related Human Rights abuses

➔ Investigating alleged Human Rights abuses of Thai sugar company in Cambodia¹²⁷

The National Human Rights Commission of Thailand (NHRCT)¹²⁸ was established by the 1997 Constitution, and, following the enactment of the National Human Rights Commission Act in 1999, started functioning in July 2001. The 1999 Act requires the NHRCT to be independent and impartial, and bestows it with numerous mandates. These include to:

- Promote respect for human rights, domestically and internationally;
- Examine acts of human rights violations and propose remedies to actors concerned;
- Submit to Parliament and the Government an annual report on the country's human rights situation;
- Propose legal and regulatory reform and policy recommendations for the promotion and protection of human rights;
- Disseminate information and promote education and research on human rights; and
- Cooperate and coordinate with the Government, NGOs and other human rights organisations.

The 2007 Constitution added the following functions to the NHRCT's mandate:

- It may submit cases and opinions to the Constitutional Court and the Administrative Court where legislative, regulative or administrative acts are deemed detrimental to human rights;
- It may file lawsuits on behalf of a complainant in order to redress a general problem of human rights violations.

In May 2013, the local NGOs Licadho (Cambodian League for the Promotion and Defence of Human Rights) and Equitable Cambodia filed a complaint with the Thai NHRC on behalf of 602 families from Oddar Meanchey province of Cambodia. The complaint accused the Thai sugar firm Mitr Phol of illegally taking their lands and violating their human rights. In 2007, the Government had granted Mitr Phol three plantations totaling more than 20,000 hectares in Samroang City and Chongkal district. The lands of more than 2,000 families

¹²⁷ Peter Zsomer, *Thai Human Rights Body Says Plantations Stole Land*, The Cambodia Daily, 14 August 2014; Peter Zsomer and Pheap Aun, *Second Sugar Firm Taken to Thai Human Rights Commission*, The Cambodia Daily, 3 June 2013

¹²⁸ Website of the Office of the National Human Rights Commission of Thailand: <http://www.nhrc.or.th/en>

are affected, but many have moved away since they lost their lands. Following mounting pressure for greater transparency of global supply chains, it was revealed in 2013 that Mitr Pohl was one of Coca Cola's three main global suppliers of sugar.

On 13 August 2014, the Thai NHRC backed claims that the Thai Coca Cola supplier illegally acquired the lands of the villagers in Cambodia and violated their human rights. In May 2015, Mitr Pohl announced that it had withdrawn from its three Cambodian plantations, though victims have seen no compensation or improvement to their conditions to date.¹²⁹

This is not the first case by the Thai NHRC confirming human rights violations committed by Thai corporations abroad. In a preliminary report of 2012, the Commission confirmed the allegations of a 2010 complaint submitted by a local aid group, the Community Legal Education Center, against the Thai company Khon Kaen Sugar for forcing hundreds of families off their lands in the Koh Kong province of Cambodia. However, apart from investigating and confirming the human rights violations and playing a mediating role between the parties, the Thai NHRC has no other powers to address violations taking place outside Thailand. FIDH and numerous NGOs continue to take action regarding human rights abuses occurring on sugar plantations in an effort to secure reparations for affected communities.

As of February 2015, there are plans to merge the NHRCT with the Thai Office of the Ombudsman, who has competence to look at administrative errors or abuses by state agencies.¹³⁰ The proposed merger has been met with strong opposition from NGOs and academia, who are concerned about the independence of the National Human Rights Commission, which enjoys a much broader mandate (see above). By time of publishing, this merger has not yet been implemented.

➔ **The Human Rights Commission of Malaysia (SUHAKAM): Cambodian and Thai villagers file complaint against Malaysian company for involvement in Don Sahong dam project in Laos**¹³¹

The Human Rights Commission of Malaysia (SUHAKAM) was established by the Parliamentary Act 597 "Human Rights Commission of Malaysia Act" of 1999, and was inaugurated on 24 April 2000. Under the 1999 Act, SUHAKAM's functions are:

– To promote awareness of and education relating to human rights;

129 Daniel Pye, "Sugar Company Pulls Out", Phnom Penh Post, 11 May 2015, <http://www.phnompenhpost.com>; Zsombor Peter & Aun Pheap, "No Relief for Evictees One Year on From Coca-Cola Visit", Cambodia Daily, 14 February 2015, www.cambodiadaily.com

130 See website of the Office of the National Human Rights Commission of Thailand: <http://www.nhrc.or.th/en>; Human Rights Watch, *Thailand: Keep Independent Rights Commission. Plan to Merge With Ombudsman Would 'Gut' Rights Agency*, 3 February 2015, <http://www.hrw.org>

131 Bobbie Sta. Maria, "Human rights institutions in Southeast Asia: Are the "paper tigers" coming to life?", Asian Correspondent, 21 October 2014. The author is a representative for the Business and Human Rights Resources Centre.

