

A Liber Amicorum  
for Dr. Roel Nieuwenkamp,  
Chair of the OECD Working  
Party on Responsible  
Business Conduct  
2013-2018



# OECD Guidelines for Multinational Enterprises: a Glass Half Full



Kingdom of the Netherlands



OECD **GUIDELINES** FOR MULTINATIONAL ENTERPRISES

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## FOREWORD

This book is a gift to Roel Nieuwenkamp to pay tribute to his work on the OECD Guidelines for Multinational Enterprises. He has spent many years promoting responsible business conduct with governments, companies, non-governmental organisations and trade unions. Initially in his capacity as Director of Trade Policies at the Ministry of Economic Affairs in the Netherlands and, since 2013, as the Chair of the OECD Working Party on Responsible Business Conduct. Five years later, as he steps down from his role as Chair, this Liber Amicorum compiles testimonies from academics close to him engaged in efforts to promote responsible business conduct.

Submissions from contributing authors address a number of themes: progressive expansion of the scope and increasing scale of norms and practices of responsible business conduct (John Ruggie), focus on stakeholder-based governance (Mervyn King), strengthening NCP roles and functional equivalence (Christine Kaufmann, Michael Addo, Larry Catá Backer, Maartje van Putten, Martijn Scheltema/Constance Kwant, Sander van 't Foort/Tineke Lambooy), stakeholder involvement (Ola Mestad), strengthening Pillar 3: 'Access to Remedy' (Joseph Wilde-Ramsing). Further perspectives offered are country-specific views on the United States (Lance Compa), China (Liang Xiaohui), India (Bimal Arora), the desired linkage with the United Nations Sustainable Development Goals (Teresa Fogelberg/Tim Mohin, Karin Buhmann, Rob van Tulder) and the academic grounding through the OECD Academic Network on Responsible Business Conduct (Raymond Saner).

Herman Mulder and Martijn Scheltema wrote the Synthesis and further perspectives. All contributions solely represent the views of the respective authors.

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## PREFACE BY ANGEL GURRÍA

Today the OECD Guidelines for Multinational Enterprises (OECD Guidelines) are the leading instrument on responsible business conduct worldwide. This is evidenced by the growing commitment by business, governments, and also investors, consumers and society at large to the values underpinning the OECD Guidelines—fundamentally, that business should do good while doing no harm. In addition to growing awareness and uptake of the recommendations of the OECD Guidelines, the functioning of the National Contact Points (NCPs), the implementation mechanism of the OECD Guidelines, has also been strengthened. NCPs are increasingly making headlines for helping address issues related to the observance of the OECD Guidelines. Roel has played a crucial role in these developments. His strategic and tireless leadership has raised the visibility and prominence of the OECD Guidelines, and responsible business conduct more generally and globally.

Roel's connection with the OECD started in 2006, first as a delegate and later as a Bureau member of the Investment Committee. In this capacity, he contributed to preparing the ground for the most recent review of the OECD Guidelines and subsequently chaired the working group responsible for the review process. This two-year effort resulted in the adoption of the 2011 version of the OECD Guidelines, currently in force today. The review was ground-breaking for many reasons, but three elements in particular stand out: the addition of a chapter on human rights, the enhanced expectation of due diligence across the value chain and reinforced procedures for NCPs.

To better respond to the heightened expectations resulting from the 2011 update, the Investment Committee created a new subsidiary body, the Working Party on Responsible Business Conduct. Roel was designated as the first Chair of the Working Party at its inaugural meeting in March 2013. However, Roel's involvement, dedication and engagement to the responsible business conduct agenda has extended far beyond the traditional role of a Chair for an OECD body. In this respect, he has travelled the world to reach out and participate in events and initiatives to promote the OECD Guidelines and the NCP mechanism as the best available means to advance responsible business conduct. He has chaired numerous multi-stakeholder groups and consultations on responsible business conduct to ensure alignment with the OECD Guidelines.

Roel has embraced preaching the RBC gospel through social media channels like Twitter, YouTube and LinkedIn to reach a broader audience. As he leaves his role as Chair, he leaves behind a legacy of blogs, academic articles and opinion pieces, in which he boldly champions a new, more meaningful understanding of responsible business conduct. Examples include proclaiming that “CSR is dead”, cautioning against “SDG washing” and “addressing the imbalance between investment protection and people protection”.

As Chair, Roel has demonstrated strong political leadership, strategic thinking and negotiation skills. His energy for discovering new frontiers and achieving pragmatic solutions has helped drive the RBC agenda forward. The emphasis and the support he gave to inclusive approaches has also been central to the success of his role as Chair, and truly reflected the spirit of the OECD Guidelines. He also showed a remarkable ability to build trust and confidence with governments, international organisations, business, trade unions, civil society, academics and other stakeholders, which has enabled him to break silos and build lasting partnerships.

