

10 Years On

OECD Watch

Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct

June 2010

Colophon

10 Years On: *Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct*

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Introduction: A golden opportunity

The year 2010 is an important year in global corporate responsibility and accountability. The UN Global Compact is marking its 10-year anniversary, the ISO 26000 Guidance on Social Responsibility is being finalised after many years of multi-stakeholder consultations, the International Finance Corporation is reviewing and updating its Policy and Performance Standards on Social and Environmental Sustainability, and Professor John Ruggie, appointed the Special Representative to the UN Secretary-General on Business and Human Rights (SRSR), is in the final full year of his mandate. Perhaps the most significant event, however, is related to the OECD Guidelines for Multinational Enterprises (OECD Guidelines), one of the key international instruments for promoting corporate responsibility. Not only are the OECD Guidelines marking the 10-year anniversary since their last revision in 2000, but June 2010 also finds us on the eve of a new year-long process to revise, update, and upgrade the OECD Guidelines. The review is a make-or-break moment and provides a golden opportunity to ensure that the OECD Guidelines are given the necessary scope and institutional authority to make them an effective corporate accountability tool.

A call for corporate accountability

Not coincidentally, recent years have also witnessed an intensification of concerns regarding the impacts of corporations on human rights, labour rights and the environment. While the private sector can be a powerful driver of economic prosperity and poverty alleviation, a growing body of evidence confirms that, without the necessary due diligence, disclosure and accountability checks, multinational enterprises (MNEs) can have a significant negative impact on workers, communities and the natural environment.¹ There is now widespread acknowledgement that MNEs are required to be responsible for avoiding or remedying any negative consequences of the full range of their

business activities. The principles of “do no harm” and, when things do go wrong, providing a remedy for the victims, must be upheld through corporate accountability mechanisms.

The increasing frequency of global crises – with regard to food, climate, energy, and most recently finance and the global economy – has further highlighted the scale of impact that irresponsible and unsustainable business behaviour can have on society. More than ever, there is an urgent need to fully and completely integrate the notion of rights-based sustainable development, with its equally-balanced social, environmental and economic components, into business practice.

Although the rapid expansion in both the number and scope of voluntary corporate social responsibility (CSR) initiatives was initially hailed as a highly promising solution to the shortcomings of state regulation, such initiatives have also been sharply criticised on the grounds that voluntary instruments are inherently incapable of addressing market and regulatory failures. Indeed, recent academic research and the financial crisis indicate that self-regulation and initiatives that rely wholly on a voluntary approach to improving business behaviour have major limitations.² Therefore, international corporate responsibility and accountability instruments – like the OECD Guidelines – must be significantly strengthened to ensure that business, civil society, and governments succeed in meeting this challenge.

“The Guidelines” – 1976 to 2010

The OECD Guidelines are a multilaterally endorsed, government-backed set of normative standards that aim to promote responsible business conduct among corporations based or operating in adhering countries.³ In effect, this means these country governments have “signed up” on behalf of all MNEs based

within their borders to uphold the provisions of the Guidelines. Although the original version of the Guidelines dates to 1976, the specific instance mechanism for addressing concerns about company compliance with the Guidelines was only opened up to non-governmental organisations (NGOs) in 2000 as part of a comprehensive revision process. In this complaint mechanism, National Contact Points (NCPs), the governmental bodies charged with promoting adherence to the Guidelines and handling complaints about specific instances of alleged corporate misconduct, should offer their “good offices” to mediate among the parties to a complaint and, ideally, facilitate a mutually-agreed resolution to the conflict. If this is not possible, NCPs are instructed to issue a final statement detailing the facts of the case and offering recommendations to improve adherence to the Guidelines.

Since 2000, NGOs from around the world have used the Guidelines’ specific instance mechanism in the expectation that government involvement in corporate-community disputes would not only help resolve the problems communities and workers are faced with when corporate conduct is poor, but also clearly state the standards expected of corporations wherever they operate. NGOs wanted to test the effectiveness of the Guidelines and the readiness of OECD governments to curb corporate abuses.

OECD Watch, a global network of more than 80 NGOs from 45 different countries promoting corporate accountability, has monitored the implementation and effectiveness of the OECD Guidelines over the past ten years. In its 2005 “Five Years On” report, OECD Watch took stock of experiences and achievements. Now, ten years on, and on the threshold of another revision, it is timely to assess successes and failures and analyse the overall effectiveness of the Guidelines so that lessons drawn can inform the negotiations.

The 2010-2011 review of the OECD Guidelines provides an essential opportunity to incorporate global developments in corporate accountability and to learn from the experience of the global financial crisis. This is an opportunity to revise the Guidelines by implementing real improvements to enhance the instrument’s effectiveness, particularly that of the specific instance mechanism, in promoting responsible business conduct.

Outline of the report

This report assesses the contribution of the OECD Guidelines to responsible business conduct, sustainable development, and the resolution and reduction of conflicts between companies and communities regarding social issues, environmental concerns, and human rights. In light of the 2010 revision, OECD Watch will make continuous contributions to the review of the Guidelines. Forthcoming publications will therefore provide concrete and specific recommendations for strengthening the effectiveness of the Guidelines, including procedural improvements.

This report is intended to make a constructive contribution to the review through a comprehensive, evidence-based, qualitative and quantitative analysis of the past 10 years of implementation of the Guidelines. It focuses on the experiences with the current (2000) version of the Guidelines which for the first time set up a complaints procedure that NGOs could use. It provides a selected case-by-case analysis of both the shortcomings and successes of the Guidelines. The report identifies the limitations of the Guidelines and the functionality of NCPs in light of global developments in corporate accountability and the complaints raised by project affected communities. It also acknowledges the positive contribution of selected specific instances.

The report responds to three central questions:

1. What evidence exists that the OECD Guidelines have had a positive impact on the global conduct of MNEs based in adhering countries?

The 'voluntary' nature of the OECD Guidelines has resulted in adhering governments being reluctant to monitor company compliance. While some information exists regarding companies' "use of and reference to" the Guidelines⁴, such information says little about the specific added value of the OECD Guidelines *vis-à-vis* other sets of CSR standards, nor does it provide any evidence as to whether the OECD Guidelines have been fully integrated into business policies and practices that have resulted in improvements on the ground. This report examines the positive elements of a number of concrete OECD Guidelines cases to evaluate the potential positive impact and constructively inform the review process.

2. What aspects of (ir)responsible business conduct have not been addressed through the OECD Guidelines' specific instance procedure, and why not?

There are a variety of reasons that affected communities, indigenous peoples, workers, unions, and NGOs may choose not to use the OECD Guidelines' specific instance mechanism to address their concerns. These include:

- the limited scope of the Guidelines, particularly in relation to supply chain and human rights responsibilities;
- lack of confidence in the complaint mechanism and NCPs;
- the high cost (in terms of financial resources and time) of filing a complaint;
- no follow-up or monitoring of recommendations;
- no consequences or penalties for serious and repeated breaches;

This report will assess which critical elements of responsible business conduct are left uncovered by the Guidelines and the reasons why NGOs have often been unable to use the OECD Guidelines to address certain issues.

3. How successful have NCPs been in resolving conflicts between communities and corporations that have been brought to their attention?

This question is crucial to appreciating the potential added value of the OECD Guidelines over the plethora of codes, guidelines and principles for CSR. In the specific instance mechanism, the Guidelines possess a unique feature that provides the means to actively attend to and potentially resolve conflicts between aggrieved communities and companies. This report will address the successes and failures of the specific instance procedure based on statistical evidence and a number of selected case studies that exemplify the critical issues faced by NGOs and their constituencies.

In order to answer these questions, the report presents a comprehensive qualitative and quantitative analysis of NGO experiences with the Guidelines. The analysis draws from the vast body of experience and knowledge that has been documented in the OECD Watch case database as well as on case studies and in-depth interviews with representatives of communities affected by corporate misconduct, NGOs involved in specific instances, unions, businesses, and NCPs.

As the analysis below makes clear, to date the OECD Guidelines have had a poor track record in dealing with the social, environmental and economic problems that matter most to communities and workers whose rights have been harmed by the actions of MNEs. From OECD Watch's analysis the main impediments to the Guidelines being an effective instrument concern the confusion about their voluntary

nature, their restrictive scope as well as failings with the implementation procedures and the lack of authority of most NCPs.

Yet, the OECD Guidelines, with their unique combination of internationally-agreed normative standards, and government oversight, have the potential to make a significant contribution to improving business conduct. If that potential is to be realised, then it is imperative that there should be genuine improvements to both substance and procedure so that the Guidelines become more than a set of voluntary recommendations.

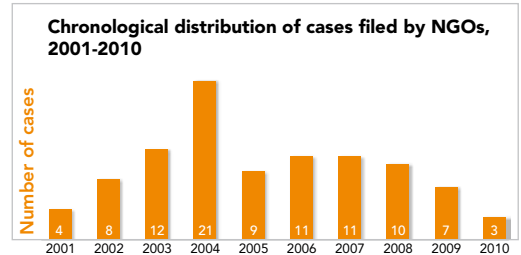
The facts: Statistics from the OECD Watch case database

Since the specific instance dispute resolution mechanism was established in 2000, OECD Watch has documented and kept track of cases filed by NGOs at NCPs around the world in its case database.⁵ The aim is to help NGOs, NCPs, unions, businesses, and other stakeholders learn from the experiences of their colleagues and counterparts, to critically monitor the effectiveness of the specific instance mechanism in resolving disputes and grievances, and to compare and contrast NCPs' handling of cases. The database contains all relevant, non-confidential information about the cases, including the complaint, case developments, supporting documents, letters and statements, and follow-up measures. It serves as a rich source of information for a statistical analysis that provides greater insight into how the complaint procedure has worked in practice.

Nearly 100 NGO cases filed

From the first case filed in 2001 through to June 2010, a total of 96 cases have been filed by NGOs⁶, making an average of approximately 10 NGO cases per year. The chronological distribution of cases, however, shows large annual variance, ranging from 4 cases in the first year after the 2000 revision to a high point of 21 cases in 2004, followed by a dramatic decrease in cases in subsequent years.

The relatively small number of cases – 96 filed by NGOs, 117 filed by unions, for a total of only 213 cases in nearly 10 years – is unlikely to be an indication of corporate compliance with the Guidelines, but rather a lack of confidence in the specific instance procedure. Indeed, a recent analysis of cases of human rights abuse by UK companies showed that in many of those cases using the NCP procedure to address the problem was “judged a poor investment of resources given weakness of enforcement capacity and other procedural weaknesses”.⁷



Source: OECD Watch case database (www.oecdwatch.org/cases)

Most common type of cases

With regard to the type of violations being alleged by NGO complainants, most common (found in 84% of all cases) is a claim of a breach of the “General Policies” from the OECD Guidelines (Chapter II), which includes provisions on human rights, sustainable development, and the supply chain. In fact, nearly half (49%) of all NGO cases allege that a company violated the human rights of those affected by their operations. Also under Chapter II, 36% of cases allege that a company failed to contribute to achieving sustainable development, another 36% allege that a company sought exemptions to laws or regulations or was improperly involved in local politics, 26% allege improper or inadequate engagement with local communities, and 17% allege that a company failed to sufficiently encourage compliance with the Guidelines among business partners in its supply chain. These percentages add up to more than 100% because most cases comprise multiple breaches of the Guidelines’ provisions.

Other breaches that have frequently been the subject of NGO cases include environmental violations (53% of cases), violations of labour rights (33% of cases), failure to disclose relevant information (32% of cases), and bribery and corruption (21% of cases). Also interesting to note is that the Science and Technology provision is the only Guidelines chapter that has never been the subject of a case.

Uneven distribution of cases among NCPs

The 96 cases filed by NGOs as of June 2010 have been unevenly distributed over the 41 existing NCPs⁸, with approximately half (23) of all NCPs having received one or more NGO cases and half (17) having never handled a case. The 17 NCPs that have never received an NGO case include several in eastern Europe (Slovenia, Romania, Hungary, Poland, and the Czech and Slovak republics), three in southern Europe (Greece, Spain and Portugal), two in northern Europe (Luxembourg and Iceland), the Baltic states of Lithuania, Latvia and Estonia, the Middle Eastern and North African countries (Israel, Turkey, and the recently-formed Egyptian NCP), and the newly-formed Peruvian NCP.

Of the 23 NCPs that have received NGO cases, only seven NCPs have received more than five cases: The UK NCP has, far and away, received the most NGO cases (23), followed by Germany (15), then Belgium and the US (13 each), the Netherlands (12), Norway (8), and Canada (7).

In terms of geographic distribution, the OECD Guidelines are clearly being put to use beyond the borders of adhering countries. The vast

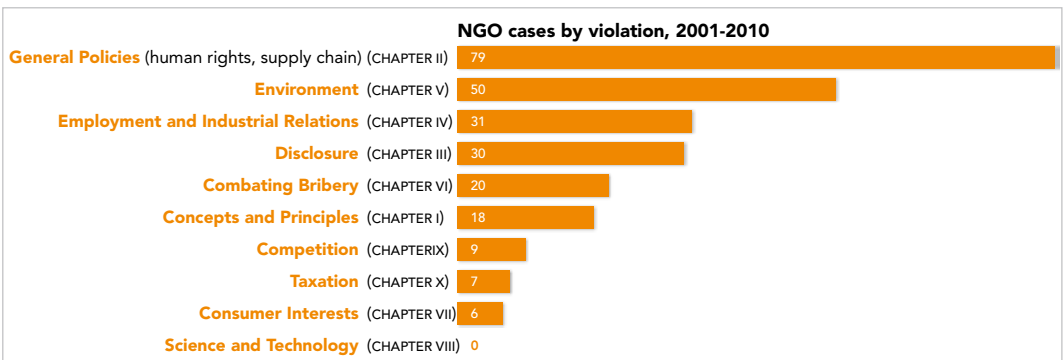


Source: OECD Watch case database (www.oecdwatch.org/cases)

majority of cases lodged by NGOs (72%) concern an alleged breach of the Guidelines in a (non-adhering) developing country. Another 16% of NGO cases involve an alleged violation in an OECD country, and a further 12% relate to a breach in a non-OECD adhering country.

Most common case outcomes

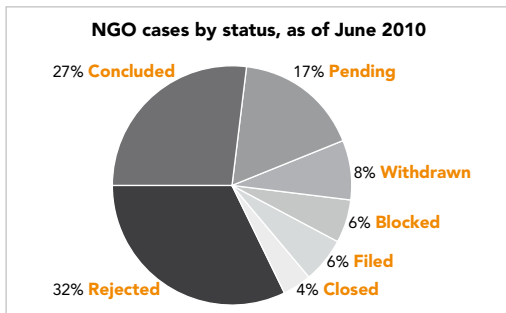
The average duration of an OECD Guidelines case filed by an NGO is just over two years (24.32 months), with some cases going on for more than seven years (85 months). Although there are no comprehensive statistics available, one



Source: OECD Watch case database (www.oecdwatch.org/cases). Note: the number of cases filed at the various NCPs adds up to more than the total number of cases filed because some cases are filed at multiple NCPs.

NGO recently estimated that the total financial cost of their average-length OECD Guidelines specific instance approximated €100,000, including personnel costs, travel, research and documentation. Given the time and resources that must be put into researching, drafting and filing an OECD Guidelines complaint, it is disheartening that the most likely outcome of a case filed by an NGO is outright rejection by the NCP.

A full 31% of NGO cases have been rejected compared to only 27% of cases being accepted and concluded with a mediated settlement or final statement.⁹ A further 23% remains pending or filed as of June 2010, 7% was withdrawn, 6% was closed without resolution, and 6% was blocked by the NCP.



