

Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges

JOHN GERARD RUGGIE

Bertholz Beitz Professor in International Affairs and Human Rights
Kennedy School of Government, Harvard University

TAMARYN NELSON

Researcher, Corporate Social Responsibility Initiative
Kennedy School of Government, Harvard University

99

INTRODUCTION

In the 1990s—as global markets widened and deepened significantly due to trade liberalization, privatization, deregulation, offshore production, and growing influential financial centers—the impact of business became increasingly

JOHN GERARD RUGGIE is Bertholz Beitz Professor in International Affairs and Human Rights at Harvard's Kennedy School of Government, and Affiliated Professor in International Legal Studies at Harvard Law School. He has also served as United Nations Assistant Secretary-General for Strategic Planning, and as the UN Secretary-General's Special Representative for Business & Human Rights. His most recent book, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013) has been translated into Chinese, Japanese, Korean, Spanish, and Portuguese. He is a Fellow of the American Academy of Arts & Sciences, and in 2014 he received the Washington Foreign Law Association's annual award to the individual who made the most important contribution to the development and implementation of international law.

TAMARYN NELSON received her Masters in Public Administration from the Kennedy School in 2014, where she was a Jorge Paulo Lemann Fellow, focusing on business and human rights. Currently she is a researcher at the Kennedy School's Corporate Social Responsibility Initiative. Previously, she has led research for NGOs including Amnesty International, Planned Parenthood's Global Advocacy Program, and WITNESS. She holds a Certificate in International Human Rights Law from Oxford University.

Copyright © 2015 by the *Brown Journal of World Affairs*

prominent on the international agenda. During this time, the rights of multinational enterprises (MNEs) to operate globally became legally enshrined in a vast expansion of investment treaties and free trade agreements, as well as in a new international regime protecting intellectual property. According to one UN study, some 94 percent of all foreign investment–related national regulations that were modified from 1991 to 2001 were intended to facilitate this global expansion.¹ As a result, MNEs thrived, and so did people and countries that were able to take advantage of the opportunities created by this transformative process.

But others were less fortunate. Global social and environmental protections lagged behind; domestic safety nets, where they existed at all, began to fray; and income inequality increased. International attempts to regulate the conduct of multinational corporations, which date back to the 1970s, continued to fail while human rights abuses continued to be documented, including forced, bonded, and child labor; land grabs that displaced communities; and even instances of private security contractors raping and sometimes killing those protesting company operations or mere bystanders. Better understanding the means by which global and local communities can avoid such harm and seek redress when it does occur are urgent policy and moral challenges.

This paper takes one small step in that direction. It analyzes the first—and one of the few—international mechanisms that governments have established to enable individuals, communities, and their representatives to bring complaints against multinational corporations: the Guidelines for Multinational Enterprises (“Guidelines”) promulgated by the Organization for Economic Co-operation and Development (OECD). First, we identify patterns of use over time to better understand the Guidelines. Second, we determine whether any difference exists in these patterns since the endorsement by the United Nations Human Rights Council in 2011 of the Guiding Principles on Human Rights (UNGPs), core elements of which were incorporated into the 2011 OECD Guidelines revision. Finally, we offer some concluding recommendations on how this mechanism can be strengthened.

100

A BRIEF HISTORY

THE ORIGINAL GUIDELINES

In 1976, on the eve of UN negotiations on a Code of Conduct on Transnational Corporations, which would be abandoned some 15 years later, the OECD adopted a Ministerial Declaration on International Investment and Multinational

Enterprises. It was the first multilateral instrument to include the principle of national treatment in the investment context, whereby states' treatment of foreign-controlled enterprises would be "consistent with international law and no less favorable than that accorded in like situations to domestic enterprises."² Perhaps in an attempt to also recognize these MNCs' responsibilities, the Declaration annexed a set of "recommendations" that the OECD member states addressed to global companies—the original OECD Guidelines for Multinational Enterprises. While OECD member states were obligated to promote these Guidelines, they were nonbinding on multinationals. Companies were merely advised to comply with national laws and encouraged to make a positive contribution to economic and social progress in their countries of operation (known as host countries), contribute to technology transfer, and not harm the environment. Apart from freedom of association and the right to bargain collectively, which are recognized in International Labor Organization (ILO) conventions, the Guidelines referenced no other international human rights standards at the time.³ To operationalize these procedures, in 1984 OECD members also agreed to formally establish National Contact Points (NCPs) within each national government. The purpose of these offices would be to promote the Guidelines and "to contribute to the solution of problems which may arise" while following the Guidelines—in short, a nonjudicial mechanism to address complaints on individual cases, which the OECD refers to as "specific instances."⁴ While organized labor subsequently sought such help on a number of occasions in connection with antiunion activities by companies, by the 1990s, this mechanism had "slumped into disuse."⁵ Companies were not obliged to participate in the complaints process, and the most an NCP could do was issue a public report that might or might not have an impact.

Following the 1998 collapse of the OECD negotiations on a Multilateral Agreement on Investment (MAI), whose critics (including several member states) charged that it excessively favored the rights of investors over considerations of public interest, the OECD revised the Guidelines in 2000 in an attempt to breathe new life into the moribund NCP system.⁶ Corporate observance was still voluntary, but changes took place at two levels. First, the OECD "encouraged" OECD-based multinationals to follow these Guidelines in all host countries in which they operated—not only in OECD countries—and it began encouraging nonmember states to adhere to the Guidelines.⁷ Secondly, it expanded the scope of issues covered by the guidelines, and firms were specifically advised to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments"—that is, according

to the international human rights obligations of the host government, a broader standard than that of the previous, narrow recommendation to respect a select few labor-related rights.⁸ This new iteration of the Guidelines also encouraged disclosure of information regarding company activities, finances, and performance; urged the elimination of forced and child labor; and laid out the basic principles of environmental management. The revised Guidelines further stipulated that companies should not offer or demand bribes or engage in anti-competitive practices, yet should facilitate technology transfer “where practicable” and pay taxes.⁹ Finally, NGOs were given the opportunity to submit complaints against companies to NCPs in OECD-adhering and member countries.¹⁰ The system continues to play this unique role today as the only avenue where individuals, communities, and representatives from civil society can attempt to bring cases against MNEs directly.

THE UN PROTECT, RESPECT AND REMEDY FRAMEWORK

102

In the late 1990s, the UN Sub-Commission on Human Rights began to draft a treaty-like document called the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.” Among other features, the document essentially sought to impose on companies, directly under international law, the same duty that states accepted for themselves under treaties “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”¹¹ This would have so intermingled the respective roles of states and business that it would have been impossible to determine whether the government or a company was responsible for guaranteeing and fulfilling human rights on the ground. In 2004, the intergovernmental parent body, the Commission on Human Rights (revamped as the Human Rights Council in 2006), rejected the proposal, stating that it had no legal status. At its next meeting a year later, the Commission requested that UN Secretary-General Kofi Annan appoint a Special Representative (SRSG) to start the process afresh. Annan appointed Professor John Ruggie, this paper’s co-author, to that position.¹² Initially, Ruggie was asked merely to “identify and clarify” existing standards and best practices, as well as such contested concepts as “corporate complicity” (indirect involvement by companies in abuses, where the actual harm is committed by others) and “spheres of influence” (a company’s relationships associated with its activities and operation).¹³ He did so, and in 2008, at the end of his three-year mandate, Ruggie recommended that the Human Rights Council adopt what he called the “Protect, Respect and Remedy” Framework, which he elaborated

in his final report.¹⁴ The Framework rests on three pillars:

- 1) The state's duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- 2) An independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved;
- 3) Greater access by victims to effective remedy, judicial and nonjudicial.

The Council “welcomed” the Framework and extended Ruggie’s mandate for another three years, asking him to “operationalize” it.¹⁵ Various stakeholder groups, including governments, businesses, and civil society organizations, began to reference the Framework almost immediately. NGOs and workers’ organizations drew on the Framework in lodging new complaints to OECD NCPs, which in part accounts for the increase in cases in the 2010–2011 cycle that we see in Figure 1. Two of these NCP cases are particularly noteworthy because they signal how the Framework began to influence the way NCPs treat cases and how the OECD Guidelines strengthened human rights provisions in the 2011 revision.