This book demonstrates the extent of his achievements and the high regard in which he is held by all who have worked with him as Chair. I would like to add my voice to this chorus of appreciation and good wishes and express my gratitude for his dedication and commitment to the OECD standards. I wish him all the best in his future endeavours knowing that, wherever his professional career may lead him, he will always be an inspiring ambassador for responsible business conduct and for the OECD Guidelines.



Angel Gurría,  
Secretary-General, OECD

## PREFACE BY MARTEN VAN DEN BERG

**R**oel Nieuwenkamp is a so called ‘founding father’ of the work on responsible business conduct. First in his capacity as director Trade Policies at the Ministry of Economic Affairs in the Netherlands. Later as the Chair of the Working Party on Responsible Business Conduct at the OECD.

Roel Nieuwenkamp acknowledged very soon the importance of the new DNA of global trade and investment: the international fragmentation of production and services in global and regional value chains as an important driver of globalization. This process of fragmentation was an important driver for global trade and investment.

We all know how important global trade and investment are for growth and employment. But today, global trade and investment is not only about growth and employment. It is also about human rights, labour and environmental progress. Therefore it is important that an international economic system of trade and investment is delivering for everyone. Not only on growth, but also on the social and environmental aspects of growth. And to make the international trade and investment system work better, responsible business conduct in global and regional value chains is crucial.

The private sector plays a vital role in those value chains, therefore it can also play a vital role in human, labour and environmental progress. Especially because many parts of these value chains are located in complex and/or conflict areas. It is for the private sector a challenge to do business in those areas. By acting in a responsible way, the private sector will contribute substantially to human rights and will have a positive impact on labour and environmental conditions.

The OECD Guidelines for Multinational Enterprises (Guidelines), the National Contact Points, the continued efforts to reinforce the effectiveness of the Guidelines and the outreach to non-OECD countries are very important steps in further strengthening responsible business conduct and to bring responsible and sustainable business to the heart of every business model.

Roel Nieuwenkamp played a leading role in the development and the implementation of the Guidelines. This Liber Amicorum is a wonderful tribute to the work of Roel Nieuwenkamp, to his never ending enthusiasm to convince governments, companies, non-governmental organizations and trade unions to participate in the process of responsible business conduct. But I hope that this Liber Amicorum is also an inspiration for everybody who is involved in responsible business conduct. The different contributions from so many different countries illustrate how Roel Nieuwenkamp was able to connect so many people from the globe to the agenda of responsible business conduct. This Liber Amicorum is part of the legacy of Roel Nieuwenkamp on responsible business conduct to make the world a better and more responsible and sustainable place.

**Marten van den Berg**  
Director-General Foreign Economic Relations,  
Ministry of Foreign Affairs,  
The Netherlands



# Synthesis and further perspectives



*Herman Mulder*

Fellow Nyenrode Business Universiteit

Member of the Dutch National Contact Point  
(2007-2016)

AND *Martijn Scheltema*

Professor of Law, Erasmus University Rotterdam,  
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## A TRIBUTE TO ROEL NIEUWENKAMP

Roel Nieuwenkamp wrote recently: “corporate responsibility as described in the OECD Guidelines is not optional, as more and more consequences are attached to non-compliance”. And: “the NCP glass is now half full, but the aim should be fill it to the top”

Indeed, the evolution since 2011 of the application of the OECD Guidelines for Multinational Enterprises (Guidelines), in tandem with the 2011 United Nations Guiding Principles for Business and Human Rights (UNGPs), has been remarkable, with more conceptual clarity and improving practice on responsible business conduct, also in the context of John Ruggie’s 3 Pillars for human rights: “Government duty to Protect, Business responsibility to Respect, and Access to Remedy”. Despite these positive developments, the practice and learnings, as reflected by the various chapters in this Liber, show that more needs to be done for responsible and sustainable business conduct to be the “natural thing” to do by business: inclusive, integrated, focused and with ambition.

We are proud to present this “Liber Amicorum”, especially to Roel Nieuwenkamp, but also to all diverse interest-holders in responsible (and sustainable) business conduct. The Liber is a tribute to the impressive work Roel has done as moderator of the 2011 Update of the Guidelines and, subsequently, till mid-2018, as the Chair of the Working Party for Responsible Business Conduct (WPRBC). But it is definitely also an encouragement to all interest-holders, the OECD, the business and further global communities to “fill the glass to the top”.