Source: OECD Watch case database (www.oecdwatch.org/cases)

As OECD Watch has documented over the years in its annual NCP reviews, NCP handling of specific instances has been erratic, unpredictable and largely ineffectual. An examination of the seven abovementioned NCPs that have handled more than five NGO cases is illustrative. Although far from having a perfect record, the UK NCP is somewhat of a positive example, having concluded 35% of its 23 NGO cases with a mediated agreement or a final statement. Norway

has concluded 25% of its eight specific instances, and stands out for never having rejected a case. The Dutch NCP has also concluded 25% of its 12 cases with a final statement, while the Canadian NCP has concluded only 14% of its seven cases. The German NCP has rejected a remarkable 60% of the 15 cases NGOs have filed and concluded only 20%, and the Belgian NCP has rejected or blocked 54% of cases and concluded only 15%. Finally, the US NCP is a unique example, having never resolved or concluded a single NGO case, leaving many cases blocked or rejected.¹⁰

The most common reasons given by NCPs for rejecting NGO cases include the lack of an “investment nexus” (i.e. an investment-like relationship) between the company against which the complaint was filed and the company or entity that actually committed the alleged violation, e.g. a supplier, and the existence of parallel proceedings, legal or otherwise, dealing with the same or a similar issue as that raised in the OECD Guidelines complaint. NCPs have rejected or blocked 21 of the 33 NGO cases (64%) in which the investment nexus has been in question and 16 of the 38 cases (42%) involving parallel (legal) proceedings.¹¹

Trade union case statistics

Trade unions have raised 117¹² cases since the 2000 review of the Guidelines. The annual average for the number of cases currently stands at 11.6. The majority of cases to date concern breaches of the Guidelines in adhering countries, although recent trends show an increase in the number of cases from non-adhering countries – in 2007 and 2008 the number of cases from non-adhering countries exceeded those in adhering countries. Trade unions have raised cases with just over half the number of NCPs with the largest number of cases having been submitted to the USA, UK, Korea, Brazil and the Netherlands. The majority of cases cite Chapter IV Employment and Industrial Relations, although trade union cases

have also raised breaches relating to Chapters II, III, V, VI and VII. Trade unions have not submitted cases under the Chapters covering *Science and Technology, Competition or Taxation*. Within Chapter IV, article 1.a) the right to be represented by a trade union is the most frequent basis for the case.¹³

Experiences from the field

Over the past decade NGO complaints have covered a wide range of problems in many different sectors. In this chapter various sectors of business conduct and business relations that have been the subject of NGO complaints are further highlighted and assessed. These telling experiences explain why NGO attempts to use the procedures have so often been unsuccessful and why, despite the claims of many OECD governments, the governance gaps brought about by globalization and lax international regulation of business persist.

Extractive industries

The extractive industry is regarded as a high-risk industry and the prevailing challenges in this sector are manifold. Without adherence to human rights standards, mining can cause loss of land and livelihoods, degradation of the natural environment, and increased violence and conflict by security forces and regimes and rebel groups in weak governance zones. The most marginalised members of communities – such as women, children and indigenous peoples – tend to both be excluded from the economic benefits of mining and to bear the brunt of any negative social and environmental impacts.¹⁴

Adhering countries (as well as China) are importing vast quantities of coltan, copper, bauxite, iron ore, uranium and gold from mineral rich countries. Many raw materials are sourced from developing countries, including conflict or weak governance zones, through complex multi-layered supply chains, including traders and intermediaries. The growth of for example Australian investment in Africa's minerals and petroleum resources sector has been significant. According to Australia's Minister for Foreign Affairs "there are now over 300 Australian companies active across Africa, with current and prospective investment estimated at approximately US\$20 billion".¹⁵

Some of the most serious human rights abuses, including those related to corporations occur in conflict zones.¹⁶ Doing business in conflict and post-conflict zones significantly increases the likelihood of real or complicit violation of human rights. This is further exacerbated by the presence of "heavy handed" security personnel and militia. The likelihood of company involvement (even unknowingly) in bribery and corruption in conflict zones is significant. Revenue transparency is critical, including the full disclosure of all payments (taxation, royalties, licence fees and other payments) to host governments, contractors, and intermediaries on a country-by-country basis is necessary. The full disclosure of mining licence terms, concessions and taxation arrangements and benefits will mitigate the risks of complicity in corrupt practices.¹⁷

Given this context, it is not surprising that 41 of the 96 NGO complaints have dealt with issues in the mining, oil and gas industry. A further 10 cases have involved the finance sector, predominantly through their provision of loans and financial services to the extractives sector.



The UN, conflict and the Congo's natural resources

In 2002, the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo¹⁸ listed over 80 foreign companies as being implicated in the armed conflict, illicit trading in minerals and human rights violations. The UN Panel accused about 50 companies from OECD countries of breaching the Guidelines. The publication of the list caused uproar and more than anything drew international attention to the existence of the Guidelines. Most OECD governments initially refused to investi-

gate the UN's allegations and, in the face of their inaction, NGOs such as the British NGO, RAID, started to file complaints, many of which were rejected outright or simply ignored.¹⁹ In 2004, the first of the Congolese cases was considered by the Dutch NCP, who rejected the complaint against the coltan importer Chemie Pharmacie Holland (CPH) because there was no 'investment nexus' [see Critical issues (i) below]. The Belgian, British, Canadian, Finnish, French, German and US NCPs followed suit and there was a wholesale dismissal of all UN allegations against OECD companies.

However in 2006, in response to mounting indignation in the British media and pressure from Members of Parliament, the process started to be taken more seriously. In 2008 a complaint involving DAS Air that RAID had filed years earlier was re-opened. Despite the fact that the company had by then gone into administration, the UK NCP issued a strongly worded final statement concluding that DAS Air had breached the human rights provision and had failed to undertake due diligence with regard to its supply chain. The DAS Air decision set an important precedent: it demonstrated that when there is sufficient political will the Guidelines

can be used to hold a company publicly to account for activities that exacerbate conflict and contribute to human rights violations.

The critical issues raised by the UN Panel with regard to the role of companies during the Congolese wars, which OECD governments proved unwilling or incapable of addressing, had a profound and lasting impact on the business and human rights debates at both the OECD and the UN. The OECD's Risk Awareness Tool was the first attempt by an inter-governmental body to provide guidance to companies operating in situations of conflict or weak

governance. The issue of companies in conflict zones is one of Professor Ruggie's priorities. In 2008 evidence collected by another group of UN experts and NGOs such as Global Witness showed that many of the same individuals and companies accused of breaching the OECD Guidelines in 2002 had continued to be involved in the minerals trade in the Eastern DRC and thereby were supporting Congolese army officers and commanders of rebel groups responsible for mass rape and other gross human rights violations. This has prompted the OECD in 2010 to undertake a new project ('Due diligence in

"Until impartial and fair public investigations have been carried out, the unanswered questions will continue to cast their shadow over the DRC's future and corporate activities in the country."

RAID Unanswered Questions 2004

the mining and minerals sector'²⁰) to assess and develop practical ideas for due diligence for responsible supply chain management of minerals from conflict-affected and high-risk areas. The results of the project will feed into the revision of the Guidelines' supply chain provision. ●



Finance sector

The responsibility of the financial sector in relation to the OECD Guidelines has become increasingly apparent in recent years. At issue is the role and degree of influence of public and private financial institutions in their choice of clients and the projects that they fund. NGOs have addressed the responsibilities of financial institutions and banks through their investments, lending practices and project financing in controversial projects in approximately ten cases. For example, Australia's mining sector expansion into the countries of Africa is made possible with the assistance of financial institutions. Private sector banks, superannuation and pension funds, export credit agencies and multilateral financial institutions support extractive investments through loans and the provision of financial services.

However, the application of the OECD Guidelines to the financial sector has been an area of much debate, not least amongst the NCPs themselves. Most cases filed by NGOs have been rejected by NCPs, using the investment-nexus argument (see case box *Financial facilitation of destructive forestry in Papua new Guinea*), or have not been taken up seriously at all, such as the cases against the Belgian banks for their role in the financing of the Baku-T'bilisi-Ceyhan (BTC) oil pipeline.

In recent years however, constructive discussion within the Investment Committee and between NCPs suggests an increasing number of NCPs see no sound reason to exclude the finance sector from consideration under the OECD Guidelines. OECD Watch has actively contributed to these discussions including a submission to the 2007 OECD Corporate Responsibility Roundtable, and a further submission to the Investment Committee in preparation for its Working Party meetings in March 2009 on the application of the OECD Guidelines to the financial sector. Both submissions articulated practical criteria for NCPs in assessing the sphere of influence and business

conduct of financial institutions. They are available on the OECD Watch website.²¹

In 2006, the Swedish and Norwegian NCPs accepted a complaint against the bank Nordea for its financial involvement in Botnia's controversial pulp mill in Uruguay. Whilst rejecting the case in 2008 for not having found "indications to support the complaints", it is stated that "this assessment was based on the procedural guidance prescribed by the OECD Guidelines, and on the view that these could also apply to financial institutions with reference to Chapter 2:10."²²

If there is one lesson to be taken from the recent global economic crisis, it is that banks exercise significant leverage over business' ability to operate. If financing and credit dry up, the ability of business to function becomes compromised and potential economic benefits are not realised. Much in the same way as individual consumers are now beholden to the stricter terms and conditions banks require to do business, financial institutions can, and do, exercise influence over business. Issues of responsible business conduct apply equally to the financial sector via their business decisions and operations. Financial institutions must therefore ensure their due diligence goes beyond fiscal imperatives, particularly when funding large infrastructure projects in developing countries, conflict zones and when there is a likely impact on communities including on women and indigenous peoples.

If the OECD Guidelines are to be considered a credible, legitimate and enforceable standard of business behaviour, greater conformity and coherence in the assessment of admissibility by NCPs of specific instances involving financial institutions are needed. For the OECD Guidelines to be relevant today, they must take into account and reflect the complex and ever-changing nature of enterprises, including the critical roles banks play in their ability to do business.

NGOs argued the ANZ Bank's financial support of a logging company that fails to promote sustainable development, respect human rights or exercise sound environmental management meant the bank had also violated the OECD Guidelines.

Financial facilitation of destructive forestry in Papua New Guinea

In 2006, a group of Australian and Papua New Guinea (PNG) NGOs lodged a complaint against the Australian and New Zealand Banking Group (ANZ Bank), because the bank provided guarantees and other financial services to Rimbunan Hijau for its operations in PNG. They argued ANZ Bank's financial support of a logging company that fails to promote sustainable development, respect human rights or exercise sound environmental management, meant the bank had also violated the OECD Guidelines. ANZ Bank countered that its provision of financial services did not constitute an

"investment", and that it had no influence over Rimbunan Hijau's activities.

In October 2006, the Australian NCP rejected the complaint for lack of an investment nexus while also offering to "inaugurate" a dialogue between the groups. The NCP was unable to reach a firm conclusion on the extent of ANZ's influence over Rimbunan Hijau, and did not investigate that question independently. Despite the rejection of the complaint, pressure by NGOs on the bank to articulate clear sustainability standards continued.

ANZ Bank became the first

Australian bank to adopt a formal forestry and biodiversity policy in 2007, developed in consultation with civil society groups and industry. Among others, this policy includes clear commitments to not support illegal forestry or large-scale conversion. And ANZ's CEO has publicly criticised Rimbunan Hijau, even as the bank continues actively to urge Rimbunan Hijau to improve its operations.

In October 2008, the PNG Supreme Court found that Rimbunan Hijau's massive forestry concession at Kamula Doso was illegally obtained, thus substantiating primary arguments advanced in the ANZ complaint. ●

Manufacturing Industries

Labour intensive manufacturing, in particular of consumer goods like garments and electronics, is for a large part outsourced to low-income countries. It has been well-documented that working conditions in factories supplying for OECD based brands are often a key area of concern. Prevailing issues in the manufacturing industry include: low wages, long working hours, lack of freedom of association, unhealthy and unsafe working conditions, discrimination and harassment, and insecurity of employment (migrant and precarious work). NGOs have, sometimes in coalition with trade unions, filed many cases against MNEs for labour rights violations in their production chain. In general, NCPs seem to expect more responsibility of brand companies in the manufacturing industry compared to the supply chains of extractives industries, as is shown by the number of accepted complaints compared to other sectors. In general NCPs, notably the Dutch NCP²³, have interpreted the supply chain provision in a broader way, also taking into account supplier relationships in manufacturing industries.

The area of debate in this sector has therefore not focused on the admissibility of the complaints, but rather on the actual ability of the NCP to contribute to a resolution between the parties concerned, in particular when it concerns suppliers and local organisations that must ultimately be part of the solution. While accepting cases, NCPs have still struggled with the question what can be expected from buyers in terms of using their leverage to ensure better working conditions in supplier factories. As a result, NCPs were largely unable to act as drivers for change or make a meaningful contribution to better supply chain management, transparency and independent verification of compliance to the Guidelines' provisions throughout the supply chains of consumer goods.

NCPs have thus far not proven to provide a very useful additional mechanism for the resolution of conflicts, in particularly concerning these sectors (such as the garment industry) where campaign organisations have been addressing brand responsibilities for many years, through a wide range of instruments, including public campaigning, as well as negotiations with companies regarding the (independent) monitoring and verification of their codes of conduct.

The cases filed by various sections of the Clean Clothes Campaign (see case box *Labour rights in the garment industry*), provide telling examples of the challenges faced by NGOs in using the OECD Guidelines to improve working conditions in garment factories. The lack of tangible results in improving working conditions has left the CCC and their local partners highly disappointed in the OECD Guidelines' complaint mechanism.

NGOs and unions typically expend significant time and resources investigating and developing a complaint. Many of them, recognising the weakness of the Guidelines' specific instance process and the non-uniform way NCPs handle cases, do not see the value in filing complaints. Indeed, it is hardly surprising NGOs see more possibility for change and solutions by actively campaigning or taking legal action. But as is evidenced by the recent case filed against Triumph in December 2009 with support of the Swiss CCC, some NGOs are still willing to seek the good offices of NCPs to resolve labour rights violations even when past cases could have been handled better. More would do so if NCPs functioned consistently and in accordance with minimum procedures where, if mediation fails, the NCP makes a determination on whether or not the OECD Guidelines have been breached.

Labour rights in the garment industry

In developing countries, factory workers who make clothing and sportswear for brand name companies that sell their apparel in Western markets repeatedly have their labour rights violated. They are frequently denied freedom of association, paid low wages, labour for long hours without overtime pay, work in hazardous conditions, and face harassment and discrimination. If freedom of association is even allowed, many factory owners overtly or covertly engage in union busting.

Over the last ten years, NGOs have filed a number of complaints against Western garment and

footwear companies, which buy from suppliers that violate labour rights. For example, in 2001, the India Committee of the Netherlands submitted a case against Adidas after it was discovered that their footballs were being produced by children in India.²⁴

In 2002, the Austrian Clean Clothes Campaign (CCC) submitted complaints against Adidas and Nike because their Indonesian suppliers were carrying out an aggressive campaign of intimidation to discourage workers from organising and to suppress demands for a living wage and decent working conditions. The complaint against Adidas was transferred to the German NCP, and further handled by the German section of the CCC. The Nike case was rejected by the US NCP.²⁵

In 2006, the International Secretariat for the CCC and the India Committee of the Netherlands submitted a complaint against G-Star, because Indian NGOs and unions had documented dozens of labour rights violations by the company's Indian supplier. In an outrageous move, the supplier took legal action to silence the Indian NGOs and unions after they, working with the CCC, initially tried to engage in a direct dialogue with the companies.

In each of the cases, the companies categorically denied the specific allegations of rights violations in their supply chains. During the handling of the complaints, a lot of time and resources was spent questioning the evidence and producing counter evidence. The NCPs struggled with conflicting information ▶

"The work intensity of [football] stitching children is high. A 6-year-old "only working child" spends on average 7.5 hours stitching balls while a 13-year old child spends 9 hours".

Excerpt from the India Committee of the Netherlands 2001 complaint against Adidas.