- To advise and assist the Government in drafting legislation and procedures, and make recommendations for necessary measures;
- To make recommendations to the Government regarding adherence to treaties and other instruments in the field of human rights; and
- To inquire into complaints regarding human rights infringements.

Furthermore, in order to exercise its functions effectively, the 1999 Act empowers SUHAKAM to:

- Undertake research by conducting programs, seminars and workshops;
- Advise the Government or relevant authorities of complaints against them, and recommend adequate steps to be taken;
- Study and verify human rights infringements;
- Visit places of detention, in accordance with legal procedures, and make necessary recommendations;
- Issue public statements on human rights as and when necessary; and
- Undertake appropriate activities, as deemed necessary.

In October 2014, rural Cambodian and Thai villagers filed a complaint with their NGO representatives to SUHAKAM against the Malaysian company Mega First for the company's work on the Don Sahong dam project in Laos. The dam project is likely to have serious and irreversible effects on the environment, as well as the communities living in the river areas. The project is located less than two kilometres upstream from the Cambodia-Laos border, and scientists have warned that the project will seriously disturb fish migration between Cambodia, Laos and Thailand. Villagers also warn that the project will largely undermine food and livelihood security for communities in Laos, Thailand, Cambodia and Vietnam. At time of publishing, SUHAKAM had not yet delivered an opinion on the issue.

➔ Singapore's Transboundary Haze Pollution Act¹³²

On 2014 Singapore adopted the Transboundary Haze Pollution Act, which allows the Government to act against companies contributing to haze and fine them. On this basis companies contributing to the haze could be held accountable. Until now, 6 companies have been compelled to take action to stop burning and to seek information with regard to haze causing activities by their **subsidiaries and suppliers**.

¹³² Business and Human Rights Resource Centre, *In courtroom and beyond : New strategies to overcome inequality and improve access to justice*. - *Corporate Legal Accountability Annual Briefing*, Fevrier 2016, p. 5.

② ICC Working Group on Business and Human Rights¹³³

Following a roundtable on Human Rights and Business held in July 2008 and convened by the Danish Institute for Human Rights, a thematic Working Group on the issue of Business and Human Rights was established by the International Coordination Committee of National Institutions (ICC) in August 2009.¹³⁴

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."¹³⁵

ADDITIONAL RESOURCES

- **International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC):**
www.nhri.ohchr.org
- **UN Office of the High Commissioner for Human Rights (OHCHR) on OHCHR and NHRIs:**
<http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>
(or accessible through "Quick links" on OHCHR's home page: www.ohchr.org, where you can find relevant UN resolutions, the latest Secretary General's report to the Human Rights Council and information about the regional networks for NHRIs.
- **Report of the NANHRI mapping survey on Business and Human Rights 2013**, Network of African NHRIs (NANHRI) in cooperation with the Danish Institute for Human Rights, accessible on NANHRI's website under Resources, Reports: www.nanhri.org.
- **Updated list of NHRIs and their accreditation under ICC on:**
www.nhri.ohchr.org "About us", "ICC Accreditation".
- **Business and human rights guidebook and e-learning for NHRIs**, available at:
<http://www.ohchr.org/Documents/Issues/Business/ForumSession2/DanishInstituteHR.pdf>.

¹³³ International Coordinating Committee on NHRIs for the Protection and Promotion of Human Rights (ICC), Business and Human Rights, the ICC Working Group on Business and Human Rights, see: <http://nhri.ohchr.org/EN/Themes/BusinessHR>

¹³⁴ *Ibid.*

¹³⁵ ICC Working Group on Business and Human Rights, <http://nhri.ohchr.org>

- FRA (European Union Agency for Fundamental Rights), *Strengthening the fundamental rights architecture in the EU I, National Human Rights Institutions in the EU Member States*, available at: http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.

 - Gauthier de Beco, “National Human Rights Institutions in Europe”, *Human Rights Law Review* (2007) 7 (2): 331-370, available at: <http://hrlr.oxfordjournals.org/search?author1=Gauthier+de+Beco&sortspec=date&submit=Submit>.

 - Christopher Schuller and Deniz Utlü, *Transnational Cooperation in Business and Human Rights A model for analysing and managing NHRI networks*, German Institute for Human Rights, 2014, available at: http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Transnational_Cooperation_in_Business_and_Human_Rights_A_model_for_analysing_and_managing_NHRI_networks.pdf.
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PART III

Ombudsmen

Ombudsmen represent another type of mediation mechanism that 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 organisations from both public and private sectors. In some countries, they take the form of the National Human Rights Institutions (NHRIs – see previous part of this section). After reviewing the complaint, the Ombudsman determines whether the complaint is justified and makes recommendations to the organisation to resolve the problem. Sometimes they may also provide support to human rights defenders.