## THE 2011 UPDATE AS A KEY INFLECTION POINT

The 2011 Update of the Guidelines has proven to be an important inflection point for defining the role of business in the context of a broad set of important societal themes. It not only clearly sets the stage and baseline for responsible and sustainable business conduct in the interest of society and of business itself, but it also, uniquely, introduced a combination of a new scope for responsible business conduct (due diligence in business’ value chains), an integrated approach with new emphasis on important issues (human rights aligned with the UNGPs, enhanced disclosure as driver of change), an inclusive approach with new partners (next to BIAC for business, TUAC for trade unions, also OECD Watch for NGOs), a strengthened implementation regime through the National Contact Points (NCPs) and the creation of the Working Party on Responsible Business Conduct.

Moreover, while putting the Guidelines into practice, it offered the opportunity to deepen and broaden the understanding of business responsibility, clarifying underlying principles by guidance papers (notably on general and sector-specific due diligence), strengthening the NCPs by advice and peer-learning and by active outreach, and the promotion with the (34) OECD Member States and the (14) Guidelines’ Adhering Countries, business sectors and possible future partner-countries.

## AUTHORITATIVE CONTRIBUTIONS

The appreciation for what has been achieved by the WPRBC and its Secretariat under the leadership of Roel Nieuwenkamp is reflected by the immediate enthusiasm of a diverse group of (academic) “Amici” to contribute to this Liber Amicorum and providing rich contributions on the learnings and achievements since 2011 and the expectations and promises for the future.

Some of the themes addressed are not necessarily new, but the authoritative nature of each of the “Amici” should provide food for thought and, hopefully, immediate action, or later in a possible Update (in 2021?). The themes include: progressive expansion of the scope and increasing scale of norms and practices of responsible business conduct (John Ruggie), focus on stakeholder-based governance (Mervyn King), strengthening NCP roles and functional equivalence (Christine Kaufmann, Michael Addo, Larry Catá Backer, Maartje van Putten, Martijn Scheltema/Constance Kwant, Sander van ‘t Foort/Tineke Lambooij), stakeholder involvement (Ola Mestad), strengthening Pillar 3: ‘Access to Remedy’ (Joseph Wilde-Ramsing). Further perspectives offered are country-specific views on the United States (Lance Compa), China (Liang Xiaohui), India (Bimal Arora), the desired linkage with the United Nations Sustainable Development Goals (SDGs) (Teresa Fogelberg/Tim Mohin, Karin Buhmann, Rob van Tulder) and the academic grounding through the OECD Academic Network on Responsible Business Conduct (Raymond Saner).

## IMPORTANT THEMES FOR ATTENTION

More specifically, certain important themes in the space of business and society are not at all explicitly addressed in the 2011 Guidelines (such as climate change, land governance (*inter alia* Free prior and informed consent) (FPIC), biodiversity, animal welfare, “externalities”, data-collection, privacy and artificial intelligence, as well as the role of government in connection with public procurement, contracting, investing, or not sufficiently (such as corporate governance, taxation, competition law, consumer interests). Due diligence by multinational enterprises in their value chains should pay particular attention to sourcing from, or other association with conflict zones and on human rights (including gender, children, minorities). Moreover, the learnings since 2011 offer opportunities to reinforce the effectiveness of the Guidelines through the NCPs (such as their stature, independence, governance, resources, its low-threshold, low cost, remedy-effective processes and procedures, own investigatory initiatives).

These are not recommendations for a distant future. Some NCPs already consider climate change to be part of the spirit of the Guidelines; for example, the Dutch NCP has accepted a specific instance against a Dutch financial institution related to climate change. The same may apply to topics like artificial intelligence, which have a considerable impact on labour and human rights, as some artificial intelligence applications are reported to make discriminatory assessments.

As (effective) legislation on some of these responsible business topics may be remote, an immediate need (and opportunity) emerges to consider these themes in connection with the Guidelines. Working Groups have been successfully established to provide multi-stakeholder (due diligence) guidance, including due public consultation processes, in specific sectors, further working groups may be established to develop guidance on these specific themes.

Other themes may be strengthened and improved, such as strengthening Pillar 3 on Remedy (soft law with -hard- consequences), not only by strengthening the NCP function itself, but also by other aspects such as: (better) aligning it with other dispute resolution mechanisms, providing credible and effective escalation mechanisms which provide (binding) dispute resolution between companies and affected individuals or communities, guidance on effective leverage in the value chain, improved disclosure, further sharpening “for whom it may concern”: beyond large international enterprises (smaller companies with vulnerable value chains, aided by advanced certification schemes); policy coherence within the OECD: Common Approaches, corporate governance.