Factory owners that supply Nike and Adidas “keep full time wages below what is needed to meet the basic needs of a single worker. This makes most workers desperate to work as much overtime as they can – hence the factory owner is able to fill new orders quickly, whenever they come in. The pressure for maximum flexibility and minimum cost also makes it necessary for factory owners to prevent the growth of active unions, which might stop production or seek to increase wage costs”.²⁶

Excerpt from the Clean Clothes Campaign 2002 complaint against Adidas and Nike.

► from the parties, and were reluctant to determine whether the Western companies had actually violated the Guidelines. Rather than actively trying to figure out the facts on the ground and solve the problems with the involvement of local stakeholders and affected workers, the NCPs mostly took a “low hanging fruit” approach, and focused on whether the companies had sufficient supply chain and labour rights policies in place, thereby shifting the focus away from the victims’ perspective. In the case against G-Star in the Netherlands, the company never formally accepted a mediation process, and the NCP was unable to bring the parties together before further escalation.

On a positive note, the NCPs handling the two Adidas and the G-Star cases did not reject the complaints for lack of an investment nexus. The cases were clearly dealing with the companies’ suppliers, and the NCPs accepted them, confirming that companies in this sector do have responsibility to ensure their merchandise is made in factories with good labour conditions. The specific instance process also allowed for new levels of engagement and dialogue in two of the cases.

However, in the experience of the CCC these four cases illustrate significant shortcomings in the Guidelines’ specific instance procedure: they illustrate that mediation is difficult, because of a

lack of mutual trust between the parties. Furthermore, it is not enough for a campaign group and retailer in the OECD country to enter into dialogue. Unless firm agreements are also reached between workers or unions and their employers in the producing countries there is unlikely to be any real improvements. Unfortunately, despite several cases being handled and several statements being published it does not appear that the OECD Guidelines have made any significant contribution to ending labour rights abuses in the global garment industry. ●

The bright side: Positive outcomes of OECD Guidelines' cases

Despite the fact that the case statistics and case experiences drawn from the OECD Watch case database show that the current Guidelines mechanism has many weaknesses, several positive outcomes can also be reported. Determining the degree to which the OECD Guidelines have positively influenced the global conduct and behaviour of MNEs based in adhering countries is a complex task, especially given the difficulty in attributing causality in the convoluted arena of regulatory frameworks, societal and governmental expectations, and CSR initiatives aimed at influencing business values and behaviour, not to mention the subjective nature of the notion of “positive” and the fact that views of what is positive often differ among stakeholders and even within stakeholder groups.

Undoubtedly, part of the positive impact of the OECD Guidelines is tacit. The Guidelines have become one of the key global benchmarks of CSR, and they undeniably influence and define what government expects of business. The Guidelines have had ripple effects on other CSR processes and instruments such as the Global Compact and ISO 26000. Professor Ruggie has frequently referenced the OECD Guidelines throughout his mandate and in his “Protect, Respect, Remedy” framework, for example. Furthermore, there is evidence that the Guidelines are influencing socially responsible investors and financial institutions.

On a more concrete level, while some information exists regarding individual companies’ “use of and reference to” the Guidelines²⁷, such information says little about the specific added value of the OECD Guidelines *vis-à-vis* other sets of CSR standards, nor does it provide any evidence as to whether the OECD Guidelines have been fully integrated into business policies and practices or if they result in improvements on the ground.

In a recent article published in the journal *Public Administration*, researchers at Bocconi University in Milan, Italy, found that while corporate behaviour is “unlikely” to change simply as a result of the existence of the OECD Guidelines, the Guidelines’ “soft sanctioning power has the potential to alter corporate behaviour in the long run” if the Guidelines’ ability to “consistently discriminate between good and bad performers” is improved.²⁸ This means that the Guidelines’ “specific instance” grievance mechanism is where their unique added value lies and is a key determinant of the positive impact that they can have. It makes sense then, to assess the positive impact of the OECD Guidelines by evaluating the degree to which OECD Guidelines cases have contributed to some form of remedy or resolution for the victims of corporate abuse, a behavioural change within the company, or improvements in the environmental and human rights conditions on the ground.

Mediated agreements, NCP statements, and (some) improved behaviour

The most logical place to begin the search for positive elements is with cases that have resulted in an NCP-mediated or facilitated agreement between the complainant and the company. A review of the 96 cases filed by NGOs reveals that, although this type of outcome is unfortunately rare, there have certainly been some notable agreements. For example, as early as June 2001, just one year after the specific instance mechanism was opened to NGOs, the Dutch NCP mediated an agreement between Adidas and the India Committee of the Netherlands on the need for company codes of conduct to be based on international standards and to be actively monitored. In a case filed the same year by Oxfam Canada, RAID, *et al.* against the Canadian mining company First Quantum Mining (see case box *No follow-up Zambian copper mine agreements*), an agreement was reached to remove the threat of forcible evictions from mining areas in Zambia and

to negotiate a phased resettlement programme for settlers. In more recent years, cases against GSL and BHP Billiton (both handled by the Australian NCP) and Accor Services (handled by the Argentine NCP) led to agreements between the parties. In all these instances, the OECD Guidelines mechanism undoubtedly contributed to mediated outcomes.

While a resolution of the issues raised through a mutually accepted agreement is the ideal outcome of an OECD Guidelines case, experience shows that governments' reluctance to attach consequences to a company's refusal to participate in the specific instance process³⁰ means that an agreement is the exception rather than the rule. However, even if an agreement is not possible, an NCP statement that acknowledges the validity and legitimacy of the complainant's concerns, determines whether the Guidelines were actually breached, and provides recommendations to the company on how it can better implement and uphold the Guidelines can be seen as a positive outcome. The government-backed weight attached to the OECD Guidelines provides authority to NCP statements and the importance of an NCP publicly finding companies to have been in breach of the Guidelines should not be underestimated. In addition, a strong and clear NCP statement can contribute to a better common understanding of how business is expected to behave and provide useful recommendations for improving the implementation and effectiveness of the Guidelines. Recent statements by the UK NCP in cases against Vedanta and Afrimex and by the Norwegian NCP in a case against Aker Kværner have done just that.

Despite approximately 25% (26 cases) of the specific instances filed by NGOs being concluded with an NCP-mediated agreement or final statement, it is telling that only a handful³¹ of cases have actually led to improved corporate behaviour and/or improvements on the

ground. Those cases that can count a change of behaviour among their positive elements include a case against GSL in which, as a result of an agreement facilitated by the Australian NCP, the company improved its performance on human rights (related to detention centres for underage immigrants in Australia); a case against Bayer in which the German company accepted responsibility for child labour in its cottonseed supply chain and took action to improve the situation; and a recent case against Accor Services, in which the Argentine NCP facilitated an agreement that saw the company contribute financially to help improve its performance on transparency and bribery/corruption.

Positive indirect impacts and procedural elements

Even in instances where there is no agreement, settlement, or immediate improvement in the situation, the OECD Guidelines cases can sometimes have an indirect positive effect. In some cases, the mere fact that a complaint exists, can prompt a resolution of the case in another forum. In a case lodged by Germanwatch against Continental, for example, although there was no agreement within the specific instance process or even a final statement by either the Mexican or the German NCP, the complaint attracted media attention and eventually members of the German parliament helped to settle the case. A Guidelines complaint can generate media attention, raise awareness, and lead to increased public pressure on companies to improve their behaviour. It is also a means of alerting governments about the issues at stake. For example, although a case raised by the Australian Conservation Foundation against ANZ Bank was rejected by the Australian NCP, the case resulted in a review of the applicability of the Guidelines to the financial sector, and ANZ became the first Australian bank to develop a forestry and biodiversity policy (see case box *Financial facilitation of destructive forestry in Papua New Guinea*).

In a number of cases an NCP has taken a procedural decision that, if generally adopted, could greatly enhance the effectiveness of the Guidelines. In a case against DAS Air, for example, the UK NCP confirmed that public determination of a breach of the Guidelines is a legitimate role for an NCP. And in a case against the Scandinavian bank Nordea, the Swedish and Norwegian NCPs confirmed that the Guidelines do apply to the financial sector, a position that was previously not accepted by all NCPs. Another positive procedural development has been the willingness of the Dutch NCP to travel and conduct in-country fact-finding and mediation with the parties; an example of this is the Shell Pandacan case in the Philippines. Victims of corporate misconduct in developing countries often lack the financial resources to travel to meet the NCP in person. The effectiveness of the mechanism can be greatly improved if NCPs are able to go and meet them and conduct local mediation.

The “caveats”

In contrast to the improvements and positive outcomes observed in this handful of cases, the vast majority³¹ of OECD Guidelines cases have unfortunately not led to any significant improvement in the respective company's behaviour or the situation that led to the complaint. Indeed, many of the cases with a positive element have had some underlying weakness or limitation. For example, in the First Quantum Mining *Zambian copper mine agreements* case (see case box *No follow-up Zambian copper mine agreements*), the Canadian NCP was successful in mediating a negotiated agreement to stop the violent eviction of people farming on mine land and increase communication between the company and local communities. However, the NCP did not monitor implementation of the agreement. Subsequent research found that Mopani Mines had not honoured the agreement, the affected communities were being displaced

and the company breaches of Guidelines were continuing.³³ This case highlights how important it is for NCPs to monitor and follow-up on final statements and agreements; the fact that this rarely happens is one of the major weaknesses in current OECD Guidelines procedures.

Table 1 (pages 26-29) provides a compilation of the positive elements of the cases raised by NGOs but it also notes less welcome aspects that have weakened or even undermined the outcome (caveats). It should be noted that this list is not exhaustive and that there may be other cases in which one or more parties felt that the case had a positive outcome.

While the complaint mechanism continues to be used by affected communities, workers, NGOs and unions, the limited number and quality of positive elements in OECD Guidelines cases has undermined the reputation of the OECD Guidelines complaint procedure over the years. Although some limited reforms have occurred as a result of NGO and trade union pressure, these have not been widespread enough to overcome the view among many influential international NGOs that using the OECD Guidelines is a time-consuming, resource-intensive process that, even in the best case scenario, results in only minor improvements.

In the next three chapters, the report focuses on three key critical issues that OECD Watch would like to see addressed in the revision of the OECD Guidelines. These critical issues are related to supply chain and trade relations, human rights and the environment.

Table 1:

Overview of positive elements with caveats of cases filed by NGOs, 2001-2010

Title	Date filed	Issue
Survival International vs. Vedanta Resources plc	19 Dec 2008	Human rights
H. Recalde and H.W. Jofre vs. Accor Service	28 Nov 2007	Bribery & Corruption
Colombian communities vs. BHP Billiton and Xstrata	26 June 2007	Human rights
Global Witness vs. Afrimex	20 February 2007	Human rights
ACF et al. vs. ANZ Bank	24 August 2006	Environment, human rights
CEDHA and Bellona vs. Nordea	28 June 2006	Financial sector, Environment
Fenceline Community and FoE NL vs. Royal Dutch Shell	15 May 2006	Disclosure, Community engagement
ForUM vs. Aker Kværner ASA	20 June 2005	Human rights
Human Rights Council of Australia et al. vs. GSL	15 June 2005	Human rights

Positive element	Caveat
Strong statement from UK NCP confirmed alleged breaches. NCP included element of monitoring by asking parties to provide a follow-up report three months after the final statement.	No change in corporate behaviour in policy or practice. Complainants' attempt to follow up on local situation was met with physical threats and vandalism.
Successful mediation by Argentine NCP resulted in negotiated settlement. Accor agreed to make a financial contribution to Transparency International Argentina for its anti-corruption programme.	NCP has not followed up or monitored implementation of the agreement.
The case contributed to an agreement between Cerrejón Coal and the township of Tabaco that included contributions to indemnities of US\$1.8 million and a further US\$1.3 million for sustainable projects. In addition, the case has prompted a pilot company-based grievance mechanism to be put in place as part of UN SRSG Ruggie's framework.	A similar agreement was not reached for four other affected communities. NCP has not followed up or monitored implementation of the agreement.
Strong statement from UK NCP confirmed alleged breaches.	No change in corporate behaviour on the ground. NCP has not followed up or monitored implementation of the recommendations in the statement.
Although the case was rejected by the Australian NCP, the case resulted in a review of the applicability of the Guidelines to the financial sector, and ANZ subsequently developed a forestry and biodiversity policy.	The Australian NCP applied a restrictive interpretation of the "investment nexus" to reject the case.
Swedish & Norwegian NCPs confirmed that the Guidelines should apply to financial sector and accepted the case against Nordea bank.	Although the NCPs did accept the case, they eventually ruled that the Guidelines had not been breached. No change in company behaviour.
Dutch NCP conducted field visits and local fact finding to investigate allegations. Although Shell refused to engage in NCP-led mediation, the company subsequently initiated an "independent" risk assessment of its operations and invited some local residents and stakeholders to participate.	The NCP accepted Shell's unreasonable confidentiality requirements and failed to get the parties to the mediation table. A large group of local citizens and community leaders questioned the "independence" of Shell's initiative. The questions were directly posed to Shell, but the company declined to respond.
A strong statement from the Norwegian NCP confirmed alleged breaches, and the company ceased the activities in question. The case generated broad public debate in Norway, and demonstrated that an OECD Guidelines complaint can affect a company's reputation.	The company claimed its cessation of activities was not a result of the OECD Guidelines case, but a simple business decision.
Australian NCP-facilitated mediation resulted in a negotiated agreement. The Australian Human Rights Commission determined that conditions in detention centres had improved since the case. GSL remained open to direct consultation with the complainants.	It is not known if agreements reached with GSL carried through to subsequent detention centre managers. The NCP did not monitor implementation of the agreement.

Title	Date filed	Issue
Germanwatch, CBG and Global March against Child Labour vs. Bayer	11 October 2004	Child labour
RAID vs. Das Air	28 June 2004	Human rights
FoE Netherlands and Ecoceanos vs. Nutreco	22 August 2002	Environment
Germanwatch vs. Continental AG	27 May 2002	Labour rights
Oxfam Canada, RAID et al. vs. First Quantum Mining and Glencore	16 July 2001	Human rights
ICN vs. Adidas Netherlands	20 June 2001	Labour rights

Positive element	Caveat
<p>During the course of the case, Bayer accepted its responsibility for child labour which it had previously neglected. Bayer set up a programme for child care for its cottonseed production in India</p>	<p>The process of the case was not optimal as the German NCP accepted Bayer's refusal to negotiate with one of the complainants, which resulted in parallel talks and no joint mediation meetings. The NGOs later questioned Bayer's claims of how much child labour had been reduced.</p>
<p>A strong statement from the UK NCP confirmed alleged breaches and criticized the company for failing to undertake due diligence with regard to its supply chain. One important procedural element of this case is that the UK NCP confirmed that determination of whether or not a breach of the Guidelines has occurred is part of an NCP's task in handling specific instances. In addition, the case drew attention to the role of transporters, which, under a strict interpretation of the "investment nexus" would have been considered by many NCPs to be outside their remit.</p>	<p>Lengthy delays by the UK NCP in acting on the complaint meant that DAS Air had ceased its activities long before the case was concluded. The main source of pressure on DAS Air was a ban imposed by the EU on the grounds of safety, which meant the company was not allowed to fly its planes in the EU region. As a result DAS Air was in administration by the time the final statement was issued.</p>
<p>The Chilean NCP facilitated an agreement between the local (Chilean) company and the local NGO involved.</p>	<p>Most of the issues of the complaint were not dealt with, FoE Netherlands was excluded from the agreement, and no agreement was reached at the headquarters level with the Netherlands-based parent company.</p>
<p>Although the case was never officially concluded, the filing of the complaint attracted media attention and eventually led to a number of parliamentarians getting involved in the case. The situation in the factory improved as a new investor was found and a solution was negotiated, which resulted in the co-ownership of the factory by the workers.</p>	<p>The NCP process itself was unhelpful in resolving the issue. No agreement was reached, nor was a final statement issued by neither the Mexican nor the German NCP.</p>
<p>The Canadian NCP was successful in mediating a negotiated agreement to stop abuses on the ground and increase communication between the company and local communities.</p>	<p>The NCP did not monitor implementation of the agreement. Follow up research by a third party several years later indicated that the company had breached every aspect of the agreement, that the situation on the ground remained extremely problematic, and that the company continued to violate the Guidelines.</p>
<p>The Dutch NCP was successful in mediating an agreement between the parties on the need for company codes of conduct based on international standards and monitoring of the codes.</p>	<p>NCP unable to gather its own information on Adidas' practices and unable to monitor its own agreement (ironic given the emphasis on monitoring in the agreement).</p>

TI-G argued that “Alleged breaches by such a large number of companies cannot be ignored without undermining the credibility of the Guidelines”.