103

DAS AIR CARGO

A UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo (D.R.C.) delivered its final report to the UN Security Council in October 2003.¹⁶ It identified approximately 125 companies and individuals allegedly contributing directly or indirectly to the ongoing conflict in the D.R.C., in which ultimately as many as five million people were killed.¹⁷ The named companies included MNEs operating within or from countries adhering to the OECD Guidelines. Thus the panel specifically requested that those governments address those cases.

Based on the report, the British NGO Rights and Accountability in Development (RAID) brought a case to the U.K. NCP in 2004 against international cargo airline DAS Air. RAID alleged that DAS Air Cargo was involved in the transportation of coltan—a metal used to manufacture electronics—from the eastern D.R.C. for the benefit of the Ugandan-backed rebel group Rally for Congolese Democracy, operating in the eastern D.R.C.. As the case lingered within the U.K. NCP process, it garnered media attention and was brought to the attention of Members of Parliament. In correspondence between the U.K. NCP

and DAS Air, the company “firmly denied that it had ever knowingly transported coltan sourced from the D.R.C., explaining they believed the coltan it flew out of Kigali originated in Kigali,” thereby acknowledging that it had not made sufficient efforts to investigate the details of what it was transporting in the midst of a conflict fueled by mineral trade.¹⁸

In an attempt to shift the responsibility for knowing whether its business was com-

pllicit in any human rights violations, DAS Air stated it was “merely contracted by the freight forwarders to transport the minerals” so “any enquiries the NCP has in regards to the consignors and consignees should be made to DAS Air’s customer as DAS Air would not have that information.”¹⁹ This don’t ask, don’t tell approach to doing business in conflict-ridden zones with weak human rights protections is one of the problems that Ruggie’s three pillar framework sought to address and change.

This don’t ask, don’t tell approach to doing business is conflict-ridden zones with weak human rights protections is one of the problems that Ruggie’s framework sought to address and change.

In 2007, the NCP admitted the DAS Air case for review, and one month after the UN Human Rights Council welcomed the Protect, Respect and Remedy Framework in June 2008, with U.K. government support, the U.K. NCP rejected DAS Air’s explanations regarding its lack of information about the source of the coltan. The NCP’s final report stated that records showed DAS Air flights between Entebbe, Uganda and the D.R.C., and therefore the company should have had a clear understanding of the potential for coltan to be sourced from Eastern D.R.C. Moreover, as “DAS Air clearly stated to the NCP that they did not question the source of the mineral that it transported, the NCP considers that DAS Air undertook insufficient due diligence on the supply chain.”²⁰ As there was no provision on human rights due diligence in the Guidelines at the time, the implicit source of that concept was the newly adopted UN Framework.

104

AFRIMEX

In August 2008, the U.K. NCP applied a similar human rights due diligence argument to the Afrimex case. The NGO Global Witness accused Afrimex, a U.K.-based commodities trader that was also featured in the UN D.R.C. report, of paying taxes to rebel forces in the D.R.C. and practicing “insufficient due diligence on the supply chain, sourcing minerals from mines that use child and forced labor, who work under unacceptable health and safety practices.”²¹

Human Rights and the OECD Guidelines for Multinational Enterprises

Although Afrimex claimed that it was several steps removed from the mines, and that a “lack of an audit chain prevents Afrimex’s materials from being traced back to the mine [where] they were sourced from,” the NCP determined that personal links between U.K.-based Afrimex and D.R.C.-based partners Société Kotech and Socomi were sufficient for Afrimex to significantly influence the practices of these two companies.²² The U.K. NCP, specifically referencing the UN Protect, Respect and Remedy Framework, urged Afrimex to use its influence to ensure it was not complicit with these practices. Both this case and the DAS Air one illustrate how the NCPs began to draw on the UN’s work well before the UN Guiding Principles were fully developed, setting the stage for the 2011 revision of the OECD Guidelines.

THE UNITED NATIONS GUIDING PRINCIPLES

The operationalization of the Protect, Respect and Remedy Framework produced 31 Guiding Principles (UNGPs), each elaborating the meaning of the foundational elements and their implications for law, policy, and practice.²³ They represented six years of extensive research and nearly 50 consultations around the world, as well as pilot projects in different industry sectors and countries. The UNGPs had strong support from governments, as well as from the business community and many NGOs. In June 2011, the UN Human Rights Council unanimously “endorsed” the UNGPs, marking the first time that a UN body had ever endorsed a normative text that governments had not negotiated themselves.²⁴ That endorsement made the UNGPs an authoritative global standard on the subject of business and human rights.

From the start, Ruggie began working with other international and national standard-setting bodies, as well as with additional stakeholder groups, including business itself, to achieve maximum coherence and alignment with the UNGPs so as to leverage their influence on corporate conduct and generate greater scale effects. He also collaborated closely with the OECD, which was discussing another revision of its own Guidelines. As a result, the current OECD Guidelines are fully aligned with the UNGPs in two specific ways. First, the OECD added a dedicated human rights chapter that replicates the UNGPs’ operationalization of business’ responsibility to respect human rights, explicitly stating that all human rights are to be respected, irrespective of states’ abilities and/or willingness to fulfill their own obligations. It also stipulated the systems that companies need in order to meet this responsibility, centering on due diligence processes of both their own activities and their business relationships. Second, the UNGPs’

formulation of the corporate responsibility to respect human rights was also enshrined in the Guidelines' General Policies chapter, which established a new due diligence requirement for all subjects covered by the Guidelines.²⁵ With these updates, claims of ignorance such as the one made by DAS Air could no longer be used as justifications by businesses.

Through these changes, the NCP system became a venue to which complaints regarding any and all internationally recognized human rights could be brought against multinational enterprises operating in or from the 46 countries that adhere to the Guidelines, including several operating from emerging market countries.²⁶ Thus, the Guidelines now provide de facto coverage to the majority of MNEs and extend due diligence requirements to their business relationships, including supply chains.

PATTERNS OF COMPLAINTS (2000–2014)

We now turn to a survey of cases examining overall patterns, beginning with a brief but necessary discussion of the methodology of case selection.

METHODOLOGY OF CASE SELECTION

106

According to the OECD, roughly 300 cases have been presented to NCPs since 2001.²⁷ These cases are logged in the OECD database in 12-month cycles that go from July to June of every calendar year. This paper reviews five such cycles spaced over a period of 11 years (2003–2014), which yielded 158 cases. The first three cycles reference the 2000 Guidelines, whereas the latter two followed the Guidelines of 2011.

TABLE 1: CYCLES REVIEWED

Guidelines of 2000	Guidelines of 2011
July 2003–June 2004 (38 cases)	July 2012–June 2013 (40 cases)
July 2007–June 2008 (16 cases)	July 2013–June 2014 (35 cases)
July 2010–June 2011 (32 cases)	

There is no single database of all complaints lodged with NCPs, but rather three separate ones, each of which we drew on.²⁸ None of these databases has a comprehensive record of all cases submitted to NCPs, and many cases overlap, yet each one uses different methods of categorization. To ensure the most com-