Lastly, new developments, some of which were catalyzed by the Guidelines need to be considered: legislative initiatives (on ”duty of care”, due diligence, key issues such as modern slavery, child labour, gender/diversity, corporate reporting/disclosure), National Action Plans (on human rights and beyond), structured multi-stakeholder governance of the NCPs, better resourced NCPs for more promotion and in some specific cases room for possible clarifying field visits, further sector- or theme-specific guidance papers.

Important is also to evaluate national legislation as well as international treaties and standards which are in conflict with the objectives of the Guidelines. For example, competition law may hamper collaborative initiatives (including exercising leverage in the value chain) by business, either or not with non-governmental organizations or governments, to enhance responsible business conduct in line with the societal interests and priorities. To date, little progress has been made to adapt competition law in this respect. In connection with this, transparency issues arise. Some responsible business initiatives require public reporting on business policies and progress. Especially if this reporting includes third parties (“business relationships”). For example, if banks would have to report also on the progress of their clients, confidentiality and competition issues may arise. To date, this is partly addressed by legislative reporting requirements, but it may be advisable to more broadly discuss the role transparency should have regarding responsible business conduct. Whereas new technologies such as block-chain provide new inroads to transparency, this topic becomes even more salient.

## FURTHER DEEPENING AND BROADENING

Beyond that, the OECD may play a role to align and reinforce legislative initiatives on responsible business conduct as well as to propose and discuss other (concerted) steps governments may take to enhance responsible business conduct, not only by strengthening National Action Plans but also through other means such as public procurement, tax incentives, subsidies, export credit insurance and reaching out to governments in developing countries to discuss issues in connection with responsible business conduct.

In connection with the foregoing, the global effectiveness of the Guidelines as a “do no harm” framework itself, as the most comprehensive contributor to “an international business level playing field”, would be enhanced if at least all G20 countries would become “adhering”, or fully aligned and “at the table”, and supporting the underlying principles, the dynamic learnings, through cooperation and coordination on material issues.

## THE SUSTAINABLE DEVELOPMENT GOALS

The 2015-2030 SDGs have added an important new dimension to responsible (and sustainable) business conduct, hence also the Guidelines. The Guidelines are focusing on preventing, mitigating, reducing adverse impacts (“do no harm”) in their own value chain, while the SDGs offer a comprehensive, universal agenda to create a just and equitable (“doing good”) environment “from us all, by us, for us all”, including by and for business. In the Preface of the 2011 Guidelines, paragraph 1 states: “The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign direct investment climate and to enhance the contribution to sustainable development made by multinational enterprises”. In other words, the basis for linkage with the SDGs, as the universal, comprehensive agenda for inclusive sustainable development worldwide, is already implicitly in the 2011 Guidelines.



The agendas of “do no harm” (in the business value chain, per the Guidelines) and “doing good” (in society-at-large, per the SDGs) should reinforce each other. Issues such as workers’ exploitation are connected to poverty issues as minimum wages are often below the level of a living wage. As long as this situation continues, workers remain vulnerable and prone to irresponsible business practices. If SDG #1 to eradicate poverty is implemented and for example supports the raise of minimum wages to the level of living wages, this will enhance responsible business conduct and counter workers’ exploitation.

Thus, it would make sense to include the SDGs framework in the discussion on responsible business conduct as adopted in the Guidelines. Moreover, it may be hard to eradicate irresponsible business conduct if the SDGs are also not (at least in part) been achieved. In connection with this, currently adhering, and also not-yet-adhering governments, should realize that they have an important, proactive role to play in the achievement of the SDGs in connection with the promotion of responsible and sustainable business conduct as the SDGs cannot be achieved without business.

## MOVING FORWARD WITH AMBITION

The Guidelines have proven to be a key driver in “making markets fit for sustainable and responsible purpose”; the role of the NCPs has always been and still is beyond resolving a particular case. It offers the opportunity to “address accidental pain in the value chain for systemic gain”, offering learnings and commitments for real improvement in behavior to prevent, mitigate or at least reduce adverse impacts in the entire value chain. We do hope the Guidelines will maintain this function in future. By addressing the abovementioned topics, the Guidelines will keep their dynamic relevance and bringing about future improvement of business conduct in these areas is well conceivable then.

The 2011 Updated Guidelines, led by the WPRBC, has accomplished much of its mission by its collaborative approach, constructive challenge, building multi-stakeholder trust: “we may move fast alone, but much farther together”. This is the social capital which Roel Nieuwenkamp has created and must be built on for “continuously better” in the interest of the long-term value creation by business and a just society. We, as “Amici”, thank Roel for his great contribution!