UN Oil-for-Food scandal in Iraq

In a complaint filed in 2007, Transparency International’s national chapter in Germany (TI-G) argued that 57 German medical, manufacturing and transport companies had violated the Guidelines when they allegedly paid US\$ 11.9 million in kickbacks to obtain contracts as part of the UN “Oil-for-Food” programme in Iraq. The complaint drew on substantial evidence from a UN report published in 2005 that named 2,253 companies which allegedly made a total of \$1.8 billion in illicit payments.

TI Germany argued that the alleged corrupt and illicit payments marked a clear and large-scale breach of the OECD Guidelines’ anti-bribery provisions (Chapter VI). It asked the NCP to

ascertain whether, in view of the evidence presented in the Volcker report, the named corporations had subsequently introduced appropriate precautionary measures as recommended in the Guidelines to prevent any likelihood of such breaches occurring in the future.

However, TI-G’s complaint against 57 German companies failed to be considered due to lack of an investment nexus. The German NCP rejected the case on technical grounds. It claimed that the German companies had been involved in trading with Iraq and that trade lay outside the Guidelines’ remit.

TI-G maintains that the authoritative evidence provided in the Volcker report

should have been more than sufficient to justify an examination by the NCP as to whether a breach of the Guidelines had occurred. TI-G argued that “Alleged breaches by such a large number of companies cannot be ignored without undermining the credibility of the Guidelines”.

With its assessment of the inadmissibility of the Oil-for-Food complaint, the German NCP confirmed its reputation for applying a restrictive interpretation of the Guidelines. In a letter to the Ministry of Economics, which houses Germany’s NCP, the chapter TI-G rejected the NCP’s arguments. It asked the minister to reconsider the complaint’s dismissal and to reinforce the Guidelines applicability to all business activities. ●

Critical issues for the review (i): Supply chains and trade relations

The previous chapter showed that in some cases NCPs sought to issue useful recommendations to guide corporate behaviour, and that in a few cases these recommendations resulted directly or indirectly in positive changes in a company's behaviour. However, the overwhelming majority of cases were rejected, blocked or otherwise concluded without meaningful resolution. What are the implications of these failures and will the revisions be sufficient to enable the OECD Guidelines to deal with the challenges of the 21st century?

International business has undergone far-reaching structural and organisational changes as it has grown larger and more complex. Through international business transactions and global production networks, the boundaries of enterprises tend to blur, often as a result of the outsourcing of manufacturing and other business processes. Trade in goods and services constitutes the biggest single sector of the global economy and it will continue to grow unabated as new players from all over the world enter the market. As a rule, multinational corporations engage in production, services and trade.

Many of the adverse consequences of corporate activities that affect workers and communities occur further down the supply and production chains. Large multinational corporations are influential players in global supply chains, they can have a significant impact on social and environmental conditions throughout these production and supply chains. It thus seems entirely artificial to expect to be able to promote responsible business behaviour in selected parts of a corporation while excluding other parts of the same supply chain from having to meet internationally defined standards.

When the OECD Guidelines were revised in 2000, NGOs pushed to include supply chain responsibility in the list of essential recommendations to be included. They considered it imperative that

the OECD Guidelines should address all business conduct and the responsibilities arising throughout the whole production and supply chain. After intense debate, a paragraph was included that encouraged multinational enterprises to promote responsible business conduct with their business partners, sub-contractors and suppliers.

However, the wording of this provision remained vague. Moreover, the first NGO complaints dealing with supply chain issues provoked an intense debate about the scope of the Guidelines. This resulted in 'a clarification' by the Investment Committee (then called Committee on Investment and Multinational Enterprises) in 2003, which introduced the new term "investment nexus". It imposed the view that the Guidelines apply only to investments or "investment-like relationships". This position was justified on the grounds that the OECD Guidelines were part of the Declaration on International Investment.

In tune with the spirit of deregulation of the past decade, the investment nexus came to be used by many NCPs to beat an unprecedented retreat in relation to the business activities that the Guidelines apply to. Ultimately, the investment nexus was interpreted by some NCPs as an obligation to reject all complaints related to business transactions such as trade and finance: in short, everything but direct investment.

While there are some variations in the way NCPs interpret the supply chain provision, and some NCPs continue to apply the original, broader interpretation of the 2000 version, there is no doubt that the investment nexus has been used to reduce significantly the scope of the Guidelines and has therefore dramatically limited their usefulness.

Cases related to value chains and trade relations

As a result of the ever-increasing trend towards outsourcing of business activities to countries

with a high risk of breaches of OECD Guidelines' provisions, it is not surprising that many of the cases raised by NGOs relate to an MNE's supply chain and other business relationships. In total, 33 (more than one third of all NGO cases) relate to a company's supply chain. Of these 33 cases, 21 (64%) have been rejected by the NCP or withdrawn without resolution. Only 10 (30%) have been accepted and concluded within the NCP process. In other words, more than two thirds of all cases that have attempted to address an alleged violation in an MNE's supply chain have been rejected, while less than one third have even been dealt with by an NCP.

The OECD Watch case database confirms that the OECD Guidelines have been used by NGOs in a wide range of sectors and areas of business activity, including manufacturing, extractives, finance sector, and trade. The characteristics of the business relationships and supply chain structures between these sectors vary widely, and so do the challenges faced by NGOs seeking to use the OECD Guidelines in their work in a particular sector.

Too many NCPs have systematically refused to deal with any breaches that relate to trade or supply chain issues, without examining the type of relationships and the level of influence a company may have over its business partners. This position is illustrated by the German NCP's rejection of the Oil-for-Food corruption case. In October 2005, the Volcker report had concluded that some 2,000 firms, 57 of which were German corporations, linked to the UN oil-for-food programme in Iraq, had been involved in bribes and surcharges to the Iraqi government. (see case box *UN Oil-for-Food scandal in Iraq*).³³

A company that engages in bribery in order to obtain a contract and or an exemption from complying with international and national standards is in full control when it resorts to such

an illicit method, irrespective of the nature of its business, e.g. sales in goods, services, or direct investment. There is no justification to be drawn from the substantive text of the Guidelines and most certainly none from normal business practice to free multinational corporations from taking full responsibility for whatever undesirable effects their trade in goods and services might and sometimes do produce.

By failing to use the Guidelines to examine serious allegations such as bribery in the supply chain, the governments not only undermine the integrity of the procedures but also deny a company that may have been wrongly accused of the opportunity of clearing its name.

Defining the scope

The poor record on coverage of supply chain and trade relations has made OECD Watch call for a broad application of the OECD Guidelines to investments and business relationships for many years now. The narrowing of the OECD Guidelines to exclude trade was a manoeuvre to limit their scope despite the gains that had been made in the review in 2000. The clear references in the text to both trade and investment were ignored. The investment nexus" arose out of political expediency rather than a fair interpretation of the text as can demonstrated by the attempts by some NCPs to designate activities defined in trade and investment agreements as "trade" so as to avoid having to take up the cases.

Defining the exact scope of the supply chain responsibility will always be subject to debate and varies widely from sector to sector. But a mere case-by-case approach in assessing the applicability of the Guidelines to supply chains can no longer be justified, as this has resulted in a lack of coherence amongst NCPs and arbitrary NCP decisions. Criteria for defining supply chain responsibility are being heavily debated

in various international fora and there are best practices in supply chain management and multi-stakeholder initiatives that provide guidance for assessing where to draw the line and for defining what is reasonable to expect from companies in terms of responsibility throughout their supply chains. Of particular relevance is the concept of sphere of influence as described in the ISO 26000 guidance on social responsibility. While influence alone may not be a sufficient reason to attribute responsibility, it is clear that the greater the influence the more likely there is also a responsibility to exercise that influence appropriately. However, the responsibility to exercise influence positively must be linked to the existence of a negative impact.

Drawing on and reinforcing these criteria, the OECD should provide better guidance for NCPs, businesses and NGOs as to what can be expected from MNEs in terms of their supply chain responsibility. NCPs should assess whether the company has exercised a duty of care and took all reasonable steps to avoid or mitigate negative impacts through its supply and production chain. Recommendation II.10 and its commentary that deals with relations among suppliers and other business partners, and the clarification by the OECD in 2003, have an excessively narrow focus on the degree of influence rather than assessing the human rights, social and environmental impact of the companies.

This is a vitally important issue for the revision of the Guidelines. The OECD will have to take into account the current business structures and redefine the supply chain responsibility which should not be based on investment relationships only.³⁴ A broader understanding of the scope of the Guidelines is needed, accepting them as being recommendations for responsible international business conduct where no artificial distinction between trade and investment should be made.

The update should incorporate the results of Professor Ruggie's work in clarifying supply chain responsibility. He has focused on the real and potential human rights impact of a company's actions and the due diligence that is expected of them. The scope of responsibility is defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents. The components of due diligence according to Professor Ruggie comprise the following: A commitment to human rights set out in a company policy statement, periodic human rights assessment of the real and potential impacts of company activities and those of business partners and the supply chain, establishing relevant controls and management systems to monitor the company's human rights policy, and reporting.³⁵

The issues of sphere of influence, impact and corporate complicity in violations that run throughout production networks, and via sub-contractors and agents, remain contested by both business and some NCPs. However, there is now global recognition that the objectives of sustainable development, equitable economic prosperity and responsible business conduct can only be achieved if implemented throughout all aspects of the business, and particularly in high risk sectors and zones with conflict, post-conflict or weak governance.

The examples in previous chapters show that arguably some of the most fundamental dimensions of responsible business conduct have been ruled out of consideration under the OECD Guidelines because of the arbitrary approach to the investment nexus.

Briton linked to Congo war crimes



Jon Beckett

The deadliest war in the world was being won. American warplanes were dropping bombs on the Congo. A British special forces operative in the French-speaking Congo, reported for duty in the Congo. He had been appointed military commander of Avient, an air cargo company, by Andrew Likiep, a former British army officer.

When he discovered that his army units did not agree to British air operations in the Congo, he was ordered to leave the UN. The UN also decided in 2002 to end its mission in the Congo. The conflict had become too complex and too high a price to pay for the world.

Avient, an American company, was an American company. The company was based in the Congo. It was the only company in the Congo that had the permission to operate in the Congo. It was the only company in the Congo that had the permission to operate in the Congo.



Providing aid to the Congo

Also the Department of Trade and Industry has previously examined reports of military activities in the Congo following evidence presented by the United Nations.

In 2002, a UN panel of experts named Avient among companies whose activities in the Congo were alleged to have breached international norms. In 2004, however, the UN found that a number of allegations were unfounded. It argued that the company was working under a contractual arrangement with the already recognised government in the area.

Avient is to join the UN to support its investigation into whether Avient breached the provisions of the Organisation for Economic Co-operation and Development (OECD), to which British airlines

Each of the findings in the Congo in 1999 and 2002 was almost as if what Britain had to say about its own actions. It is a matter of fact that the company was found to be in violation of international and domestic laws.

According to former, British and American news for and British companies, the company was found to be in violation of international and domestic laws.

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Indiscriminate bombing in the DRC

According to the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Avient Air was contracted to organize bombing raids into eastern DRC in 1999 and 2000.³⁶ Avient provided planes, attack helicopters and Ukrainian crews to the Congolese Air Force and the Zimbabwean Defence Force. The evidence collected suggests that Avient dropped hand made fuel bombs from the back of Antonov Cargo planes. This indiscriminate bombing lead to the loss of civilian life in Equateur. The company denied that Avient "organised" bombing raids. But it admitted that Avient leased aircrafts to the Zimbabwean Government

for use in the DRC. Avient also admitted that it had provided engineering, training and crews for the Congolese Army. The second allegation concerned the provision of military supplies to both the Congolese Army and the Zimbabwean Defence Force. In particular, the UN accused Avient of having brokered the sale of six attack helicopters to the DRC government in April 2002.³⁷ Avient denied this but admitted shipping military cargo on behalf of the Zimbabwean Government in 1999. The company argued that since none of the military hardware had been exported out of the EU, Avient was not in breach of the Arms Embargo.

In 2003, after the UN Security Council had called for a full investigation of these allegations, the case was referred to the UK NCP. The NCP refused to admit RAID as complainants in the process and nor was any investigation conducted. The NCP issued a final statement in September 2004 essentially recording Avient's response to the allegations and effectively exonerating the company. This took place despite the fact that the NCP had a letter from the DRC Air Force in its possession which clearly implicated Avient in military campaigns on behalf of the DRC government. The statement only reminded the company to "carefully consider" its future conduct in relation to human rights. No follow-up or monitoring of Avient's subsequent behaviour has been performed by the NCP. ●

Critical issues for the review (ii): Human rights

In 2000 the inclusion of a general human rights provision into the revised text of the Guidelines marked a small but significant breakthrough. Only workplace and some labour rights had been included in the previous texts. It predated developments at the United Nations in Geneva where in 2004, after years of discussion and consultation, the Commission of Human Rights had called for a study into the human rights obligations of corporations. Of course, given that the OECD Guidelines operate through the actions of home or host governments, its human rights provisions do not fundamentally challenge the received notion that international human rights law is applicable only to States. Corporations are however increasingly recognized as participants at the international level, with the capacity to bear some rights and duties under international law. Distinguished legal experts consider that this “makes it more difficult to maintain that they should be exempt from responsibility in other areas of international law”.³⁸

The human rights recommendations of the OECD Guidelines are not grouped into a single chapter of the Guidelines. The overarching human rights provision is very short and is contained in the General Policies Chapter paragraph 2, which states that companies should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” But many paragraphs in different chapters contain human rights provisions, especially provisions on labour rights in Chapter 4.

The unwillingness of most NCPs to address grave human rights abuses, coupled with the fact that few NCPs had human rights training, has been a major obstacle in the implementation of the Guidelines. Many NCPs refused to examine information about alleged human rights abuses, however serious, or to conduct their own fact-finding, claiming that the Guidelines were

“future-focused” and not intended “to act as an instrument of sanction nor to hold any company to account”.³⁹ The case of Avient Air concerning its alleged involvement in bombing raids in the Democratic Republic of Congo (DRC) illustrates this approach (see case box *Indiscriminate bombing in the DRC*). The negligent way in which this and other cases that occurred in the DRC were handled by the NCP, provoked outrage among British Members of Parliament and the public who then joined forces to demand a complete overhaul of the procedures.

In 2005, Professor John Ruggie was appointed Special Representative on Business and Human Rights. His initial mandate⁴⁰ was to identify and clarify human rights standards of corporate responsibility and accountability for business. He examined the Guidelines and the functioning of the NCPs and has subsequently made a number of recommendations about how they might be strengthened. Professor Ruggie has encouraged NCPs to consider how they might apply the principles he has identified for effective non-judicial grievance mechanisms.⁴¹ They are legitimacy, accessibility, predictability, equitability for the parties involved, transparency, and compatibility with internationally recognised human rights.⁴²

There is no doubt that under basic principles of international law, States have the duty to take measures to prevent, investigate, and punish abuses by private actors and to provide a means to redress harm done to victims. Due to limited capacity or lack of political will, governments often fail in these regards. While the State may not exercise its jurisdiction overseas, it is not barred from exercising jurisdiction in its own territory in respect of acts committed abroad.