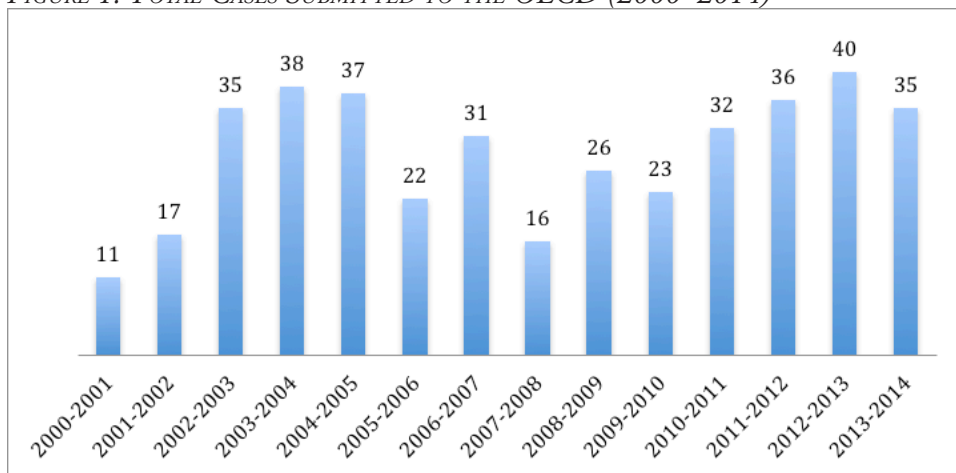
prehensive and accurate picture for this article, information for each case in the five cycles reviewed was compiled from all three databases and cross-checked for accuracy and maximum detail. When the data was inconsistent, additional research from supplementary sources was conducted to corroborate the information whenever possible. As a result, much of the data used in this paper was established through an iterative process of clarification and consolidation of information. To the best of our knowledge, this process of consolidation across all three databases has not been previously done and we consider this to be a unique contribution to the analysis of individual cases and historical trends of the NCP system.²⁹

CASELOAD PATTERNS

Per Figure 1 below, between 2000 and 2014 an estimated 399 complaints were filed with NCPs.³⁰ The increase for the three cycles from 2002 to 2005 is partially due to the previously discussed UN investigation into the D.R.C. This brought the OECD Guidelines into the spotlight and led NGOs to submit several D.R.C. cases to the NCP system, which account for at least 12 out of the 38 cases identified in the June 2003–June 2004 cycle alone. The 2004–2005 cycle also saw an increase due to trade union cases, but by 2008 complaints declined to 16.

While this number slowly crept back up in subsequent cycles, the next bump in cases took place in the 2010–2011 cycle. The 2000 Guidelines were last applied during this 12-month period, and the current version of the Guidelines came into effect for NCPs' casework in the 2011–2012 cycle. It is noteworthy that the high number of submissions during the post-2011 cycles is comparable only to the years when a bundle of D.R.C. cases related to a UN investigation was referred to the OECD (2002–2005). This demonstrates that the 2011 revision resulted in a significant increase in the visibility and use of the NCP system.

FIGURE 1: TOTAL CASES SUBMITTED TO THE OECD (2000–2014)



Source: Authors' calculation per case consolidation in the OECD, OECD Watch, and TUAC databases.

DISTRIBUTION OF HOME AND HOST COUNTRIES

108

One reason the OECD updated the Guidelines in 2000 was due to the change in the landscape of international investment and multinational enterprises during the 1990s. Non-OECD countries were attracting more foreign investment, and enterprises from nonadhering countries were gaining more relevance in the global arena.³¹ One way to track this shift is to compare the geographical distribution of host countries (where operations take place) to home countries (where enterprises are headquartered) in cases presented to the NCP system.

Figure 2 demonstrates that there has been a diversification in the regional distribution of host countries. In the first cycle of 2003–2004, no cases from North America, Oceania, or Europe were submitted. This began to change in the following cycle. In the last cycle analyzed, all regions are represented and roughly half of cases took place in Asia and Europe.

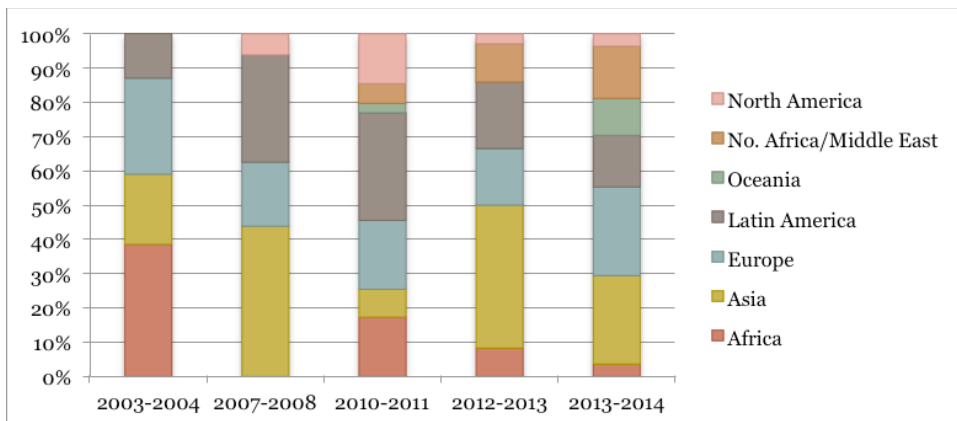
The record of home countries involved in cases submitted to the NCP system is more consistent and less surprising. Figure 3 demonstrates that the overwhelming majority of MNEs involved in submissions were based in advanced and high-income economies, especially in Europe.

Figure 4 provides the same information as the previous two figures, broken down by individual host and home country (excluding countries with fewer than two cases) and the number of cases over each of the five cycles reviewed for this article. The home countries with the highest number of cases through-

Human Rights and the OECD Guidelines for Multinational Enterprises

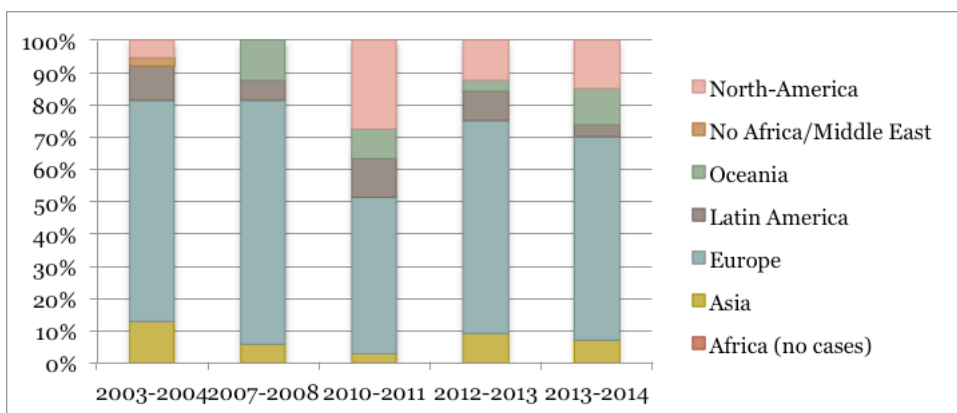
out the five cycles reviewed were the United Kingdom (29), the United States (14), France and Germany (13), the Netherlands (9), and Brazil (8). The host countries with the highest number of cases were D.R.C. (17), Brazil (14), India (8), and Argentina (7).

FIGURE 2: HOST COUNTRY REGIONAL DISTRIBUTION



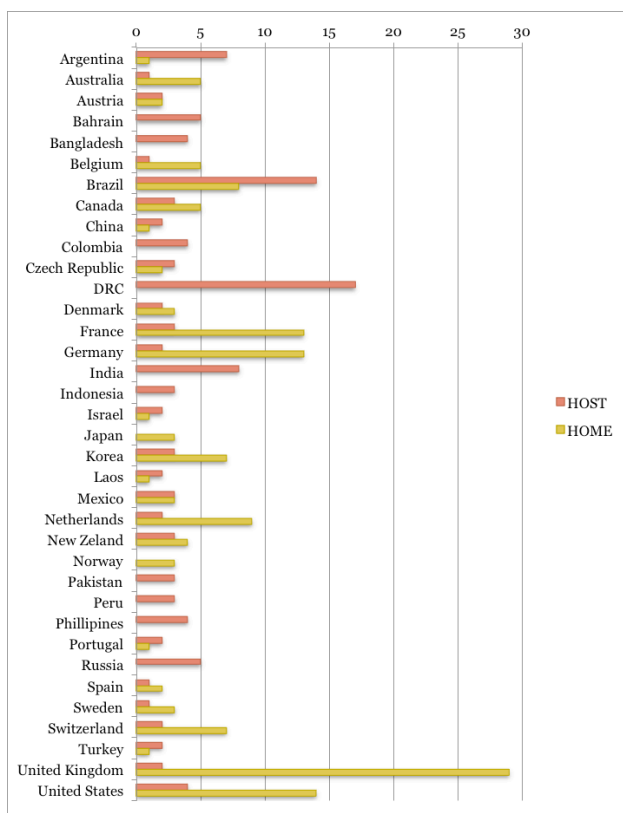
Note: When a region is not represented in the bar, it had no cases reported during that cycle.