An ombudsman may be appointed by a legislature, a professional regulatory organisation or a local or municipal government, but s/he may also be appointed directly by a company to handle complaints internally, or by an NGO. Depending on the type of ombudsman 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 numerous ombudsmen in several countries, mandated to hear complaints from individuals against public or private actors (industry, electricity and gas, banking, insurance, telecommunications, consumer, etc.). Examples of countries would include the United Kingdom¹³⁶, New Zealand¹³⁷, Ghana¹³⁸ and India¹³⁹. In many countries the Ombudsman only has competence to hear complaints against the public administration, but this may still be relevant to corporate-related human rights abuse if it includes the way in which the administration has dealt with the abuse. Some Ombudsmen are established for specific industry sectors, such as the Canadian Office of the Extractive Sector Corporate Social Responsibility (CSR)

¹³⁶ British and Irish Ombudsman Association: www.ombudsmanassociation.org/

¹³⁷ Office of the Ombudsman: www.ombudsman.parliament.nz/

¹³⁸ The Ombudsman of Ghana is a part of the Commission on Human Rights and Administrative Justice (CHRAJ) of Ghana, see: www.chrajghan.com, ‘Mandates’.

¹³⁹ The Central Vigilance Commission, <http://cvc.nic.in>

Counsellor for the Extractive Sector,¹⁴⁰ and the Pakistani Federal Ombudsman Secretariat for Protection Against Harassment of Women at Work Place.¹⁴¹

A number of mediation mechanisms including ombudsmen are reviewed under other sections 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 mechanism 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 Ombudsman).

🕒 Process and outcome

Ombudsmen do not exist in all countries or for all sectors, and are often only mandated to deal with complaints against the state administration. You may verify if there exists an ombudsman in the particular country or for the particular industry relevant to your situation, either in the country where the human rights abuse has occurred or in the home country of the corporation involved. Contact the relevant Ombudsman directly or see their website for procedural requirements.

The expected outcome will vary greatly according to their degree of independence, their mandate, etc.

Ombudsmen in action in corporate-related human rights abuses

➔ Costa Rica Ombudsman's Office files legal action against genetically modified corn

In June 2013, the Ombudsman's Office of Costa Rica filed a legal action challenging the constitutionality of a decision permitting a subsidiary of the multinational biotechnology company Monsanto to grow genetically modified corn in the country. The complaint also requested the reform of the country's Phytosanitary Law in order to better protect against entry of genetically modified organisms (GMOs) in the country. In September 2014, the Constitutional Chamber of the Supreme Court annulled the decision for unconstitutionality.¹⁴²

¹⁴⁰ The Office's mandate is to review CSR practices of Canadian companies operating outside of Canada. Affected individuals, groups, communities or their representatives can request the Ombudsman to facilitate dispute resolutions. See www.international.gc.ca/csr_counsellor-conseiller_rse/

¹⁴¹ Pakistan Federal Ombudsman Secretariat for Protection against Harassment of Women at Workplace: www.fos-pah.gov.pk/

¹⁴² Judicial Bulletin n°155 11/08/2015, p. 1-25.

➔ Canada's Corporate Social Responsibility (CSR) Counsellor for the Extractive Sector

Since its inception in 2009, this mechanism has proved to be deeply flawed. As the mandate of the first Counsellor only included a voluntary participation-based mediation mechanism, companies repeatedly walked away from the mediation with no consequences.¹⁴³ The first Counsellor quietly resigned in October 2013 before the end of her mandate after none of the six cases brought before her was mediated, and none of the complainants had received remedy.¹⁴⁴

After more than a year of inaction, November 2014 saw the launching of “Canada’s Enhanced CSR Strategy: Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad.”¹⁴⁵ On 1 March 2015 the second CSR Counsellor for the Extractive Sector was appointed, with reportedly “enhanced” mandate. Canadian civil society organisations remain highly critical of the Counsellor and its mandate: they are calling for an independent and effective ombudsman that can investigate allegations and offer recommendations and remedy for workers or communities affected by Canadian-owned mines.¹⁴⁶

143 Mining Watch Canada, *Third Mining Company Walks Out in Canada’s Extractives Counsellor*, 16 October 2013, accessible on www.miningwatch.ca

144 Mining Watch Canada, *The Federal CSR Counsellor has Left the Building: Can we now have an effective ombudsman mechanisms for the extractive sector?*, 1 November 2013, accessible on www.miningwatch.ca

145 Foreign Affairs, Trade and Development Canada, *Appointment of Canada’s Extractive Sector Corporate Social Responsibility Counsellor*, News Release by the Media Relations Office, 1 March 2015, accessible on www.international.gc.ca

146 Canadian Network on Corporate Accountability (CNCA), *New Mining Counsellor Set Up to Fail*, 3 March 2015, <http://cnca-rcrce.ca/new-mining-counsellor-set-up-to-fail/>