Professor Ruggie considers NCPs to be a potentially important vehicle for providing remedy, even if, “with a few exceptions,

experience suggests that in practice they have too often failed to meet this potential".⁴³ But many NGOs, such as Amnesty International, strongly disagree. They argue that while the NCP process may – in some circumstances – result in a remedial outcome for those who have suffered human rights harms, any such outcome is usually dependent on the cooperation of the company that is alleged to have harmed rights in the first place. "While NCPs make recommendations to companies, there is no means of enforcing these recommendations and no systematic process to engage the host state. The suggestion that a system where a discussion process may produce a remedial outcome, so long as the alleged perpetrator is willing to (a) agree there is a problem and (b) agree to a solution – the shape and scope of which is determined by that actor - cannot ever be considered a human rights remedial mechanism".⁴⁴

Human rights cases

Since 2000, 54 NGO cases related to 'human rights', of which 19 (35%) were rejected, blocked or closed without resolution and 17 (31%) concluded. The types of human rights violations that have been addressed in NGO cases include labour rights, illegal exploitation of natural resources, complicity with human rights violations by host regimes or rebel groups, violation of the rights of indigenous peoples or women's rights through forced evictions, and violations of the right to health and a healthy environment.

Strengthening human rights

The 2010 revision is expected to correct a number of the omissions in the human rights provisions. At the time of the last review the notion that corporations might have human rights responsibilities was a matter of considerable argument. This is no longer the case. the Human Rights Council has endorsed Professor Ruggie's 'protect, respect and remedy' framework, which states that as a minimum companies should

uphold the International Bill of Human Rights (which consists of the Universal Declaration of Human rights; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) as well as the ILO core conventions.⁴⁵ Given the recognition that "companies can and do infringe on the enjoyment of the rights that these instruments recognize" and that "corporate responsibility to respect human rights exists independently of States' duties or capacities"⁴⁶, these and other standards, including international humanitarian law should be explicitly reference in the revised text.

The human rights provision should be clearer about the relationship between companies and the local population, specifically including the rights of indigenous peoples and other groups that are disadvantaged, structurally excluded or discriminated against. The Guidelines currently lack clarity on what demands companies should meet in engaging with local communities in relation to social and environmental damage and hazards to health. Further detailing of what constitutes adequate and timely disclosure and consultation with local stakeholders should be provided on the basis of existing best practices such as pro-active consultation and the principle of free, prior and informed consent.

While the primary focus of the OECD process is on mediation between the parties, when a company is responsible for or complicit in serious human rights abuses, this is neither desirable nor sufficient. In cases of breaches of the human rights provision, the NCP should reach a clear and reasoned finding on the substance of the allegations and whether they represent a breach of the Guidelines based on an assessment of the available facts. While determination does not provide a remedy it is an essential first step. Even when there is no means of enforcing a remedy, an NCP, by upholding a corporate-related human

rights complaint, can publicly acknowledge the harm a company's actions has caused to affected individuals and communities. This is meaningful to victims. Determination also acts as a deterrent as it sets a clear benchmark about the standard of behaviour expected of companies. Furthermore, an adverse NCP finding may have repercussions on a company's reputation, which may limit its ability to raise capital or obtain insurance.

Underpinning the OECD review should be the knowledge that there are significant power, knowledge, and economic imbalances at play in many – if not most – cases where companies are involved in the abuse of rights, and that some rebalancing is needed. Also, while the territorial State has clear responsibilities in relation to regulation, accountability and remedy – there are cases where the territorial State cannot or will not act, or where the parent company is at fault. When there is a rational and a legal capacity in another State – such as the home state – to act, they should act.

Human rights provisions should be integrated into other Chapters particularly those on Disclosure and Environment. A separate human rights chapter could be helpful in providing further details, references and guidance for companies with regard to due diligence and human rights impacts assessments.



"If backed up with strong political support, the UK government's findings on the Afrimex case could set an important precedent in holding companies accountable for their activities in conflict zones and could set an example for other governments."
Global Witness

Controversial mineral trading in the DRC

In its report “Faced with a gun, what can you do?” Global Witness details how companies are buying from suppliers who trade in minerals from the warring parties in the DRC. Since the mid-1990s, countless poverty-stricken people living in the eastern DRC have suffered horrifying abuses by rebel groups battling for control over the region’s vast mineral wealth. During the DRC’s “second” war from 1998-2003, the rebel group RCD-Goma controlled the coltan and cassiterite (tin ore) trade throughout much of the region. By illegally taxing commercial activities, RCD-Goma was able to finance its war with the national government and its campaign of human rights abuses against innocent civilians. The scope and scale of abuses are shocking: massacres, sexual violence, arbitrary detention, torture and recruitment of child soldiers.

In February 2007, Global Witness accused Afrimex, a British company that trades coltan and cassiterite from the DRC, of paying taxes to the RCD-Goma through associated companies, Société Kotecha and

SOCOMI, in a complaint submitted to the UK NCP. Global Witness also accused Afrimex of buying minerals from mines with harsh, abysmal working conditions and where child and forced labourers were used.

The UK NCP attempted to mediate a solution, but talks broke down when Afrimex stopped cooperating and refused to participate. After carrying out its own investigation, in August 2008, the NCP issued a decisive and detailed final statement that “concluded that Afrimex had failed to ensure that its trading activities did not support armed conflict and forced labour”. The NCP’s statement emphasised that because Afrimex failed to practice supply chain due diligence, it had failed to contribute to the abolition of child and forced labour in the mines or to take steps to influence the working conditions of the mines.

Afrimex subsequently claimed that it had stopped trading minerals from the DRC in late 2008. However, in 2008 and 2009, a United Nations Group of Experts referenced Afrimex and its director Keten Kotecha as being affiliated with the

comptoir, Muyeye, who is cited to have made payments to another rebel group, the FDLR. Like the RCD-Goma, the FDLR is well-known for its human rights abuses. Many of the FDLR’s leaders allegedly participated in the Rwandan genocide in 1994.

While the UK NCP handled the complaint well, the Afrimex case highlights a key problem: when an NCP issues recommendations to a company that has breached the Guidelines, the NCP’s inability or unwillingness to monitor adherence allows companies simply to ignore the statement and continue business as usual with absolutely no consequences. In fact, Global Witness asked the NCP to verify the authenticity of Afrimex’s claim it was no longer trading minerals from the DRC. To date, no action has been taken. In the eastern DRC, illegal mineral exploitation and widespread human rights abuse continues with no signs of abating. ●

“The NCP does not have the legal powers to enforce decisions arising from its conclusions and there is no in-built mechanism for following up its recommendations.”

Global Witness

Critical issues for the review (iii): Environment & climate change

The Environment Chapter of the OECD Guidelines was one of the chapters most thoroughly revised in 2000. Unlike labour rights which are the primary focus of unions, NGOs have been most active in monitoring the impact of business conduct on the environment. It was thus anticipated that the revised chapter would generate a large number of complaints from the NGO community. To what extent have the new provisions been helpful in addressing the key environmental concerns such as climate change in today's globalised world?

Environment cases

Almost half of all cases filed by NGOs (46 cases) have included references to "environment". Out of this total, again almost half, 19 (41%) have been rejected, blocked or closed without resolution, while 12 (26%) were concluded. Not surprisingly, many cases dealt with environmental issues in the oil, mining and extractive industries, and the impacts of companies active in those sectors on local communities and their environment, which they are often highly dependent on for their food, water supply, and income.

The business contribution to climate change

With the growing international concern, some NGOs took on the challenging task of testing the relevance of the OECD Guidelines to global climate change. Two cases were filed by German NGOs in 2007 and 2009 respectively both of which related to the climate-sensitive behaviour of Volkswagen Germany and the energy conglomerate, Vattenfall. Both cases were rejected by the German NCP. In each case, the NGOs believe that the Guidelines could easily have been applied. In both cases there were distinct grounds for filing the complaint but there were also matters of general company policy regarding sustainable development, the precautionary principle and disclosure.⁴⁷

The complaints were rejected essentially because the NCP found that they could not come to a decision regarding non-compliance with the Guidelines in the absence of laws defining corporate obligations or specifically prohibiting certain activities (such as designing and selling cars, building coal plants). Given that climate change or rather emissions of greenhouse gases by industry are regulated in Europe through the Emissions Trading Schemes⁴⁸, it follows that the Guidelines could and should complement national and EU law. Chapter V on environment essentially calls on enterprises to "do the best they can", and this general behavioural standard could achieve a great deal in addition to the reductions prescribed by Emissions Trading Schemes.

Large companies have the ability to make a significant contribution towards achieving the overall reduction target (so that global warming does not exceed 2°C). It is precisely for this reason and because national laws are not yet sufficiently developed to ensure this outcome, that Germanwatch and Greenpeace had wanted to use the Guidelines to raise these issues with the companies. While the international negotiations around the Kyoto Protocol and a post-2012 climate deal concern governments, the Guidelines could provide substantial guidance to companies. Even though the Guidelines were not drafted with such problems in mind, they are sufficiently flexible and in some respects sufficiently progressive to make an important contribution to reducing the impact of climate change.

NCPs seem to be unwilling to accept that a global issue such as climate change and the responsibility of companies for greenhouse gas emissions can be the basis of a specific instance under the OECD Guidelines. NGOs remain convinced that both complaints were justified and that they had produced evidence of breaches of

particular provisions of the Guidelines. The NCP's rejection of the complaints cannot alter the fact that responsibility for climate change manifests itself in company policy in general, in product placement and in investment decisions.

Fears that the Oyu Tolgoi copper and gold mine might exacerbate climate change impacts and cause potentially irreversible damage to the fragile ecosystem of the South Gobi region, underpin a complaint filed in April 2010 by OT Watch and a coalition of Mongolian NGOs against the Canadian company Ivanhoe Mines Ltd and its partner Rio Tinto.⁴⁹ Increasingly Mongolian civil society fears that the mine licences awarded to foreign companies will reduce both the quality and availability of water, threaten Mongolia's wildlife and biodiversity, and decrease the amount of pasture on which the country's traditional nomadic population depends for their survival. These problems are compounded by the inadequacy of Mongolia's Minerals Law and structural weaknesses which leads to poor enforcement of the country's environmental laws. Concerns about the impact of mining generally have led to demonstrations, hunger strikes and mounting tension throughout Mongolia. As of June 2010, the admissibility of the Oyu Tolgoi complaint is still being assessed by the Canadian NCP.

It is clear that the current Chapter on environment needs revision to ensure it is fully up to date regarding policy developments and multilateral commitments to sustainable development. In particular, the chapter should take into consideration climate change, and multinational enterprises should be encouraged to reduce their carbon footprint.

A villa suffers while an OECD case lingers

The residents of “Villa Inflamable” – a name the community earned because the water in the nearby river has been known to burst into flames – suffer from a host of health problems and are subjected to a toxic soup of environmental pollution. Villa Inflamable is home to about 1,300 families who live in extreme poverty and lack access

to basic sanitation, clean water and other essential utilities. Located in the Matanza-Riachuelo Basin on the outskirts of Buenos Aires, the neighbourhood is surrounded by the Dock Sud industrial area, where dozens of oil refineries, chemical plants and other heavy industrial operations are located.

residents by Argentina’s national environmental authority (SAyDS) in August 2007. Indeed, the environmental and regulatory crimes discovered by SAyDS were so extensive that the government closed the refinery for seven days. The company did not have environmental impact studies, carried out work without proper permits, stored waste longer than the six months allowed by law, did not keep records about waste and waste transfers, concealed information about environmental inci-

The community’s closest corporate neighbour, Shell Capsa’s oil refinery, was found to be dangerous to the environment as well as to the physical integrity of

“This situation shows the weakness of the Guidelines to provide NCPs the necessary tools to get companies to participate in specific instances and contribute to achieve effective long term solutions.”

Verónica Cípolatti, Centro de Derechos Humanos y Ambiente



dents over the previous two years, and there was onsite soil contamination.

In response, in June 2008, FOCO/INPADE and Amigos de la Tierra Argentina filed a complaint in Argentina and the Netherlands against Shell Capsa for violations of the environment and disclosure chapters of the OECD Guidelines. Key among the violations was that Shell Capsa had never once consulted with or provided information to nearby communities about the environmental, health and safety risks of its operations.

After the case was accepted by the Argentine NCP, as lead NCP, and the Dutch NCP, Shell Capsa

refused to participate in the process, claiming the existence of parallel legal proceedings. Yet the NCPs did not let the fact that parallel legal proceedings were taking place keep them from accepting the case. The Argentine NCP also pledged to publish a report that describes its findings on the case, including the fact that the company refused to cooperate.

However, this complaint also illustrates significant, recurring problems with the OECD Guidelines. NCPs have no power to compel companies to engage, and only a handful of NCPs are willing to carry out an investigation and issue a final statement when companies

“The residents of Villa Inflamable continue living in the same unhealthy conditions that the complaint described. In no aspect has the situation improved. The company has still not disclosed any significant information regarding the risk factors the community is exposed to”.

**Agostina Chiodi,
INPADE**

refuse to cooperate. It is essential that NCPs have some leverage to persuade companies to come to the table, such as the possibility of losing the ability to obtain export credits or public financing, if the NCP finds breaches have in fact been committed. Also, when cases linger indefinitely, whether it is due to NCP inaction or a company's refusal to cooperate, it is important to remember that these situations have very real impacts on people and the environment.

Today, the conditions in Villa Inflamable remain dangerous to human health. Shell Capsa still has not disclosed any significant information about the many environmental hazards the people of this community face. In fact, according to the complainants, the company's refusal to participate in the specific instance process is a missed opportunity. They continue to believe mediation could have fostered much needed communication, and could lead to some lasting solutions. ●





Better late than never

Ordinarily if a government's export credit agency updates its policies to combat bribery and corruption in international business transactions, they would apply equally to all companies receiving loans or guarantees. But not if you are BAE Systems, Rolls Royce or Airbus.

In 2004, the UK's Export Credit Guarantee Department's (ECGD) introduced new anti-corruption measures that require companies to provide information about the agents they use in ECGD-backed transactions, including how much they are paid in commission.

BAE Systems, Rolls Royce and Airbus blatantly refused, claiming this information was confidential. ECGD assured the companies that the information would be safeguarded under strengthened procedures, but the companies continued to rebuff ECGD. In the end, they even secured assurances from ECGD that the new policy would not apply to them.

In April 2005, a British NGO, The Corner House, lodged a complaint against BAE Systems, Rolls Royce and Airbus for their violation of the OECD Guidelines' Bribery Chapter with the UK NCP. The relevant Guideline could not be clearer on this issue. It states: "Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities".

In May 2005, the UK NCP accepted the complaint, but it was put on hold pending the outcome of a parallel proceeding, namely the public consultation initiated by ECGD on its anti-corruption procedures. These resulted in new rules, under which companies are required to give details of agents, but may request special handling arrangements to protect commercial confidentiality.

In September 2009, the NCP wrote to the Corner House, apologising that the case had not been taken forward, since it had apparently been lost by the NCP, following changes in staff. The NCP stated that it had only become aware of the case "after reviewing OECD Watch's submission to the OECD dated 12 June 2009 which included this complaint as a "blocked case". The case has been reactivated and the NCP is drafting its final statement.⁵⁰ ●

"The companies' refusal to disclose the names of their agents caused considerable costs to the UK Treasury. The Export Credit Guarantee Department was not only subject to judicial review but was obliged to conduct a full consultation on its anti-bribery measures. All of this could have been avoided."