FIGURE 3: HOME COUNTRIES REGIONAL DISTRIBUTION



Thus, while investment trends have changed, cases submitted to NCPs largely continue to reflect patterns very similar to the past: host countries (where operations take place) tend to be in the Global South and emerging markets, and home countries (where MNEs are headquartered) in the Global North. Brazil is the only country that has a significant number of cases both as a home and host state: in nine instances it was the home of MNEs against which a complaint was lodged with an NCP, and in 14 it was the host state where the alleged violation took place. It is worth noting that the high number of cases for some countries may be related not only to the actual distribution of corporate-related human rights harm by companies headquartered in those jurisdictions, but also to greater stakeholder confidence in that country's NCP process.

FIGURE 4: HOST/HOME COUNTRY DISTRIBUTION OF CASES



110

Note: The table indicates the distribution of cases against companies in their respective home and host countries, not necessarily the NCP to which a case was brought.

HUMAN RIGHTS UNDER THE 2011 GUIDELINES

Public discussion about a possible revision of the Guidelines began at the 2009 Annual Meeting of NCPs and at the OECD Council Meeting at Ministerial level.³² In April 2010, the OECD officially announced that the Guidelines would be updated. The terms of reference for the revision stated that the new version should provide more guidance to assist companies to “identify, prevent and remedy negative human rights impacts which may result from their operations,” including a separate human rights chapter “drawing, in particular, on the work of the UNSRSG [UN Special Representative to the Secretary General, in this case John Ruggie].”³³

The issue we turn to now is the impact of the new human rights additions to the 2011 Guidelines. Although these revised Guidelines are still in their early days, it appears that they may have had five such impacts to date: a higher admissibility rate for human rights cases than for others; a greater range of human rights issues addressed; a diversification of industries against which complaints are brought; the growing role of the Guidelines’ due diligence provisions; and a significant boost in the NCP system as a human rights complaint mechanism. We will examine each of these in turn.

111

ADMISSIBILITY AND FOCUS ON HUMAN RIGHTS

Case admissibility is key because it determines whether the NCP will consider the merits of the case, as opposed to rejecting it outright due to technical issues such as not fulfilling minimum filing requirements (for instance, if a case does not involve a company domiciled in an OECD or OECD-adhering country). Figure 5 presents an overview of NCP decisions on admissibility according to three categories: accepted, rejected, and pending (cases that NCPs have not yet decided whether they will consider). Given the limited amount of information in the databases for earlier years, it is not known for certain in 37 percent of the cases whether complaints in the 2003–2004 cycle were ever formally admitted for review by an NCP, making it a challenge to infer how admissibility patterns might have evolved over the years. Subsequent cycles indicate admittance rates between 53 and 69 percent. While admittance does not mean that a case will be resolved or that both parties will be satisfied with the outcome or agreement, it does demonstrate that most submitted cases are taken on by NCPs. The admissibility rate is expectedly lower in the most recent cycle (2013–2014), which is

consistent with the increased number of cases filed.

According to the NGO OECD Watch, under the previous Guidelines, NCPs considered roughly 40 percent of the cases submitted to be inadmissible. Because the Guidelines were linked to the Declaration, one of the most common bases for excluding cases was the lack of an “investment nexus,” as the multinational involved did not hold equity in the enterprise in question. It often was a buyer, a supplier, or a financial institution that enabled an investment without being a direct investor.³⁴ And there the matter stood until 2011, when the debate was settled on the heels of the revised Guidelines, as explained below.

FIGURE 5: ADMISSIBILITY OF CASES



112

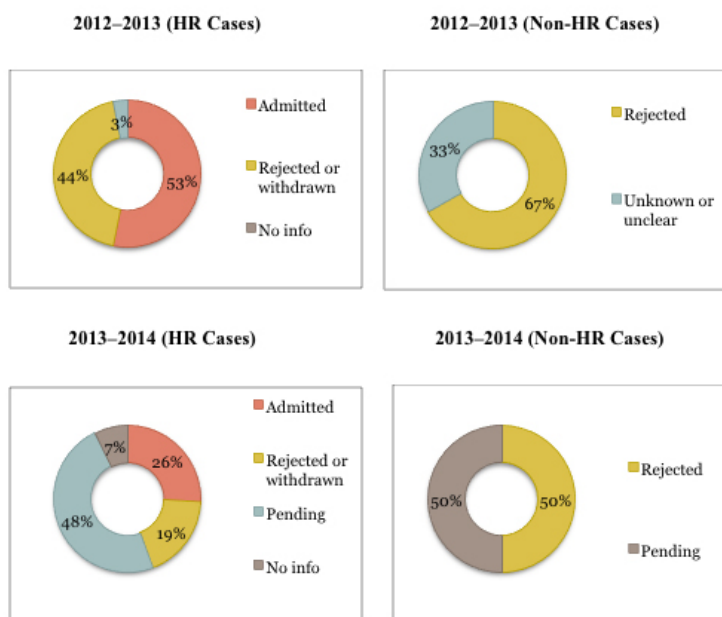
While the NCPs receive complaints related to other issues, the system today primarily serves as a mechanism to address human rights issues. In the 2012–2013 cycle, 32 of 40 complaints submitted addressed human rights; in the 2013–2014 cycle, that number was 27 of 35 cases.³⁵

In fact, as Figure 6 indicates, a review of the admissibility rate for human

Human Rights and the OECD Guidelines for Multinational Enterprises

rights and non-human rights cases demonstrates that during the most recent cycles, complaints involving human rights have had a greater chance of being admitted to the NCP system than complaints referencing other provisions of the Guidelines. In the 2012–2013 cycle, 53 percent of human rights–related cases were already admitted while no non-human rights cases are known to have been admitted. Similarly, in the 2013–2014 cycle, half of the non-human rights cases have already been rejected, while only 19 percent of human rights cases have been. These numbers indicate that the NCP system has become primarily a human rights mechanism. This, coupled with the fact that it is the only international mechanism to address direct complaints against MNEs, has made the system one of the most critical mechanisms in the field of business and human rights today.

FIGURE 6: ADMISSIBILITY OF HUMAN RIGHTS CASES UNDER THE 2011 GUIDELINES



INCREASED DIVERSITY OF HUMAN RIGHTS ISSUES AND IMPLICATED INDUSTRIES

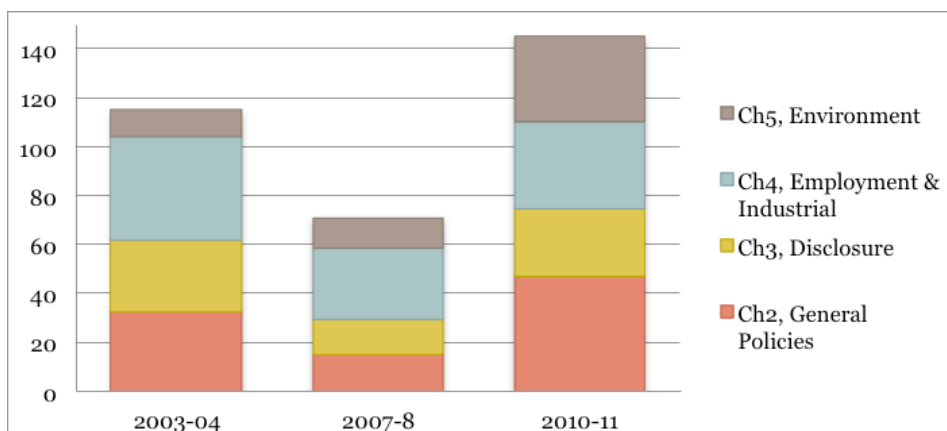
Historically, the human rights issues that the NCP system dealt with were largely confined to workplace complaints that referenced ILO standards. Under the previous Guidelines, trade unions were one of the major users of the NCP system, and Chapter IV of the 2000 Guidelines, Employment and Industrial Relations was one of the most cited provisions of the Guidelines.³⁶ In contrast, broader

human rights issues were mentioned only briefly. Chapter II, entitled General Policies, stated that companies should “respect human rights not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments.”³⁷ Framing companies’ obligations vis-à-vis human rights as dependent on standards taken on by host governments, and emphasizing labor issues, limited the scope of human rights cases brought to NCPs.