# The evolving regulatory ecosystem for business and human rights



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**A**s recently as the late 1990s, “there was no recognition that companies had human rights responsibilities,” according to the director of business and human rights at Human Rights Watch.<sup>1</sup> Today, that recognition has become increasingly embedded in the social, policy, and legal regulatory ecosystem within which global business operates. Of course, it is far from being universally acted upon even in societies where the recognition itself is relatively robust. “We didn’t take a broad enough view of what our responsibility is, and that was a huge mistake,” Facebook CEO Mark Zuckerberg conceded in the wake of the Cambridge Analytica fiasco, in which possibly as many as 87 million American users’ profile data was compromised and then weaponized in the 2016 United States presidential election.<sup>2</sup>

The concept of responsible business conduct has become a trademark of the Organization for Economic Co-operation and Development (OECD). The OECD issued the first version of its Guidelines for Multinational Enterprises (Guidelines) in 1976, largely in response to an ultimately unsuccessful initiative by the so-called “Group of 77” developing countries to negotiate what they hoped would become a legally binding treaty governing the conduct of multinationals. In gaining international recognition of the corporate responsibility to respect human rights, the “watershed event,” as the Economist Intelligence Unit put it, was the endorsement by the United Nations Human Rights Council of the UN Guiding Principles on Business and Human Rights (UNGPs) in June 2011.<sup>3</sup> Shortly before, due to different scheduling, the OECD Council had already added a human rights chapter to the Guidelines, which by agreement among its stakeholders was drawn virtually verbatim from the UNGPs. Roel Nieuwenkamp, who headed the OECD drafting group revising the Guidelines, played a central role in that process, and subsequently he successfully advanced the agenda as chair of the OECD Working Party on Responsible Business Conduct.

A core challenge in the business and human rights space is increasing its scope and reaching scale. So let me briefly differentiate among three approaches to addressing this challenge, hoping thereby to inform future steps in a journey that has only recently begun.

The traditional human rights approach has been to try and subject the entire business and human rights space to a comprehensive international treaty. In the latest iteration, led by Ecuador and South Africa, the elements of a draft treaty released in September 2017 would have international human rights law trump other areas of international law, particularly trade and investment law.<sup>4</sup> Such efforts have always been problematic on conceptual, legal, and political grounds, and it seems even less likely to succeed in the present international context.

The Guidelines approach differs. It combines the legal obligations of adhering governments to promote the Guidelines, and to establish a national complaints mechanism (National Contact Points, or NCPs) with the authority to hear complaints about “their” multinationals wherever they may operate. That is coupled with voluntary recommendations by the governments to multinationals as to the terms of responsible business conduct in different operating contexts and industry sectors. The 2011 Guidelines and the subsequent

guidance documents expanded the Guidelines' scope. Greater scale has been reached because the number of adhering countries now numbers 48, including such non-member states as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. One important development in the complaints system is that some NCPs have begun to recommend penalties on companies for non-compliance by withdrawing various forms of public support from them, such as export credits, investment guarantees, and trade missions.<sup>5</sup>

The UNGPs are complementary but were designed to reflect yet a third model. They seek to populate the business and human rights space with a mix of voluntary and mandatory standards and procedures, national and international, as well as with a greater diversity of key social actors that have not been previously engaged. The theory is that this has the best chance to drive a cumulative process of embedding human rights-related business conduct in a transnational ecosystem of mutually reinforcing expectations and rules. Let me elaborate.

Governments endorsed the UNGPs. Some 40 have developed or are developing national action plans for their implementation. Companies draw on the UNGPs, particularly the human rights due diligence process and grievance mechanisms they provide, and a growing number use the UNGPs' reporting framework created by Shift, the non-profit center of excellence for the UNGPs established by members of my former UN team. Workers organizations and NGOs use the UNGPs as an advocacy tool, affected individuals and communities as a basis on which to seek remedy. Other international standard setting bodies with a role in the business and human rights space have replicated or drawn upon the UNGPs within their own operations. We might refer to these developments as the first level of scope and scale expansion.

The next level comprises new national and regional legal developments that reference the UNGPs, including legislation to combat modern day slavery, child labor protections, the French Due Vigilance law, expanding non-financial disclosure requirements, and in the case of Canada the terms of reference for the first national ombudsperson with the authority to compel documentation and testimony from Canadian companies alleged to have committed human rights violations in their overseas operations.