The Corner House

Due process

Improving the effectiveness of the Guidelines depends above all else on improving the effectiveness of the NCPs. The Procedural Guidance sets out the framework for NCP effectiveness. Shortcomings in NCP functioning identified by Professor Ruggie that are preventing the Guidelines from meeting their full potential include: the possible conflict of interests due to NCPs' institutional set-up, the lack of resources to investigate complaints, the lack of training to provide effective mediation, unclear timeframes, and the lack of transparent outcomes. Professor Ruggie regards NCPs as "potentially an important vehicle for providing remedy," but notes that they have "too often failed to meet this potential" and that as a result NCPs and the OECD Guidelines are "coming up short".⁵¹ Even the Secretary General of the OECD, Ángel Gurría, has acknowledged that NCP performance is "patchy".⁵²

Functional equivalence

The uneven performance of NCPs is uncontested. The effects of unequal access and the unequal and arbitrary treatment of cases have resulted in a loss of confidence and has undermined the standing of the Guidelines as a whole. The current Procedural Guidance sets out four core criteria on the basis of which NCPs are supposed to achieve "functional equivalence": visibility, accessibility, transparency, and accountability. However, two important criteria proposed by Professor Ruggie for effective non-judicial grievance mechanisms are missing: equal treatment and predictability. These two elements are the main shortcomings in the NCP process, which is undermined by the absence of clear procedures. Those who would seek to use the NCP mechanism to resolve a problem or dispute cannot be assured that the NCP will deal with the case appropriately or even that they will be treated fairly and on the same basis as the other parties.

The lack of procedural standards is exemplified in the way NCPs deal with the issue of confidentiality and transparency:

- The UK and Dutch NCPs always publish initial assessments.
- The US, Swiss, Australian, and German NCPs never publish initial assessments or progress during cases.
- The Dutch, UK, Norwegian, and Australian NCPs publish all final statements.
- The UK and Australian NCPs publish names of parties where a case is accepted.
- The US NCP has required complainants to adhere to strict confidentiality requirements.

Functional equivalence between the institutional arrangements of different national NCPs is paramount. OECD Watch has welcomed the reforms that have already occurred in a number of countries including the Netherlands, Norway and the United Kingdom. There are also encouraging developments in the USA where there are ongoing discussions about measures to restructure the NCP. Even in Japan there have been some limited attempts to widen participation in the NCP process, but more thorough-going reforms among Asian NCPs are long-overdue. The review should seek agreement on minimum baseline requirements for all NCPs, incorporating similar arrangements – including in particular the requirement that any complaint should be dealt with via a three-stage process culminating in a final statement and clear determination if no mediated settlement is possible.

OECD Watch has argued for many years that one of the most effective ways of ensuring functional equivalence would be through a peer review mechanism. The recent peer review of the Dutch NCP has set a positive example.

Missed opportunity to prevent human rights abuse in Burma

Even before construction got under way, the Shwe Gas Project in Burma (Myanmar) was linked to human rights and environmental abuses. The mammoth pipeline project, which will transport natural gas from offshore fields in the Bay of Bengal to

China's Yunnan Province, is now being built across a wide swathe of the country, through populous and rural areas in several States and, finally, across the Burma-China border, an area where a palpable threat of civil war exists between the Burmese junta and formidable non-State ethnic armed groups.

Over more than a decade, observers have documented a pattern in which the Burmese military, which contracts with oil and gas companies to provide security along the Yadana pipeline, subjects local residents to forced labour, rape, killings, torture, land confiscation, destruction of livelihoods, and environmental degra-

"Since they came to our island in 2006, our island was not at peace... we are not allowed to go everywhere and they destroy our paddy fields and mountains."

**Resident of Maday Kyun
Rwama village, Kyaut Phyu
Township, Arakan State,
2010**



dition. The communities and natural environments along the Shwe pipeline are already experiencing many of the same abuses.

By late 2008, the project had already triggered numerous violations of the OECD Guidelines. Communities along the pipeline route were provided with little information, let alone an opportunity to consult on the project. Villagers were forced off their land without compensation. Fishing in many areas was restricted without informing fishermen, who were imprisoned and tortured for inadvertently intruding on these zones. Activists who tried to raise local awareness about the project in Arakan State, where the pipeline begins, were arrested or forced into hiding with their families. Daewoo International Corp., which had contracted with the Burmese government to develop the offshore gas fields, declined to comment, arguing that it was “not the right time” to talk about abuses, as the project was still in the exploration stage.

In October 2008, the Shwe Gas Movement (SGM), EarthRights International (ERI), and nine co-complain-

ants filed a complaint with the Korean NCP against Daewoo and the Korea Gas Corporation. Less than one month later, the NCP rejected the complaint in a curt letter in Korean, concluding that the case did not warrant investigation.

Basic shortcomings in the Guidelines and the specific instance procedures brought about a complete denial of due process to the complainants and failed to prevent or mitigate abuses that have occurred since the complaint was filed. Lack or directive in the Guidelines to anticipate and prevent foreseeable future harms, lack of functional equivalence, and lack of guidance on the provision of good offices, among others, allowed the Korean NCP to easily dismiss the case.

The 2008 complaint was a missed opportunity for the NCP to help prevent devastating abuses before they started in earnest. Unsurprisingly, since the NCP’s dismissal, abuses connected to the Shwe project have increased, and the latest news from the Shwe corridor bears out ERI and SGM’s fears. There have been reports of rampant land confiscations without compensation,

“They banned me not to tell about their names ... and they also ordered me not to tell about my paddy plots confiscated by them. Now I am telling you about it. I am really afraid of them to punish me because they have power in our island since they come here.”

Resident of Maday Kyun Prinwera village, Kyaut Phyu Township, Arakan State, 2010

intimidation and destruction of traditional livelihoods of farmers and fishermen.

Now Daewoo has announced that it does own a stake in the pipeline there is no longer any question that the company bears responsibility for the acts committed in the service of the pipeline consortium by the Burmese military. As construction expands into environmentally sensitive and traditionally restive border regions like the northern Shan State, an expanded military presence is to be expected, and observers expect to see a major upswing in violent abuses. ERI, SGM, and the communities on whose behalf they advocate can only hope that an update of the Guidelines will fill the gaps in due process; the gaps that are so tragically illustrated by the story of their complaint. If so, the next time the Korean NCP is called upon to evaluate Daewoo’s actions in Burma, the communities and their representatives could stand a chance of getting a fair hearing. ●

Parallel Legal Proceedings

“Parallel legal proceedings” is the term NCPs use when a complaint deals with business conduct that is also the subject of legal or administrative proceedings at the national or international level. There are different types of proceedings: 1) criminal, administrative or civil; 2) alternative dispute settlement proceedings (arbitration, conciliation, mediation); 3) public consultation; or 4) other enquiries such as by the UN. The issue has created a heated debate on scope and added value of the OECD Guidelines over other regulations and national laws. To what extent do they fill a governance gap when there are shortcomings in legal and administrative systems of host countries? When is it appropriate to preclude examination of cases by NCPs?

The existence of parallel proceedings is one of the most frequently cited reason for turning down or delaying dealing with a specific instance. Neither the Procedural Guidance nor the Commentaries of the OECD Guidelines provide guidance for NCPs on how to deal with parallel proceedings. This has resulted in a wide variety of interpretations amongst NCPs. NCPs have often argued for the need for consistency with domestic law, and pointed to the sensitivities arising from infringement of national sovereignty, when it comes to non-adhering countries. NCPs have also argued that the non-adversarial nature of the OECD Guidelines’ procedure, aiming at mediation, is in conflict with the adversarial state of mind of the parties concerned when they are battling over issues in courts. However, in contrast, experts have stated that “the existence of parallel legal procedures justifies, even fortifies mediation by the NCP”.⁵³

OECD Watch has argued that it may be appropriate in some cases, when the outcome of legal proceedings is awaited, that the NCP defers the examination of relevant parts of a complaint on the grounds that evidence may emerge which

could assist the NCP in making its assessment. Where charges are not forthcoming within a reasonable period, or if a criminal case collapses, the NCP procedures should be resumed without delay. In the case against Shell and its oil depot in Manila for example, the proceedings of the case were put on hold with the consent of both parties for more than a year, while waiting for a decision from the Philippine courts. However, after that court decision, Shell continued to use the parallel procedures argument to justify not engaging in mediation.

Overview of cases

More than 40% of all OECD Guidelines cases filed by NGOs were also being addressed in some kind of parallel proceeding. Of the 38 cases involving parallel proceedings, more than half (53%) were rejected or blocked by the NCP or withdrawn without resolution by the specific instance mechanism. Only 10 (26%) were accepted and concluded by the NCP. Seven cases remain pending as of June 2010. TUAC reports a similar experience by unions that have filed OECD Guidelines cases. Approximately 60% of all union cases have involved issues that were also being addressed in parallel proceedings. Less than one-third of these cases were accepted by the NCP and concluded.

The need for clarification

The uncertainty with regards to parallel legal proceedings has made many NGOs hesitant to use the OECD Guidelines’ complaints procedure, given that often other judicial and non-judicial mechanisms are being called upon. NGOs, in particular in developing countries, are faced with a lack of effective and available judicial and non-judicial grievance mechanisms to address their concerns regarding business conduct. All too often, serious questions can be raised regarding the fairness and timeliness of national judicial means. Court cases may linger for many years without progress and the judicial system may

lack independence or be corrupt. As a result of a narrow approach to parallel legal proceedings, NGOs may find their access to the NCP process blocked, ruling out a possibly more efficient and non-adversarial resolution to a dispute.

A wide range of different issues and concerns have emerged over the past ten years which has given rise to NCPs adopting 'a case-by-case' approach to the admissibility of a complaint which is subject to parallel legal proceedings. Still there is no reason why parallel legal proceedings should preclude the consideration of a complaint by the NCP, since OECD proceedings are distinct from judicial mechanisms in both nature and substance. A closer look at the cases reveals that whilst parallel legal proceedings might deal with the same facts, often different issues and entities are involved. For example, there may be legal proceedings against suppliers or subsidiaries in the host country, while the OECD complaint may be concerned about the broader responsibility of the buyer or parent company.

More guidance must be provided to complainants and companies on how NCPs intend to handle the issue of parallel legal proceedings within the OECD Guidelines complaints process. First of all, greater clarity is required as to which proceedings fall under this category. Are they only court proceedings or also other proceedings in (inter)national forums, such as the International Centre for Settlement of Investment Disputes (ICSID) or complaint mechanisms provided by the International Labour Organisation (ILO), World Bank etc? Second, when exactly are proceedings considered parallel, and how closely related to the issues at stake in the NCP procedure must they be? Usually cases under the OECD Guidelines deal with a broader range of issues than court proceedings.

In September 2009 the UK NCP issued guidance to parties to specific instances on the approach, including principles, it intends to follow for handling case when there are parallel legal proceedings. A key points are that the existence of parallel proceedings will not of itself cause a suspension of the NCP's investigation and/or its determination of any dispute; and that the NCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances. A similar approach is taken by the Dutch NCP: when the enterprise claims to be unable to cooperate in the NCP procedure because of potential negative impacts on its position in a parallel legal proceeding, the NCP has a duty to investigate to what extent this is true, given the contents and involved parties of both procedures. When procedures do not overlap, the NCP will propose to continue the procedure.⁵⁴ These examples make clear that more clarification is needed to ensure a coherent approach to parallel legal proceedings among NCPs, with a view to ensuring that this argument to turn down cases is only used on justifiable and verifiable grounds.

In the past TUAC proposed a four-step approach that the NCP should take. The approach includes: alerting relevant enforcement authorities in case there are indications that criminal activities are involved; evaluating where the Guidelines and parallel proceedings converge and differ; taking account of parallel proceedings insofar as it provides for relevant sources of facts and information in considering a specific case; and facilitating dialogue and dispute resolution between parties taking due account of parallel proceedings. Where there is reasonable indication that the parallel proceeding is exposed to extensive delays in procedures, it is especially important that an NCP engages the parties in dialogue.⁵⁵

No follow-up

In 2000, the Canadian/Swiss-owned company Mopani Copper Mines began evicting subsistence farmers from long-standing informal communities near Mufulira, Zambia. These subsistence farmers relied upon access to this land to gain the basic necessities of life. Loss of land is often linked to a host of severe and potentially catastrophic consequences including extreme impoverishment, malnutrition and starvation, and the breach of numerous internationally recognised human rights including the right to life, the right to an adequate standard of living, the right to adequate food, clothing and housing, and the right to be free from hunger.

In response to these evictions, Zambian land rights NGO Development Education Community Project (“DECOP”), with the help of Oxfam-Canada, initiated a complaint to the Canadian NCP in July 2001

outlining how such evictions by Mopani Copper Mines were in breach of the human rights standards contained within the OECD Guidelines.

At first, the outcome of this complaint seemed promising. The Canadian NCP organised meetings between Mopani Copper Mines, the NGO and the local community which resulted an agreement that included three key points: first, all evictions would stop; second, all parties would work together towards resettlement of the farmers on land that they could legally own; and third, there would be continued dialogue between all parties.

Yet despite the initial appearance of a successful resolution, subsequent events suggest that it was anything but. Most crucially, the eviction of subsistence farmers from some of the mine land began again in 2006, with potentially

devastating economic and social consequences for the families involved. In July 2008, DECOP reported yet another round of pending evictions.

In May 2010, DECOP reported that an uneasy interim arrangement has been reached. This arrangement gives some of the remaining farmers short-term ‘licenses’ that enabled them to remain on the land for the time being. Yet the restrictive clauses of the licenses mean that the licenses do nothing to improve land security and may serve to entrench poverty.

Nine years after the original complaint, the land situation in Mufulira remains unresolved. As Charles Mulila, DECOP Coordinator, says “[p]eople live in fear because they do not know what tomorrow holds for them.” As of yet, the OECD Guidelines have done little to ease these fears. ●



Zambian copper mine agreements

**Charles Mulila,
DECOP Coordinator:**

"People live in fear because they don't know what tomorrow holds for them."

"The problem in Zambia is that when we advocate about the OECD Guidelines [multinational companies] are quick to point out that the Guidelines are voluntary and they only make references whenever need arises. . . . [T]here is no political will by our Government to make [multinational companies] embrace the OECD Guidelines."

"[There is] No security of title to land."

Powers and mandate

The OECD Guidelines' unique and added value amongst the plethora of initiatives and instruments to promote responsible business conduct, is its function as a grievance mechanism for affected communities and workers seeking redress. Civil society organisations (CSOs), local communities, workers and their representatives are often seeking effective mechanisms of redress. Such a mechanism would provide a process by which people and communities can seek to put right or compensate a wrong caused by a violation of rights. One of the central causes for frustration with the OECD Guidelines amongst CSOs worldwide is their frequent inability to provide redress for those affected by breaches of these Guidelines. The lack of powers and mandate of NCPs has contributed to their inability to provide effective redress.

The question as to whether the OECD Guidelines can provide an effective remedy raises two separate questions:

1. What powers and mandate do NCPs need in order to investigate, monitor, get companies to engage in the process, obtain information, make an informed decision if mediation fails, and ensure follow up?
2. What power do NCPs and their governments have to impose sanctions or attach other official consequences to NCP statements of breaches of the Guidelines?

Lack of teeth?

Many NCPs claim not to have a mandate and lack capacity to undertake their own assessment and conduct fact-finding missions in order to make an informed determination. NCPs also lack the power to compel companies to disclose information or engage in the process. Very few NCPs have ever ensured adequate follow-up of a case, by ensuring NCP recommendations are integrated into business practices and promises are kept. A case filed many years ago against First

Quantum (see case box *No follow-up Zambian copper mine agreements*) provides a telling example.

NGOs believe that the whole complaint mechanism is characterised by a "lack of teeth". This has led many companies involved in cases to disregard the process and not engage constructively in a mediation, which is highly frustrating. Apart from the fact that the government convenes the process there is little incentive for a company to engage, particularly where there are few or none adverse consequences.