Figure 7 reflects this trend by detailing the specific provisions of the 2000 Guidelines that complainants invoked most frequently. For example, provisions in Chapter IV on Employment and Industrial Relations were cited 104 times, compared to 96 references to Chapter II on General Policies, which covers a broad set of issues, only one of which is human rights (beyond workplace issues). While labor was the top issue addressed under the 2000 Guidelines, the number of citations of provisions under Chapter II, General Policies, and Chapter V, Environment, increased during the last cycle under which the Guidelines applied (2010–2011).³⁸ At that time, revisions of the Guidelines were already under discussion, which might have prompted civil society organizations to submit a broader range of cases as a way to influence the revision debates and steer the direction of the new Guidelines toward a broader set of issues.

114

FIGURE 7: PROVISIONS MOST CITED UNDER THE 2000 GUIDELINES



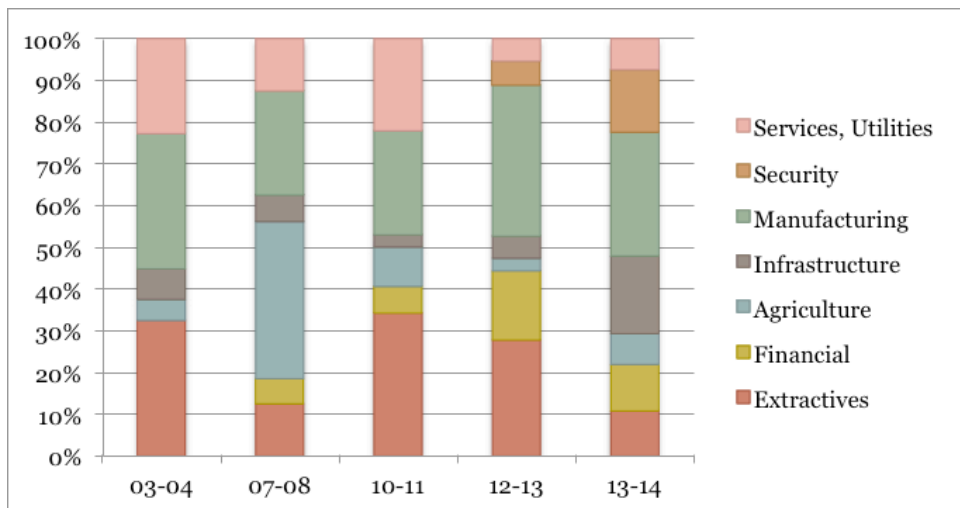
Under the Guidelines of 2011, General Policies now include all internationally recognized rights, not merely those a host government has ratified, thus expanding the scope of human rights issues. While labor rights cases continue to be the single largest category, their proportion of total rights-related complaints has dropped from 40 percent in 2003–2004 to 30 percent in the most recent

Human Rights and the OECD Guidelines for Multinational Enterprises

cycle. In turn, issues related to community consultations; impeded or destroyed sources of livelihood, health, and housing; and the security of the person and privacy have increased.

A similar diversification is found in the industry sectors implicated, especially those that involve complex supply chains. Extractives and manufacturing have always dominated the NCP system's caseload, but, as Figure 8 shows, cases involving the extractives have proportionally declined, whereas manufacturing held relatively steady and therefore increased in absolute numbers. The latter trend is undoubtedly due to the new Guidelines provision that extended the scope of human rights obligations beyond a business' own operations. Now, following the establishment of the UN Guiding Principles, companies are responsible for their own operations as well as those of their business partners, including supply chains, increasing the accountability of companies on human rights. For similar reasons, the number of cases involving financial institutions, which enable a range of industries indirectly through the provision of capital, has increased.

FIGURE 8: INDUSTRY SECTOR



Note: A few cases involve more than one industry.

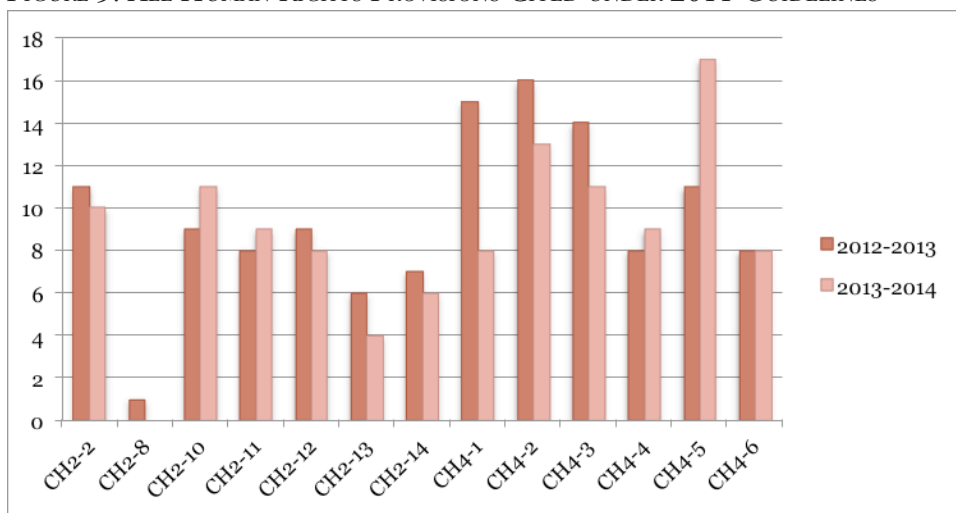
In sum, since the revision to the Guidelines in 2011, the NCP system has increased the diversity of both the human rights issues and the industries involved in cases. This shift is key to a stronger complaint mechanism because these trends will allow the NCP system to develop a richer breadth of human rights standards for a wider range of MNEs to follow.

DUE DILIGENCE PROVISIONS

The UN Guiding Principles and the 2011 OECD Guidelines stipulate not only *what* business should do in relation to human rights but also *how* they should do it. The *what* consists of avoiding adverse human rights impacts, including those that result from business relationships, and addressing such impacts where they occur. The *how* lays out a human rights due diligence process, which includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating—especially to those who are most directly affected—how impacts are addressed. The top two human rights provisions cited by complainants relate to due diligence, per Figure 9 below, and at least 17 cases in the 2013–2014 cycle cited the two most invoked provisions on due diligence in Chapter IV.³⁹ The most referenced provision stipulates that enterprises should “avoid causing or contributing to adverse human rights impacts and address such impacts when they occur”; the second-most frequent states that MNEs should “carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”⁴⁰

116

FIGURE 9: ALL HUMAN RIGHTS PROVISIONS CITED UNDER 2011 GUIDELINES



The recent case *Americans for Democracy and Human Rights in Bahrain (ADHRB) vs. Formula One Management Limited* illustrates how these provisions are being used. In May 2014, the ADHRB filed a case with the U.K.

NCP concerning four companies that it identified as involved in managing the Formula One Grand Prix in Bahrain. The pro-democracy NGO claimed that holding the race in Bahrain sent a message to the international community that ongoing human rights abuses in that country were being ignored and that the race itself had increased violations in light of law enforcement's response to protests against it.

Five months later, the U.K. NCP stated that these companies' promotion of a high-profile event that attracts protests did not itself link them to alleged abuses of protestors, rejecting "the issues raised relating to the companies' obligations to avoid or address impacts."⁴¹

Few governments have publicly stated that they will impose any material consequences in the case of a company's noncooperation with an NCP or a finding against a company.