Moving away from the world of officialdom, the UNGPs have made some inroads in the world of corporate legal practice. Several national and sub-national bar associations have endorsed the UNGPs. The International Bar Association has issued guidance as to what the UNGPs mean and entail for the practice of corporate lawyers and law firms, as businesses in their own right.<sup>6</sup> A survey of 275 senior-in-house counsel across an array of industries found that in nearly 60 percent of the responding firms responsibility for human rights issues now resides in legal and compliance departments, with just 19 percent in corporate social responsibility departments.<sup>7</sup>

When it comes to global scale, there is nothing quite like football, the world's most popular sport. FIFA, the Fédération Internationale de Football Association, is the sport's global governing body. It has a presence in 209 countries and territories, and is the organizer of the world largest single sports tournament, the Men's World Cup. The UNGPs have found their way into this sporting and cultural phenomenon. In addition to bribery and corruption scandals, FIFA also faced enormous pressure from NGOs and sponsors due to serious human rights abuses in the preparations for the 2018 World Cup in Russia and even more so the 2022 World Cup in Qatar. An international labor federation brought a complaint against FIFA to the Swiss NCP. FIFA asked me for assistance. Under the auspices of Harvard University, I worked with Shift to advise FIFA. We presented a public report and recommendations in April 2016.<sup>8</sup> In rough order, the following changes have taken place since: FIFA amended its statutes to include an article committing it to respect all internationally recognized rights; it adopted a human rights policy in line with the UNGPs; it appointed a Human Rights Advisory Council, including representation from Shift, the International Labour Organization, the Office of the High Commissioner for Human Rights, Human Rights Watch, the Players Association, and the International Federation of Building and Woodworkers, which had brought the complaint against FIFA. Human rights provisions were included in the bidding requirements for the Men's World Cup, and the two bids for 2026 (US-Canada-Mexico and Morocco) include an entire chapter on the subject. For its part, Qatar has pledged to dismantle the kafala system of labor control, which amounted to a form of bonded labor for foreign workers, beginning with the abolition of and back-payments for workers' recruitment fees. Finally, the Players Union has adopted a Players' Declaration of Human Rights, also referencing the UNGPs and our FIFA report. These developments do not only FIFA, related businesses, players, and FIFA's national associations and regional confederations. They also loop back to host governments, which are now required to support FIFA's human rights commitments for the purposes (and duration) of the Cup.

The theory of change reflected in the UNGPs is a dynamic process whereby movement by one part provides opportunities for (or the courage of) other parts to move, in a progressive expansion of scope and increasing scale of norms and practices of responsible business conduct in relation to human rights. The Guidelines are a complementary component of this dynamic. For international legal instruments to contribute to this evolution, they would have to be narrowly targeted on reinforcing specific elements or closing specific gaps, not aim to swallow up the entire space in one gulp.

There are always many impediments to achieving progress on business and human rights. But there are also opportunities. Opportunities reveal themselves more clearly - and may even be created - by looking at this space through appropriate lenses, which see the world as it is while enhancing our vision of what it can become. Roel Nieuwenkamp has the prescription for those lenses.

## NOTES

1. Quoted in The Economist Intelligence Unit, *The Road from Principles to Practices: Today's Challenges for Business in Respecting Human Rights* (October 13, 2015), available at <https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice>, accessed April 6, 2018.
2. Quoted in Kurt Wagner, "Mark Zuckerberg knows he screwed up," <https://www.recode.net/2018/4/5/17200918/mark-zuckerberg-facebook-data-privacy>, accessed April 6, 2018.
3. Quoted in *Ibid*. For the text of the UNGPs, see [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
4. [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf), accessed April 6, 2018.
5. See Roel Nieuwenkamp, "The OECD Agreement on Corporate Responsibility and its Future," forthcoming in *The CSR Handbook*.
6. See International Bar Association, "IBA Practical Guide on Business and Human Rights for Business Lawyers," <https://www.business-humanrights.org/en/intl-bar-association-issues-practical-business-human-rights-guidance-for-lawyer>; and John G. Ruggie and John F. Sherman III, "Adding Human Rights Punch to the New *Lex Mercatoria*," *Journal of International Dispute Settlement*, 6 (November 2015).
7. James Wood, Soft law, hard sanctions – Human Rights laws and the next risk front facing business," <https://www.legalbusiness.co.uk/insight-roundtables/insight/soft-law-hard-sanctions-human-rights-laws-and-the-next-risk-front-facing-business/>.
8. See John G. Ruggie, "For the Game. For the World." FIFA and Human Rights, <https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68>, accessed April 6, 2017.