There is an increasing acknowledgement that the lack of consequences attached to condemning NCP statements is a serious flaw. This has resulted in a recent groundswell of support from parliaments and some governments for more effective measures against corporate abuse, for example:

- In 2009, the UK Parliament's Joint Committee of Human Rights called on the UK Government to help develop an international consensus for enhancing access to a remedy, stating that:

"As a non-judicial mechanism for satisfying individuals who may have a complaint against a UK company, [the NCP] falls far short of the necessary criteria and powers needed by an effective remedial body, including the need for independence from Government and the power to provide an effective remedy. There is little incentive for individuals to use a complaints mechanism which offers no prospect of any sanction against a company, compensation or any guarantee that action will be taken to make the company change its behaviour."⁵⁶

- In early 2010, the Dutch parliament passed a resolution on the link between state aid and violation of the OECD Guidelines, urging the Dutch Government to work with others to

ensure such an approach is included in the update of the Guidelines.

- The Australian government recently supported a motion in parliament to develop measures at both the national and international level that prevent the involvement or complicity of an Australian company in the abuse of human rights.

Furthermore, in his 2010 report, Professor Ruggie noted that:

“there are no official consequences to an NCP finding against a company: it could reapply immediately for export or investment assistance from the same government. The Guidelines’ update should address all of these defects.”⁵⁷

Currently, however, the OECD Guidelines remain a weak, non-binding mechanism, and if NCPs cannot compel a company found to be in violation of the Guidelines to change its corporate practices, then the need for monitoring company behaviour after final statements are issued becomes all the more important. Without this, breaches of the OECD Guidelines may continue, thereby perpetuating and endangering human rights.

There should be consequences for companies that are found to be in breach of the Guidelines and who refuse to modify abusive behaviour in line with the recommendations in final statements. Such companies should forfeit or be deemed ineligible for State subsidies or guarantees or face other legal, administrative or financial penalties. The forthcoming review is a chance to strengthen the capacity of NCPs to encourage or compel companies to cooperate in specific instance procedures, to follow up on their agreements and statements and make sure business practices are changed so as to promote sustainable development and respect for all human rights.

Guidelines unable to protect indigenous people in India

The Dongria Kondh tribe in India is literally fighting to protect the lands they, and perhaps their very existence, depend on. The Dongria live in the Niyamgiri Hills in the eastern State of Orissa, and they worship one mountain above all others: Niyam Dongar. This mountain is literally a god to them, and they believe the surrounding Niyamgiri Hills and the trees growing there, which provide the tribe's 8,000 people with all they need for their existence, have divine powers. But if the

British mining company Vedanta Resources has its way, the Dongria's sacred mountain will soon be home to an open-pit bauxite mine. The company is currently on a course where, if allowed

to proceed, they will mine the Niyam Dongar without ever having held meaningful consultations with the Dongria or assessing the potential impacts to their human rights.

"We found not the slightest evidence, however, that [Vedanta] has done anything at all. On the contrary, the company appears to have ignored the NCP's recommendations in their entirety".

Survival International's December 2009 follow-up report to the UK NCP after visiting Orissa, India, to interview members of the Dongria Kondh tribe.

Survival International (SI) filed an OECD Guidelines complaint against Vedanta with the UK NCP in September 2008, because their attempts to deal directly with the company had been rebuffed. Their complaint was straightforward: Vedanta was moving forward with their

bauxite mine without properly consulting the Dongria, and in doing so, they were violating their human and indigenous peoples' rights. In September 2009, the UK NCP concurred with SI's allegations. In its final statement, the NCP called on Vedanta to "immediately and adequately engage with the Dongria Kondh" and "include a human and indigenous rights impact assessment in its project management process".

However, in early December 2009, a field investigation by SI staff found that Vedanta had totally disregarded the NCP's recommendations. While the company has

claimed differently, SI staff met with tribal leaders and community members who reported Vedanta has not made any attempt to start consultations to discuss their proposed mine. Moreover, SI staff encountered acts of intimidation by people allegedly paid by Vedanta aimed at making them abandon their efforts to meet the Dongria people.

Despite the UK NCP's exemplary handling of the case, Vedanta's refusal to abide by the NCP's recommendations means that the Dongria are still faced with a very real threat. The lack of consequences attached

"Vedanta's open pit mine would destroy the forests, disrupt the rivers and spell the end of the Dongria Kondh as a distinct people".

**Survival
International**

to even the most flagrant violations of the OECD Guidelines means that the NCP, despite its clear final statement and recommendations for improvement, is powerless to help the victims of corporate abuse if the company in question refuses to cooperate. ●



Conclusions

The wealth of experience in using the OECD Guidelines gathered by NGOs over the past decade informs the conclusions of this report.

Despite the generally disappointing experiences had by NGOs, OECD Watch believes there is still potential for the OECD Guidelines to make a valuable contribution to the enhancement of responsible business conduct. The OECD Guidelines could partly compensate for the governance gaps created by globalisation. In the ten years since the last review, the Guidelines remain the only government-endorsed instrument at the international level which addresses a comprehensive range of corporate practices and offers a means of raising a complaint. The Guidelines set out principles and standards for responsible business conduct.

However, fundamental reforms are necessary if the Guidelines are to reach their full potential. The global financial crisis, which has had such a devastating impact on communities around the world, but especially on the poor and most disadvantaged, has given an added sense of urgency to the revision process. There are renewed calls from governments, parliaments, investors and the general public for greater transparency and increased scrutiny of the private sector and financial institutions. Governments should have the conviction to use this opportunity to transform the instrument into a truly effective dispute resolution mechanism capable of holding even the most powerful corporations to account when they fall short of the standards expected of them.

It is a make-or-break moment. Ten years on, and almost 100 cases later, it is clear to NGOs that the OECD Guidelines largely fail to deal effectively with the present-day social issues, environmental concerns and economic issues that matter to communities affected by the activities and behaviour of multinational enterprises.

The statistical analysis in this report provides evidence that NCP handling of specific instances has been uneven, unpredictable and too often ineffectual in resolving the issues in cases raised by NGOs. The lack of effectiveness should be a concern to all stakeholders given the real and serious problems, as exemplified in the case boxes, which represent a cross-section of the types of issues NGOs have raised concerning the practices of adhering country-based companies and their business partners. Affected communities cannot afford to have another ten years in which there is no effective mechanism to hold companies accountable for the negative impacts of their activities.

The experience of the past ten years provides a strong basis for OECD Watch to be able to formulate its proposals for much needed improvements to both the text and the procedures. The revision, scheduled to begin June 2010, should be completed by mid-2011. Over that period OECD Watch will provide more detailed proposals at appropriate intervals as the revision proceeds. As a contribution to the debate on improving procedures and NCP performance, OECD Watch also intends to update its Model NCP. The model was developed in 2007, and there is now a need to update NGO recommendations drawing on the lessons learned and reflecting best practice.

The following recommendations, which will be further elaborated in forthcoming publications, summarize what OECD Watch believes are the most critical issues and challenges for consideration during the review.

1. The OECD Guidelines' provisions must be supplemented to ensure they include key challenges for ensuring responsible business conduct, in the areas of human rights, labour rights (such as living wage and precarious work) environment, climate change, community

relations, taxation (country-by-country reporting), and disclosure.

2. The scope and applicability of the OECD Guidelines must be broadened to include supply chain, trade, finance, and other business relations reflecting the realities of the rapidly expanding segments of global value chains.
3. The institutional set-up of NCPs and their procedures must ensure more harmonised, accessible, predictable, equitable, transparent and impartial when handling complaints.
4. NCPs should have the competence and resources to play an effective mediatory role (or offer professional external mediators), and should have greater authority so that companies engage in the process.
5. NCPs should have the necessary independence, investigative and fact-finding capacities to conduct impartial assessments of complaints.
6. NCPs must be made more accountable through improved disclosure and oversight by the OECD, peer review, parliamentary scrutiny and appeals mechanisms at national as well as OECD level accessible to all stakeholders.
7. NCPs must have the means to follow-up on agreements from mediated outcomes and recommendations from NCP statements.
8. There should be consequences for companies that are found to be in breach of the Guidelines and that refuse to modify abusive behaviour in line with the recommendations in final statements. Such companies should forfeit or be deemed ineligible for state subsidies or guarantees or face other legal, administrative, or financial penalties.

OECD Watch believes that only by adopting these measures will governments ensure that NCPs are properly prepared and equipped to handle complaints effectively. If the review not only fails to address these shortcomings but also reduces the role of NCPs limiting them to a promotional or advisory role, it will further erode the influence and effectiveness of the OECD Guidelines. Governments should be aware that such an outcome might have undesirable, long-term consequences; it would increase global civil society's sense of injustice, frustration, and powerlessness, which could further inflame feelings of anger towards corporations and financial institutions.

This report shows that civil society organisations across the world are continuing to press for global standards and the establishment of an effective remedy to deal with the negative impacts of business operations. The task ahead for the OECD and adhering governments is clear: If the OECD Guidelines are to remain relevant in resolving corporate abuses and promoting responsible business behaviour in the 21st century, then radical reforms are necessary.

Annex:

All 96 NGO cases as of June 2010

Source: OECD Watch case database: <http://oecdwatch.org/cases>

Title	Issue	Date filed	NCP(s)	Status
Saami Council vs. KfW IPEX-Bank	KfW IPEX-Bank's financing of wind farm breaches Saami rights	16 April 2010	Germany, Sweden	Filed
OT Watch vs. Rio Tinto International Holdings Ltd., and Ivan	Availability of water and sustainability issues in Mongolia	6 April 2010	Canada, UK, US	Filed
Norwegian Support Committee for Western Sahara vs. Fugro	Sahrawi right to self-determination issue in Western Sahara	28 February 2010	Norway	Filed
FREDEMI coalition vs. Goldcorp	Human rights at Goldcorp's gold mine in Guatemala	9 December 2009	Canada	Pending
Thai and Filipino labour unions vs. Triumph International	Labour rights at Triumph Thai & Philippine garment factories	3 December 2009	Switzerland	Pending
Greenpeace Germany vs. Vattenfall	Environment and disclosure issues at Vattenfall in Germany	29 October 2009	Germany	Rejected
FIAN and Wake Up and Fight for Your Rights vs. NKG	Forced evictions at NKG coffee plantation in Uganda	15 June 2009	Germany	Pending
CIPCE vs.. Skanska	Corruption in Skanska's gas pipeline project, Argentina	20 May 2009	Argentina	Concluded
ForUM and Friends of the Earth Norway vs. Cermaq ASA	Cermaq ASA's salmon farming in Canada and Chile	19 May 2009	Norway, Canada, Chile	Filed
Framtiden i våre hender vs. Intex Resources	Intex Resources' environmental threat in the Philippines	26 January 2009	Norway	Filed
Survival International vs. Vedanta Resources plc	Vedanta's environmental and human rights violations in India	19 December 2008	UK	Closed
EarthRights International et al. vs. Daewoo	Daewoo & KOGAS' pipeline project in Burma	29 October 2008	S. Korea	Rejected
EarthRights International et al. vs. KOGAS	Daewoo & KOGAS' pipeline project in Burma	29 October 2008	S. Korea	Rejected
Shehri-Citizens for a Better Environment vs. SHV Holdings, NV	Makro's human rights and environment violations in Pakistan	9 October 2008	Netherlands	Closed
Pobal Chill Chomain Community et al. vs. Shell	Shell-led consortium's gas pipeline project in Ireland	22 August 2008	Ireland, Netherlands	Pending
Pobal Chill Chomain Community et al. vs. Statoil	Shell-led consortium's gas pipeline project in Ireland	22 August 2008	Ireland, Netherlands	Pending
Pobal Chill Chomain Community et al. vs. Marathon Oil	Shell-led consortium's gas pipeline project in Ireland	22 August 2008	Ireland, Netherlands	Pending
FOCO & Friends of the Earth Argentina vs. Shell Capsa	Shell's environmental and health violations in Argentina	1 June 2008	Argentina, Netherlands	Pending
Gesellschaft für bedrohte Völker vs. Volkswagen	Volkswagen's indirect support of HR violations in Tibet	28 April 2008	Germany	Rejected
Gresea & Transparency International Germany vs. Ratiopharm	Ratiopharm's unethical marketing in Germany, Belgium et al	24 January 2008	Belgium	Rejected
H. Recalde and H.W. Jofre vs. Accor Service	Accor Service's bribes to retain business in Argentina	28 November 2007	Argentina	Concluded
Colombian communities vs. Xstrata	BHP Billiton and forced evictions at Colombian coal mine	4 October 2007	Switzerland, Australia, UK,	Concluded
Green Party of New Zealand vs. ANZ Bank	ANZ Bank's facilitation of destructive forestry in PNG	1 October 2007	New Zealand	Rejected

Title	Issue	Date filed	NCP(s)	Status
Workers Assistance Center et al. vs. Chongwon Fashion Inc	Korean textile companies' labour abuses in the Philippines	3 September 2007	S. Korea	Rejected
Workers Assistance Center et al. vs. Il_Kyoung Co. Ltd.	Korean textile companies' labour abuses in the Philippines	3 September 2007	S. Korea	Pending
CIPCE vs. Skanska	Corruption in Skanska's gas pipeline project, Argentina	1 September 2007	Argentina	Concluded
Colombian communities vs. BHP Billiton	BHP Billiton and forced evictions at Colombian coal mine	26 June 2007	Australia, UK, Switzerland	Concluded
Transparency International Germany vs. 57 German companies	German companies' involvement in UN Oil f. Food Scandal Iraq	5 June 2007	Germany	Rejected
Germanwatch vs. Volkswagen	Volkswagen's climate change impacts	7 May 2007	Germany	Rejected
CGTP et al vs. Grupo Altas Cumbres	Banco del Trabajo's labour rights abuses in Peru	25 April 2007	Chile	Closed
Global Witness vs. Afrimex	Afrimex's mineral trading in the DRC	20 February 2007	UK	Concluded
CCC & ICN vs. G-Star	G-Star's Indian supplier's labour rights abuses	13 October 2006	Netherlands	Withdrawn
ACF et al. vs. ANZ Bank	ANZ Bank's facilitation of destructive forestry in PNG	24 August 2006	Australia	Rejected
Transparency International Germany vs. Ratiopharm (second, extended case)	Ratiopharm's unethical marketing in Germany, Belgium, Canada, Spain, et al	18 July 2006	Germany	Rejected
CEDHA and Bellona vs. Nordea	Botnia's Orion pulp mill project in Uruguay	28 June 2006	Sweden, Norway, Finland	Concluded
CEDHA vs. Finnvera plc	Botnia's Orion pulp mill project in Uruguay	8 June 2006	Finland	Rejected
CAVE and FoE Netherlands vs. Exxon	Shell and Exxon's chemical storage & health impact in Brazil	15 May 2006	Brazil, US	Rejected
CAVE and FoE Netherlands vs. Royal Dutch Shell	Shell and Exxon's chemical storage & health impact in Brazil	15 May 2006	Brazil, Netherlands	Rejected
Fenceline Community and FoE NL vs. Royal Dutch Shell	Shell's Pandacan oil depot in the Philippines	15 May 2006	Netherlands	Concluded
Transparency International Germany vs. Ratiopharm	Ratiopharm's unethical marketing in Germany	20 April 2006	Germany	Rejected
CEDHA vs. Botnia S.A.	Botnia's Orion pulp mill project in Uruguay	18 April 2006	Finland	Concluded
Nepenthes vs. Dalhoff, Larsen & Hornemann (DLH)	DLH's purchasing of illegal timber from conflict zones	10 March 2006	Denmark	Concluded
ForUM vs. Aker Kværner ASA	Aker Kværner's involvement in Guantánamo Bay prisons	20 June 2005	Norway	Concluded
Rights and Democracy vs. Anvil Mining	Anvil Mining's role in massacre in Congo	17 June 2005	UK	Rejected
Human Rights Council of Australia et al vs. Global Solutions	GSL management of detention centres in Australia	15 June 2005	Australia	Concluded
MAB and Terra de Direitos vs. Alcoa Alumínios	Alcoa Alumínios et al hydroelectric dam in Brazil	6 June 2005	Brazil	Blocked