However, the NCP did accept parts of the complaint against Formula One World Championship Ltd. and Formula One Management Ltd., especially those related to appropriate due diligence and stakeholder engagement. In April 2015, after the

NCP mediated a resolution to the case, a joint statement was issued in which the Formula One Group committed to adopt a formal human rights policy, including a due diligence policy in which Formula One would require the company to mitigate any impact it may have on a host country. Moreover, Formula One stated that "where domestic laws and regulations conflict with internationally recognized human rights, the Formula One Group will seek ways to honor them to the fullest extent which does not place them in violation of domestic law."⁴² This follows precisely the language used in the UN Guiding Principles and the OECD Guidelines of 2011.

As this example demonstrates, the Guidelines' due diligence provisions provided companies with high-level guidance on what policies to instate to address the risk of contributing to human rights harm, while giving affected individuals and communities a hook to lodge NCP complaints when companies are not complying with the *what* as well as the *how* of respecting human rights.

THE EXTENDED ENTERPRISE AND ENABLERS

From their inception, the OECD Guidelines have been an integral part of the Declaration on International Investment and Multinational Enterprises. In recognition of the vast expansion of global supply chains in the 1990s, one of the changes introduced in the 2000 revision of the Guidelines was the addition that

MNEs should “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.”⁴³ NCPs subsequently applied differing standards to supply chain cases, leading the OECD Committee on Investment and Multinational Enterprises to issue an opinion in 2003 that the Guidelines should also apply to “investment-like relationships” on a case-by-case basis.⁴⁴ But this could be interpreted as requiring a company to have a direct equity stake in the supplier, potentially shielding global brands and retailers whose relationship with suppliers is purely contractual. OECD Watch’s assessment of the NCP system in 2010 indicated that one of the most common reasons given by NCPs for rejecting NGO cases was the lack of an “investment nexus” between the MNE facing the complaint and the entity that committed the alleged violation, indicating that a narrow interpretation around “investment-like relationships” continued to be common.⁴⁵

The updated Guidelines of 2011 resolved this issue by expanding the scope of responsibility for companies, stating that MNEs should avoid causing or contributing to adverse impacts on the social, environmental, and other interests related to the Guidelines, not only through their own activities but also through their business relationships. The text explicitly states that the “Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship.”⁴⁶ The latter is defined as “relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services.”⁴⁷ Therefore, MNEs are now expected to carry out risk-based due diligence efforts to identify, prevent, and mitigate adverse impacts not only within their own operations but also throughout their extended enterprise and business relationships, such as those with suppliers.

Although supply chain due diligence was clearly incorporated into the 2011 Guidelines, the role of minority shareholders (those who own less than 50 percent of stock in a company) subsequently arose as a question, triggered by the case of Pohang Iron and Steel Enterprise (POSCO), the fourth-largest global steel producer. In October 2012, a coalition of NGOs from South Korea, the Netherlands, and Norway (Lok Shakti Abhiyan, South Korean Trans National Corporations Watch, Fair Green and Global Alliance, and the Forum for Environment and Development) filed complaints with their respective NCPs regarding POSCO’s proposed iron mine, steel plant, and related infrastructure such as a port and roads in Odisha, India.⁴⁸

The complaints were filed against POSCO and its joint venture POSCO India Private Limited. The coalition of NGOs maintained that POSCO did not conduct human rights and environmental due diligence, including adequately consulting with communities about actual and potential impacts. Therefore, POSCO was in no position to “seek to prevent and mitigate human rights abuses directly linked to their operations and exercise their leverage to protect human rights,” including those of the 20,000 people expected to be economically and physically displaced.⁴⁹

In addition to targeting POSCO and its joint venture partner, the NGOs also sought to hold responsible several investors connected through a web of financial relationships, which was new territory for the NCP system. One set of investors was the Dutch Pension Fund (ABP) and its pension funds asset manager, All Pension Group (APG).⁵⁰ The other was the Norwegian Government Pension Fund Global (GPF), which comprises two of the world’s largest sovereign wealth funds, and its operational fund manager, Norges Bank [Norway’s Central Bank] Investment Management (NBIM), which is a signatory to a 2011 investor statement supporting the adoption of the UNGPs.⁵¹ ABP reportedly had approximately EUR 17 million worth of POSCO shares, and as of December 2012, NBIM’s holdings in POSCO amounted to NOK 1,420 million, representing 0.9 percent of ownership.⁵²

119

Given the stake of these investors in the project, the complaint stated that they should have sought “to prevent or mitigate adverse impacts directly linked to their operations through their financial relationships with POSCO.”⁵³ NBIM replied that the OECD Guidelines did not apply to minority shareholders.⁵⁴ To resolve the impasse, in May 2013 the Norwegian NCP issued a final statement drawing upon the OECD Guidelines, the UNGPs, and a letter the NCP had requested from the UN Office of the High Commissioner for Human Rights on the applicability of the UNGPs to minority shareholders.⁵⁵

Based on this guidance, the Norwegian NCP established several standards. First, the Guidelines apply to all types of business enterprises and relationships, defined to include “relationships with business partners, entities in the supply chain and any other non-State or State entity directly linked to its business operations, products or services.”⁵⁶ Second, the size or percentage of shareholding does not determine responsibility; “although the [Norwegian Government Pension] Fund’s equity investment in any single enterprise is on average one per cent and does not often exceed five per cent, this can nonetheless be a significantly large investment in monetary terms.”⁵⁷ Thirdly, given that any investor is expected to seek to prevent or mitigate human rights risks identified in relation to

shareholdings, “the appropriate action in response to the identified risk depends on the degree of [a business’] leverage, where a number of options would be considered with a view to use or enhance leverage, to effect change in terms of ending harmful practice and mitigating risks of human rights abuse,” a position taken directly from the UNGPs.⁵⁸ Finally, the NCP stressed the importance of investors effectively investigating allegations and influencing businesses to address human rights issues, highlighting the need for investors to proactively engage in due diligence and find ways to influence a company’s human rights practices.

Following the Norwegian NCP’s conclusions, the Dutch NCP issued a similar final statement confirming that the OECD Guidelines apply to minority shareholders and reiterating that “investors and other financial institutions have a responsibility to exert influence where possible on companies they invest in to help prevent or mitigate possible adverse impacts on these companies’ operations.”⁵⁹ Dutch investors ABP and APG also committed to exercise leverage to bring POSCO’s business practices in line with international standards.

Both the Norwegian and Dutch NCP’s statements established important precedents for cases regarding financial institutions and set the bar for what is expected from all shareholders. However, the POSCO case did not quite end there. While Norway’s Government Pension Fund Global fund manager had initially ignored Norway’s NCP, once the final statement was issued, the Norwegian Finance Ministry sought further clarification from the OECD Working Party on Responsible Business Conduct.⁶⁰ After extensively consulting its own members and outside experts, the Working Party issued reports on the subject of sovereign wealth funds, financial institutions in general, and minority shareholders.⁶¹

In an additional precedent-setting statement, the Working Party concluded that the relevant issue was not whether the Guidelines apply to such entities, but how they do so—since such entities differ from front-line operating companies. Thus, not only did the Working Party strongly reaffirm the applicability of the Guidelines to all business enterprises, but it also established what could become an important interpretive function to clarify the many questions that surely will arise in the future regarding the application of the Guidelines to specific industry circumstances and operating contexts. This is key for civil society organizations that bring cases involving financial investments to the NCP system in an effort to move due diligence forward throughout all business relationships.

CONCLUSION AND RECOMMENDATIONS

This paper has documented the trajectory of the OECD-specific instances mechanism since 2000, with a particular focus on how the new human rights provisions introduced in 2011 have affected and may continue to affect that trajectory. The admittedly limited post-2011 data suggests five impacts: reaffirmation of the procedure as mostly a human rights mechanism; a greater diversity of human rights cases than in the past; a diversification of industries against which complaints are brought; a growing role of the Guidelines' new human rights due diligence provisions; and a higher admissibility rate for human rights cases than for others.

The discussion also indicates considerable normative innovation since 2000. For example, it suggests fruitful future developments regarding the applicability of the Guidelines to various types of financial institutions and minority shareholders, as well as a potential interpretive function for the OECD Investment Committee supported by its Working Party on Responsible Business Conduct to assist in the inevitable development of more granular guidance for specific industry sectors and operating contexts. Indeed, that process has already begun. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas has become a de facto international standard.⁶² The Working Party is also developing similar guidance for the agricultural, garment, and footwear sectors, and will soon turn to the financial sector.