# Quo Vadis OECD MNE Guidelines



*Mervyn King*

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The OECD Guidelines for Multinational Enterprises (Guidelines) are recommendations addressed by governments to multinational enterprises (MNEs) operating in or from adhering countries. They are non-binding principles to hopefully create responsible business conduct which governments have committed to promoting. The Guidelines are implemented through the mechanism of National Contact Points (NCPs), which are agencies established by adhering governments to implement the Guidelines. The responsible business conduct referred to in the Guidelines includes adherence to human rights, responsible supply chain management, corruption, taxation policy and sustainable development. It also embraces the practice and upholding of good corporate governance principles.

MNEs are also asked to ensure that timely and accurate information is disclosed on all material matters regarding an organisation's activities. In the Guidelines it is stated that disclosure by MNEs should result in stakeholders having an improved understanding of the operations of MNEs. The aim is to improve the public understanding of enterprises and their interaction with society and the environment. There is a special chapter heading on human rights acknowledging that while states have the duty to protect human rights, enterprises should respect human rights, which means that MNEs should address adverse human rights impacts arising from their business models.

Similarly, there is a chapter on the environment and MNEs are called upon to establish and maintain a system of environmental management appropriate to their enterprise including the collection and evaluation of adequate and timely information regarding the environmental health and safety impacts of their activities.

The question is posed as to whether the Guidelines have achieved their purpose. It is difficult to measure such achievement because of the different laws in different jurisdictions and the overall effect of other guidelines involving good governance, disclosure, strategy and reporting.

The question can also be posed: has there been alignment with other relevant (international frameworks? In this regard the International Integrated Reporting Council (IIRC) has recognised that there are competing guidelines and standard setters in the world, which have created an alphabet soup of acronyms and also clutter. The latter word is used because there is an overlap of standards and guidelines between these international bodies. For example, for years there has been an endeavour by the International Accounting Standards Board (IASB) and the Financial Accounting Standards Board of America (FASB) to converge the United States' Generally Accepted Accounting Principles and the International Financial Reporting Standards created by the board of trustees under the auspices of the IASB. To this end the IIRC has created the Corporate Reporting Dialogue where the FASB and the IASB, the Global Reporting Initiative and the Sustainability Accountancy Standards Board of America meet and have drawn up a landscape map which indicates the overlapping. They are now in deep discussion on trying to formulate a common definition of materiality.

What are the perspectives for a possible future review of the Guidelines to make them more effective for sustainable development and the protection of human rights?

The concept of sustainable development is the opposite of unsustainable development. From the middle of the 19<sup>th</sup> century when the concept of the limited liability company was established, the equity capital granted to companies was by wealthy families. Members of those wealthy families also became directors of the company. It was almost a natural consequence that other stakeholders regarded them as the owners of the company.

This primacy of the shareholder was underscored in the famous corporate case of the Ford Motor Company and the Dodge Brothers. The Ford Motor Company had made excessive profits and it decided to increase the wages of its employees to encourage them to work longer hours to meet the demand for the company's product, the Model T Ford. The Dodge Brothers, a minority shareholder, contended that the shareholder is the primary stakeholder and with this primacy, the excess profit should be declared as a special dividend to shareholders before increasing the wages of the employees. A court granted a declarator in favour of the contentions of the Dodge Brothers.

This concept of the primacy of the shareholders and that directors should focus on the maximisation of shareholder wealth was underscored by the Nobel laureate economist, Milton Friedman, who said words to the effect that the sole purpose of the company is to make profit without deception. The question needs to be asked, at any cost? This shareholder centric governance model was at a cost to society and the environment right through the 20<sup>th</sup> century.

The success of a company was determined by its increasing monetary bottom line, increasing share price and increasing payment of dividends. That company, however, may have had a business model which resulted in a breach of human rights and unsustainable development.

For example, the dye house of a textile company uses toxic chemicals to dye fabrics and once it has been used together with water and steam the waste goes into a vat. The toxins should be treated by chemical processes and removed from the water before the valve to the vat is opened and the water runs down gulleys into rivers. By qualified chemists not treating this toxic waste, the expenditure of the dye house would diminish, the bottom line profit of the dye house would increase, but those toxins in the river would kill fish below the blue line and have an adverse impact on plant life along the river. Further, that toxified river water would be used by a local authority for use of residents in the local authority area. The local authority would have to spend more money to treat that water to remove the toxins before placing the water into the infrastructure of the town concerned.

It will be seen from this example that the increased profit of the dye house would have been at a cost to society and the environment. This, in my judgment, was the “free” part of the free economy.