Title	Issue	Date filed	NCP(s)	Status
MAB and Terra de Direitos vs. Votorantim	Alcoa Alumínios et al hydroelectric dam in Brazil	6 June 2005	Brazil	Blocked
DECOIN et al. vs. Ascendant Copper Corporation	Ascendant's Junín mine in Ecuador's cloud forest	29 May 2005	Canada	Withdrawn
Corner House vs. BAE Systems	British companies and UK export credit program	1 April 2005	UK	Pending
Corner House vs. Airbus	British companies and UK export credit program	1 April 2005	UK	Pending
Corner House vs. Rolls Royce	British companies and UK export credit program	1 April 2005	UK	Pending
11.11.11 et al. vs. Cogecom	Belgian companies illegal resource exploitation in DRC	24 November 2004	Belgium	Rejected
11.11.11 et al. vs. Nami Gems	Belgian companies illegal resource exploitation in DRC	24 November 2004	Belgium	Rejected
11.11.11 et al. vs. Belgolaise	Belgian companies illegal resource exploitation in DRC	24 November 2004	Belgium	Rejected
Proyecto Gato vs. Electricité de France	Electricité de France involvement in Laos hydroelectric dam	24 November 2004	France	Concluded
11.11.11 et al. vs. George Forrest International SA	Belgian companies illegal resource exploitation in DRC	24 November 2004	Belgium	Concluded
Germanwatch vs. Bayer	Bayer's cotton seed production in India	11 October 2004	Germany	Concluded
FoE US & RAID vs. Trinitech	US companies & illegal resource exploitation in DRC	4 August 2004	US	Rejected
FoE US & RAID vs. OM Group Inc	US companies & illegal resource exploitation in DRC	4 August 2004	US	Rejected
FoE US & RAID vs. Cabot Corporation	US companies & illegal resource exploitation in DRC	4 August 2004	US	Rejected
RAID vs. Avient	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Concluded
RAID vs. Das Air	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Concluded
RAID vs. Tremalt	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Withdrawn
RAID vs. Alex Stewart (Assayers) Ltd	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Withdrawn
RAID vs. Oryx	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Concluded
RAID vs. Ridgepoint	UK companies & illegal resource exploitation in DRC	28 June 2004	UK	Withdrawn
Proyecto Gato vs. Dexia	BTC oil pipeline in Azerbaijan, Georgia & Turkey	9 May 2004	Belgium, UK	Blocked
Proyecto Gato vs. ING	BTC oil pipeline in Azerbaijan, Georgia & Turkey	9 May 2004	Belgium, UK	Blocked
Proyecto Gato vs. KBC	BTC oil pipeline in Azerbaijan, Georgia & Turkey	9 May 2004	Belgium, UK	Blocked
Proyecto Gato vs. Tractebel	Tractebel's Houay Ho dam in Laos	15 April 2004	Belgium, UK	Concluded

Title	Issue	Date filed	NCP(s)	Status
Protest Toyota Campaign vs. Toyota	Toyota's anti-trade union practices in the Philippines	4 March 2004	Japan	Blocked
CBG vs. H.C.Starck	H.C.Starck buying coltan from DRC and thus supporting the conflict	2 October 2003	Germany	Rejected
CBE vs. National Grid Transco	NGT's mining practices in Zambia	25 July 2003	UK	Closed
NIZA et al. vs. CPH	CPH & illegal resource exploitation in DRC	3 July 2003	Netherlands	Rejected
Greenpeace Germany vs. West LB	West LB financing of oil pipeline in Ecuador	15 May 2003	Germany	Rejected
Corner House et al. vs. BP	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	UK, Italy, US, France	Pending
FoE France vs. TotalFinaElf	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	France, UK, Italy, US	Rejected
FoE US vs. Delta Hess	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	US, UK	Pending
CRBM vs. ENI	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	Italy, UK	Pending
FoE US vs. Unocal	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	US, UK	Pending
FoE US vs. ConocoPhillips	BTC oil pipeline in Azerbaijan, Georgia & Turkey	29 April 2003	US, UK	Pending
ATTAC & FoE Sweden vs. Atlas Copco	Gold mining, pollution, rights violations in Ghana	18 February 2003	Sweden	Concluded
ATTAC & FoE Sweden vs. Sandvik	Gold mining, pollution, rights violations in Ghana	18 February 2003	Sweden	Concluded
Table de Concertation sur Droits Humains vs. First Quantum	First Quantum & illegal resource exploitation in DRC	5 December 2002	Canada	Closed
Unite et al. vs. Brylane Inc.	Brylane's anti-trade union practices in the US	8 October 2002	US	Withdrawn
CCC vs. Nike	Labour rights violations in Indonesian supply chain	5 September 2002	Austria, US	Rejected
CCC vs. Adidas	Labour rights violations in Indonesian supply chain	5 September 2002	Austria, Germany	Concluded
FoE Netherlands vs. Nutreco	Nutreco/Marine Harvest's salmon farming in Chile	22 August 2002	Netherlands	Concluded
Germanwatch vs. Continental AG	Continental AG's labour practices in Mexico	27 May 2002	Mexico, Germany	Concluded
Greenpeace vs. TotalFinaElf	TotalFinaElf's oil supply from Russia	10 April 2002	France	Rejected
RAID vs. Anglo American	Anglo American mining activities in Zambia	27 February 2002	UK	Closed
Oxfam Canada vs. First Mining	First Quantum and forced evictions in Zambia	16 July 2001	Canada	Concluded
ICN vs. Adidas Netherlands	Labour violations in Indian football production	20 June 2001	Netherlands	Concluded
ICN vs. Kubbinga	Labour violations in Indian football production	20 June 2001	Netherlands	Rejected
RAID vs. Binani	Binani's corruption in mining industry Zambia	1 May 2001	UK	Withdrawn

Notes

- 1 See, for example, M. Yamin, and R.R. Sinkovics, "Infrastructure or foreign direct investment? An examination of the implications of MNE strategy for economic development," *Journal of World Business* 44(2) (2008), p. 144-157. See also numerous other cases documented on the Business and Human Rights Resource Center website, www.business-humanrights.org.
- 2 See, for example, L. Baccaro and V. Mele, "For Lack of Anything Better? International Organizations and Global Corporate Standards", *Public Administration* (2010), forthcoming.
- 3 As of June 2010, adhering countries comprise the 31 OECD member countries (Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States), and 11 additional non-OECD adhering countries (Argentina, Brazil, Egypt, Estonia, Israel, Latvia, Lithuania, Morocco, Peru, Romania, Slovenia).
- 4 P. Hohnen, "OECD MNE Guidelines: A responsible business choice", *OECD Observer*, 13 January 2009, <http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines:_A_responsible_business_choice.html>
- 5 OECD Watch's case database can be accessed at www.oecd-watch.org/cases
- 6 Unions have filed 117 cases since 2000, for a total of approximately 200 cases (there is a small degree of overlap given the fact that some cases have been filed jointly by NGOs and unions).
- 7 London School of Economics & CORE, *The reality of rights, barriers to accessing remedies when business operate beyond borders*, (London: 2009). < http://corporate-responsibility.org/wp/wp-content/uploads/2009/08/reality_of_rights.pdf>
- 8 Morocco became an adhering country in 2009, but has yet to set up an NCP.
- 9 The following definitions are used for case statuses. "Filed": the NGO has sent the complaint to the NCP, but no decision has been made as to whether the case is admissible. "Pending": the NCP has declared the case admissible and the specific instance procedure is under way. "Rejected": the NCP has formally rejected the case (declared it inadmissible). "Closed": the NCP has started the case but dropped it before mediating a settlement or issuing a statement. "Withdrawn": the complainants have withdrawn the case. "Concluded": the NCP has mediated a settlement or issued a final statement. "Blocked": the NCP is unclear about the status of the case (no formal rejection, but no statement or resolution).
- 10 It should be noted that many of these NCPs currently have cases pending that could potentially increase their "concluded" percentage. It should also be made clear that OECD Watch does not believe all cases should be accepted or that NCPs should never reject a case. There have been instances of cases being filed that were not fully substantiated, cases in which the complainants did not follow through, and even a case in which the complainant gave false information. However some NCPs appeared to have a policy of refusing to accept even well-founded cases.
- 11 It should be noted that the "investment nexus" or parallel proceedings were not necessarily explicitly mentioned in the rejection of all of the cases in these categories, although in many cases they were. See below for more on the cases related to the investment nexus and cases involving parallel legal proceedings.
- 12 One trade union case was submitted on incorrect grounds.
- 13 These statistics on cases filed by trade unions have been provided by the Trade Union Advisory Committee (TUAC).
- 14 Unsustainable mining: Unearthing human rights challenges and opportunities. Oxfam Australia Mining Symposium Communiqué, April 2010 <<http://www.oxfam.org.au/resources/filestore/originals/OAus-SustainableMiningCommuniqué-0410.pdf>>
- 15 Speech by The Hon. Stephen Smith MP, Australian Minister for Foreign Affairs, Africa Down Under Conference, 3 September 2009, Perth <http://www.foreignminister.gov.au/speeches/2009/090903_africa_down_under_conference_en.html>
- 16 28% of all reported business and human rights violations occur in the extractive sector. *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, <<http://www.business-humanrights.org/Links/Repository/594789>>
- 17 Oxfam Australia, *Inquiry into Australia's relationship with the countries of Africa: Submission to the Joint Standing Committee for Foreign Affairs and Trade into Australia's relationships with the countries of Africa*, January 2010, <<http://www.oxfam.org.au/resources/filestore/originals/OAus-AustAfricaRelationships-0110.pdf>>
- 18 United Nations Security Council no S/2002/1146, 16 October 2002, "Final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo".
- 19 RAID, *Unanswered questions: companies, conflict and the DRC*, <http://oecdwatch.org/publications-en/Publication_3041>
- 20 OECD Website, *Guidelines for Multinational Enterprises, "Due diligence in the mining and minerals sector"*, <http://www.oecd.org/document/36/0,3343,en_2649_34889_44307940_1_1_1,1,00.html>
- 21 OECD Watch website <www.oecdwatch.org/publications-en>
- 22 Statement by the Swedish National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises – with the full support of Norway's NCP – in connection with a complaint from the Argentine environmental organisation CEDHA against Nordea, January 2008
- 23 The Dutch NCP's broad interpretation of the investment nexus is stipulated in a governmental decree.
- 24 Clean Clothes Campaign website, "Outcome of OECD Complaint on Adidas" <<http://www.cleanclothes.org/newslist/613-outcome-of-oecd-complaint-on-adidas>>
- 25 Clean Clothes Campaign website, *Outcome of OECD complaint case of German Clean Clothes Campaign against adidas disappointing*, 1 September 2004, <<http://www.cleanclothes.org/newslist/618-outcome-of-oecd-complaint-case-of-german-clean-clothes-campaign-against-adidas-disappointing>>
- 26 T. Connor, "We are not machines." March 2002, p. 31. (Cited in the Clean Clothes Campaign complaint against Adidas and Nike, September 2002, p. 3. <http://oecdwatch.org/cases/Case_27>
- 27 P. Hohnen, "OECD MNE Guidelines: A responsible business choice", *OECD Observer*, 13 January 2009, <http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines:_A_responsible_business_choice.html>
- 28 Baccaro L. and Mele V. (2010), "For Lack of Anything Better? International Organizations and Global Corporate Standards", *Public Administration*, forthcoming.
- 29 See the section on "Powers and mandate" below.
- 30 The lack of systematic monitoring and follow-up by NCPs on their own statements and recommendations makes it difficult to ascertain exactly how many cases have led to actual improvements in corporate behaviour. However, the limited number of cases concluded with a joint agreement or final statement with recommendations, combined with the fact that

- companies often do not make good on their commitments or abide by NCP recommendations (see following section on “caveats”), makes it clear that the number of concrete improvements is small.
- 31 Again, the exact number is difficult to determine due to lack of systematic monitoring and follow-up by NCPs on their own statements and recommendations.
- 32 C. Wanless, et al. “Can the OECD Guidelines protect human rights on the ground? A case study: The Evictions at Mufulira by First Quantum Minerals / Mopani Copper Mines”, (Toronto: the Umuchinshi Initiative, University of Toronto) <http://oecd-watch.org/publications-en/Publication_2748/>
- 33 Volker et al., Manipulation of the Oil-for-Food programme by the Iraqi Regime. (New York: Independent Inquiry Committee into the United Nations Oil-for-Food Programme, 2005) <<http://www.iic-offp.org/documents/IIc%20Final%20Report%2027Oct2005.pdf>>
- 34 In the light of the debate around the revision of the OECD Guidelines in 2010-2011, the possibilities were discussed of delinking the OECD Guidelines from the OECD Investment Declaration. The issue never made it to the terms of reference for the revision for various reasons, but this could have provided room for a broad application of the Guidelines to investment and trade.
- 35 J. Ruggie, Further Steps toward the operationalization of the “protect, respect and remedy” framework. A/HRC/14/27, 9 April 2010, paragraph 83 <<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010>>
- 36 United Nations Security Council no S/2002/1146, 16 October 2002, “Final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo”. paragraph 55.
- 37 Idem.
- 38 J. Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, 9 February 2007, A/HRC/4/35 <<http://www.business-humanrights.org/Documents/RuggieHRC2007>>.
- 39 UK NCP Final Statement Avient Air, September 2004
- 40 United Nations, Human Rights Resolution 2005/69, 20 April 2005, Human rights and transnational corporations and other business enterprises, <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc>
- 41 J. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Annual Meeting of the National Contact Points, OECD, Paris, 24 June 2008.
- 42 ‘J. Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative to the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008, paragraph 92. <<http://www.business-humanrights.org/Links/Repository/965591>>
- 43 *ibid*, paragraph 92.
- 44 Amnesty International: Statement on the Right to an Effective Remedy; Stockholm, November 2009
- 45 J. Ruggie, Further Steps toward the operationalization of the “protect, respect and remedy” framework. A/HRC/14/27, 9 April 2010, paragraph 60 <<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010>>
- 46 *ibid*
- 47 Applicable were the introductory paragraphs to Chapter II. 1 and V which oblige companies to contribute to sustainable development, but also V.6 a (re. energy efficiency), as well as V 2a) (Information policy) and V.4 (precaution).
- 48 Some efficiency standards as well as obligations to use renewable energy exist, but are not being pursued forcefully.
- 49 Rio Tinto plc currently owns 22.4% of Ivanhoe Mines and has an option to increase that interest to 46.6% over the next 19 months. The Government of Mongolia owns 34% of the Oyu Tolgoi project and Ivanhoe Mines owns a 66% interest in the mine. Oyu Tolgoi LLC is the name of the joint venture company that holds the mine licences.
- 50 Update from Cornerhouse, June 2010.
- 51 J. Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative to the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008 <<http://www.business-humanrights.org/Links/Repository/965591>>
- 52 Opening remarks Ángel Gurría Insert OECD-ILO Conference on Corporate Social “Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalising Economy Responsibility” 23 June 2008 <http://www.oecd.org/document/55/0,3343,en_2649_34889_40884919_1_1_1_1,00.html>
- 53 L. Susskind, quoted in Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team 2010, 15 March 2010, <<http://www.oecdguidelines.nl/get-started/peer-review>>
- 54 Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team 2010, 15 March 2010, <<http://www.oecdguidelines.nl/get-started/peer-review>>
- 55 TUAC (2008) Implementing the OECD GUIDELINES on Multinational Enterprises: The Trade Union Experience, John Evans, General Secretary TUAC-OECD
- 56 House of Lords, House of Commons, Joint Committee of Human Rights, “Any of our business? Human rights and the UK private sector”, 24 November 2009, <<http://www.publications.parliament.uk/pa/jt/200910/jtselect/jtrights/5/5i.pdf>>
- 57 J. Ruggie, Further Steps toward the operationalization of the “protect, respect and remedy” framework. A/HRC/14/27, 9 April 2010, paragraph 60 <<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010>>