Moreover, while complainants often criticize the NCP system for taking a long time to decide on cases, the fact is that court proceedings and quasi-judicial international and regional systems can take even longer. The NCP system's unique focus on mediation provides those affected by human rights offenses a potentially simpler and relatively quicker alternative for the resolution of certain disputes that either do not require, or for which the complainants prefer not to pursue, judicial or quasi-judicial routes. It also can offer those at risk of violations an avenue to file a formal international complaint to stop a potentially harmful practice from moving forward. What remains generally unclear from the available documentation is what actual remedy complainants receive or what changes in company policies and practices result from NCP findings and mediation.

Thus many challenges to implementation remain—and unfortunately, most of them are not fundamentally new. To begin with, according to the OECD database, one-third of the NCPs (14 out of a total of 45) have never received a single complaint, and several have only received one.⁶³ It is implausible to as-

sume that this reflects the absence of breaches of the Guidelines in every case; it is far more likely that the NCPs in question are invisible or unresponsive to potential complainants. While the NCP system is by design decentralized, each NCP has basic rules to which participants must adhere—the OECD Guidelines are no exception. The OECD Guidelines represent a “brand” of good corporate conduct. That brand must be protected by all OECD members and adhering states if the Guidelines and the NCP system are to be taken seriously in this space in the future. Moreover, it is by now well established that the less governments do, the greater the pressure on—and the potential for community conflicts with—the businesses in question. The separate Procedural Guidelines adopted in 2011 actually address this issue, providing for the Investment Committee to “consider a substantiated submission by an adhering country, an advisory body or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances.”⁶⁴ But this provision has yet to be invoked. Related to this, promoting awareness of the Guidelines is a legal obligation undertaken by governments. Therefore, minimum performance standards for NCPs and peer learning from the innovators among them should become a procedural requirement.

122


Furthermore, few governments have publicly stated that they will impose any material consequences in the case of a company’s noncooperation with an NCP or a finding against a company. Forty years of pure voluntarism should be long enough to conclude that companies cannot be counted on to do the job by themselves. One exception is Canada, which in November 2014 announced a new strategy, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility [CSR] in Canada’s Extractive Sector Abroad,” which references both the Guidelines and the UN Guiding Principles. Its key new element is such: “As a penalty for companies that do not embody CSR best practices and refuse to participate in the CSR Counsellor’s Office or NCP dispute resolution, Government of Canada support in foreign markets will be withdrawn.”⁶⁵ Canada’s NCP has already issued one final statement based on the new strategy, specifically concluding that:

As the Company did not respond to the NCP’s offer of its good offices, the Company’s non-participation in the process will be taken into consideration in any application by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made.⁶⁶

Surely this example deserves to be emulated more widely within the NCP com-

munity. Similarly, the Dutch government has stated that NCP statements may be used as a means of assessing applications for assistance for which compliance with the OECD guidelines is requested.⁶⁷

That brings us to the last topic: the relationship between the OECD Guidelines and the OECD Common Approaches regarding Export Credit Agencies (ECAs). Export credit is an obvious governmental source of leverage for compliance with the Guidelines. As things currently stand, the Guidelines embody higher standards than the Common Approaches. This is another way of saying that governments are in the untenable position of asking more of business than they demand of themselves. The relationship between the Guidelines and Common Approaches has been a long-standing doctrinal debate in the OECD. Recently, some members sought to have the Export Credit Group modify the Common Approaches and incorporate human rights due diligence, thereby aligning the Common Approaches with the Guidelines and the UNGPs.⁶⁸ The proposal gained no traction. One ECA repeated an argument it has made many times before, stating that the Guidelines and UNGPs do not apply to it because it is not an official body but a commercial entity—missing the irony that business is precisely to whom the OECD Guidelines and Pillar 2 of the UNGPs are addressed.⁶⁹ Thus, for the moment, policy incoherence within governments in this space persists, with potentially serious adverse consequences for the credibility of the NCP system and the Common Approaches alike.

In sum, considerable normative innovation has taken place in the Guidelines-based system over the years, which is to be applauded. But now the time has come to improve on its implementation modalities, for which excellent precedents, good practices, and emerging possibilities already exist. The main challenge today is to ensure that the NCP system becomes better known, more accessible, and swifter so it can effectively offer guidance and standards for businesses, while also providing redress for individuals and communities directly or indirectly affected by business operations in adverse ways. It is also critical that companies face consequences if an NCP report finds against them. Considering that the NCP mechanism is the most important complaint mechanism today in the field of business and human rights, it is key for it to strengthen its capacity to deliver on its promise to promote responsible business conduct around the globe. 

NOTES

The authors are deeply indebted to participants in the OECD National Contact Point system and other experts closely involved in it for their helpful input and suggestions for improving earlier drafts, all of

whom were promised anonymity. An earlier draft of this article was originally published as part of a Harvard working paper series.

1. United Nations Conference on Trade and Development, *2002 World Investment Report* (Geneva: United Nations Conference on Trade and Development, 2002).
2. Organization for Economic Co-operation and Development, "Declaration on International Investment and Multinational Enterprises," (1976), Article II.
3. Jill Murray, "A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD," *Industrial Law Journal* 30, no. 3 (2001): 255–70.
4. See: Organization for Economic Co-operation and Development, "International Investment and Multinational Enterprises," (1984), 28. The current description of NCPs' role reads: "Adhering governments are obliged to set up National Contact Points (NCPs) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances." See: Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011), 68.
5. Murray, "A New Phase in the Regulation of Multilateral Enterprises," 260.
6. On the MAI, see: Andrew Walter, "NGOs, Business, And International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond," *Global Governance* 7, no. 1 (2001): 51–73; Stephen J. Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy*, no. 112 (1998): 97–109.
7. OECD, *OECD Guidelines for Multinational Enterprises: Revision 2000* (OECD, 2000).
8. *Ibid.*, II. General Policies.
9. *Ibid.*, VIII. Science and Technology.
10. Patricia Feeney, ed., *Five Years On: A Review of the OECD Guidelines and National Contact Points* (Amsterdam: OECD Watch), 2005.
11. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
12. John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013).
13. John Ruggie, *Clarifying the Concepts of 'Sphere of influence' and 'Complicity': Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/16, May 15, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/78/PDF/G0813478.pdf?OpenElement>.
14. John Ruggie, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5 (April 7, 2008), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.
15. UN Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Resolution 8/7, June 18, 2008.
16. United Nations Security Council, *Letter dated 23 October 2003 from the Secretary-General addressed to the President of the Security Council*, S/2003/1027, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/567/36/IMG/N0356736.pdf?OpenElement>.
17. "IRC Study Shows Congo's Neglected Crisis Leaves 5.4 Million Dead; Peace Deal in N. Kivu, Increased Aid Critical to Reducing Death Toll," International Rescue Committee.
18. "RAID vs. DAS Air," OECD Watch.
19. *Ibid.*, paragraph 41.
20. *Ibid.*, paragraph 44.
21. Final Statement by the U.K. NCP for the OECD Guidelines for Multinational Enterprises: Afrimex UK Ltd. Paragraph 6 is available at http://oecdwatch.org/cases/Case_114.
22. *Ibid.*, paragraph 16.
23. John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the issue of*

Human Rights and the OECD Guidelines for Multinational Enterprises

human rights and transnational corporations and other business enterprises, A/HRC/17/31 (March 21, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>.

24. UN Human Rights Council, “Human rights and transnational corporations and other business enterprises,” A/HRC/RES/17/4, July 6, 2011.

25. Due diligence was established for all subjects covered by the Guidelines, except for the taxation provisions for which it was not considered appropriate.

26. The Guidelines automatically cover all 34 OECD member states: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. In addition, 12 non-OECD members have chosen to adhere to them: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

27. “Database of specific instances,” OECD Guidelines for Multinational Enterprises.

28. The *OECD Specific Instance Database* is the OECD’s official public online repository of cases and covers complaints reported by NCPs dating back to 2000, when the mechanism was introduced to start taking complaints from civil society. Some of the older cases from the first years of the NCP system had not been entered into the OECD database when we searched it in late 2014 and early 2015, yet it still contains the most cases overall, submitted from the broadest range of stakeholders. See: “OECD Guidelines for MNEs: Specific Instances,” OECD. Our best guess after checking with experts is that somewhere between 10 and 25 percent of cases for the early years are missing because of poor reporting by NCPs. Despite its broad coverage, the database depends on information submitted from the NCP offices, so it often lacks detailed or up-to-date information on cases, a reflection of the varying performance of NCPs. Moreover, prior to the 2011 revision of the Guidelines, only complaints that NCPs accepted for consideration were reported into the database. Therefore, it does not include cases that NCPs declined to review, making it difficult to get a full picture of submissions. *OECD Watch* is a global network of NGOs that seeks to hold companies accountable for the adverse impacts they have around the globe. With more than 80 members in 45 countries, the OECD Watch Case Database tracks detailed information on complaints brought to the OECD by a broad range of organizations from 2000 through the present. While it contains very specific information on individual developments in each case, it includes only those cases brought by civil society. The Trade Union Advisory Committee (TUAC), representing workers’ organizations, has been one of the major users of the specific instance mechanism. The TUAC database contains information on 157 cases submitted only by trade unions since 2000, which represents roughly half of all cases presented to date.

29. Note that the databases sometimes merge similar submissions to different NCPs as one single case, while in other situations split one submission involving several companies or communities into multiple instances. In those cases where databases recorded cases differently, we chose to treat cases according to the NCPs’ decision because that allowed us to track the outcome of cases in a more consistent manner. This explains any discrepancy in overall numbers of cases compared to the three databases.

30. According to our count, based on slightly differing OECD and NGO documentation.

31. OECD, *Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises* (Paris: OECD, May 2010), 2.

32. “Announcement of the 2010 update of the OECD Guidelines for Multinational Enterprises, OECD Watch,” *OECD*, May 31, 2010.

33. OECD, *Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises*, 3–4.

34. Joris Oldenziel, Joseph Wilde-Ramsing, and Patricia Feeney, *10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct* (OECD Watch, 2010).

35. The latter overall number may increase as some of these cases are likely still being processed.

36. OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector* (OECD, 2014), 40.

37. “Chapter II, General Policies, Commentary 4” in *OECD Guidelines for Multinational Enterprises*, 2000.

38. “2. Enterprises should respect the internationally recognised human rights of those affected by their activities...5. Refrain from seeking or accepting exemptions not contemplated in the statutory or

regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues...10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation. 11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur. 12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. 13. ...Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines. 14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.” Human Rights related Provisions under the Guidelines Chapter II (“General Principles”).

39. 17 Cases in 2013–2014 cycle that cite Chapter IV, paragraphs 2 & 5: WeCAN vs Vero Insurance NZ Ltd, IAG NZ Ltd, Tower Insurance, Fletcher Construction Company Ltd, Southern Response; WeCAN vs. Southern Response & Earthquake Commission (EQC); Friends of the Earth vs. Rabobank; WeCAN vs. Arrow Intl; Americans For Democracy and Human Rights in Bahrain vs. Formula One Management Ltd; Center for Social Research and Development et al vs Andritz AG; Canada Tibet Committee vs. China Gold Int. Resources; International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco & Allied Workers’ Association (IUF) vs Mondelēz Int’l; Alleged human rights violations in Israel (OECD data base does not identify complainant); Lawyers for Palestinian Human Rights vs. G4S; UNI Global Union vs PROSEGUR AB; Int’l Union of Food Workers (IUF) vs PepsiCo; Privacy International vs Vodafone Cable, Interroute, Level 3, BT, Verizon Enterprise, Viatel; WWF vs SOCO; Alleged violation of employee rights in Bangladesh (OECD data base does not identify complainant); FIDH et al vs. Corriente Resources Inc; Reprieve vs. BT.

40. “Chapter IV, paragraph 5” in *OECD Guidelines*.

41. U.K. NCP, “Americas for Democracy and Human Rights in Bahrain and Formula One World Championship Limited,” in *Issues for further Examination*, OECD Watch, October 2014, http://oecd-watch.org/cases/Case_333.

42. Kate Walker, “Human rights and Formula One,” *ESPN*, April 15, 2015, http://www.espn.co.uk/fl/story/_/id/12695642/human-rights-formula-one.

43. “Chapter II, General Policies, Paragraph 10” in *OECD Guidelines*

44. “Scope of the Guidelines and the investment nexus,” OECD.

45. See: Oldenziel, Wilde-Ramsing, and Feeney, *10 Years On*.

46. “Chapter IV, General Principles, paragraph 14” in *OECD Guidelines*.

47. *Ibid.*; The language is the same as Principle 13 of the UNGPs.

48. “Human rights breaches related to manufacturing of iron in India,” OECD Guidelines for Multinational Enterprises.

49. Specific Instance Complaint submitted to OECD, October 2012, 7, available at http://oecdwatch.org/cases/Case_262. According to the complaint, many of these communities also had additional legal protections under India’s Scheduled Tribes or Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, including having to give their consent before such a project moves forward.

50. ABP is a national pension fund for employees in government, public, and education sectors in the Netherlands.

51. For an outline of the complex governance structure of Norway’s Government Pension Fund Global, see: “Governance model: Government Pension Fund,” October 13, 2014, Government.no.

52. Norway NCP Final Statement on the POSCO case, 19, https://www.regjeringen.no/contentasset/s/8d118fcbacdb41918795434c4838f848/nbim_final.pdf; *Ibid.*, 16.

53. “Case 260.” *OECD Watch*, available at http://www.oecdwatch.org/cases/Case_260.

54. OECD Watch summary of POSCO case, paragraph 3, http://oecdwatch.org/cases/Case_262.

Human Rights and the OECD Guidelines for Multinational Enterprises

55. Office for the High Commissioner on Human Rights, The issue of Applicability of the Guidelines on Human Rights on Minority Shareholders, April 2013, available at <http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>.

56. Final Statement by Norway NCP on POSCO case, 22.

57. *Ibid.*, 42.

58. *Ibid.*, 34.

59. POSCO Case Press Release, October 2012, http://oecdwatch.org/cases/Case_260.

60. The OECD Working Party is a subsidiary body of the Investment Committee composed of representatives of all countries adhering to the Guidelines, regarding the applicability of the Guidelines to financial institutions and to minority shareholders.

61. See: "Scope and Application of 'Business Relationships' in the Financial Sector Under the OECD Guidelines for Multinational Enterprises," DAF/INV/RBS(2013)2/Rev1, November 21, 2013; "Application of the OECD Guidelines for Multinational Enterprises with Respect to Sovereign Wealth Funds and Central Banks," DAF/INV/RBC(2013)3/REV1, November 21, 2013; "Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship," DAF/INV/RBC(2014)1/Rev2; and "Scope and Application of 'Business Relationships' in the Financial Sector Under the OECD Guidelines for Multinational Enterprises," DAF/INV/RBC/(2013)2/FINAL, June 27, 2014.

62. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2nd ed. (OECD Publishing, 2003).

63. "Database of specific instances," OECD Guidelines for Multinational Enterprises.

64. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011), II.2 (b).

65. For more information, see: "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad," Global Affairs Canada, last modified June 8, 2015, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

66. "Final Statement on the Request for Review regarding the Operation of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region," Global Affairs Canada, last modified April 8, 2015, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>. The company is listed on the Toronto Stock Exchange.

67. Letter from the Secretary of State for Economic Affairs, Agriculture and Innovation to the President of the Lower House of the Dutch Parliament in The Hague, January 11, 2011. Nr. 101, P 9.

68. Based on interviews with participants.

69. In fact, the ECA was established by that country's government solely for a public purpose and is an "official" agency by its own description, even if it is self-financing. (The authors checked its website.) Thus like any other ECA it also falls under Pillar 1 of the UN Guiding Principles concerning state obligations and policy rationales to ensure that business enterprises within its purview respect human rights.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.