In a future review of the Guidelines, it must be accepted that we cannot continue with the same corporate toolbox we used even as late as into the 21st century when many of these problems and challenges were created. Because of the shareholder centric governance model of acting in the best interests of the shareholders, lawful wrongs were committed. This oxymoron is

because directors were acting lawfully in making decisions in the best interests of the general body of shareholders, even if it resulted in the company having a negative impact on two of the three critical dimensions for sustainable development, namely adverse impacts on society and the environment. As stated in the United Nations' Sustainable Development Goals of April 2015, organisations in order to achieve sustainable development by 2030 must have a business model that results in positive impacts on the three critical dimensions for sustainable development, which are integrated, namely the economy, society and the environment.

There is a revolutionary immensity in the vision of integrated thinking resulting in a business model that embraces sustainability issues pertinent to the business of the MNE, with positive impacts on the three dimensions of sustainable development. It has the outcome of dealing with lawful wrongs at their source, in the boardroom, and meeting the outraged conscience of the world to corporate profit subsidized by society and the environment.

When Pacioli in the 15<sup>th</sup> century recorded the double entry bookkeeping system of the Merchants of Venice he created the foundation of accountancy as we know it today. But that was purely financial. What is needed is a multi-capital approach to reflect value creation in a knowledge-based naturally resource constrained world. Integrated thinking and drafting an integrated report matches double entry bookkeeping for its global applicability and its resonance to the needs of today's business and society.

The Guidelines have done an enormously good job in drawing the attention of the collective mind of a MNE's board to the importance for responsible business, in other words, sustainable development, focusing on human rights, the environment, transparent disclosure, combating bribery, inequitable corporate tax policies and stakeholder relationships.

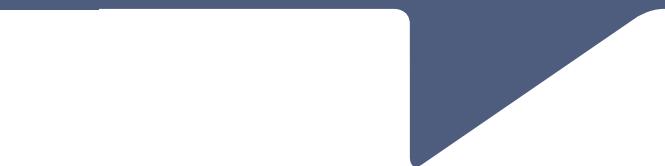
The Guidelines, however, have not been structured to deal with the outcomes or impacts of an MNE's business model. In a revision of the Guidelines, thought should be given to guide all MNEs to deal with any adverse outcomes or impacts on the issues raised in the Guidelines at their source. In other words, at the time of the board creating the MNE's business model.

The error of regulators has been to deal with adverse impacts on the three critical dimensions of sustainable development rather than dealing with a shareholder centric governance model. MNEs have complied, but it has increased the per unit cost of production. The regulators are the representatives of society, but society has carried the financial burden of paying more for the product.

In any revision of the Guidelines, the OECD should focus on the governance models of MNEs. It should be a company centric model moving away from the shareholder centric model. MNEs should be guided to focus on the long term health of their enterprises rather than maximisation of shareholder wealth, which will be in the long term better interests of all their stakeholders including their shareholders.

# OECD MNE Guidelines quo vadis?

## Making responsible business conduct work for better lives



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## BETTER POLICIES FOR BETTER LIVES – ARE WE THERE YET?

In 2011, the 50<sup>th</sup> anniversary of the OECD provided the opportunity to revive the organisation's original mandate with the catchy slogan "*Better Policies for Better Lives*".<sup>2</sup>

What did this mean for the OECD Guidelines on Multinational Enterprises? Roel Nieuwenkamp recently characterized its 2011 version as the Paris Agreement for Responsible Business Conduct. This contribution will, amongst others, focus on the newly designed concept of corporate due diligence as a key element of the 2011 revision and its consequences for the overall content of the Guidelines and the system of National Contact Points (NCPs).

With the creation of a new fully fledged Human Rights Chapter in 2011 to accommodate the UN Guiding Principles on Business and Human Rights (UNGPs), the Guidelines induced a shift in paradigm by opening their focus from investors' and economic perspectives to the people whose rights might be infringed. Accordingly, "risks" include not only investors' and corporate risks but also the risks for rights-holders on the ground. The result is a substantial expansion of the Guidelines' scope in two regards: First, they now cover all business activities regardless of an investment nexus. Second, as in the UNGPs, the new concept of risk-driven corporate due diligence applies to the whole supply chain because all suppliers' actions may have adverse impacts. Importantly – and often overlooked – according to the Guidelines General Policies (para. A.10) this newly defined due diligence applies not only to the new human rights chapter but to all chapters of the Guidelines except for the ones on science and technology, on competition and on taxation<sup>3</sup>.

Finally, strengthening the NCP system as the Guidelines' grievance mechanism is a prerequisite for these conceptual changes to become effective in the real world – a finding which was confirmed by the G7 leaders at their 2015 summit<sup>4</sup>.

So, where are we now? The number of submitted specific instances since the 2011 revision and the fact that more than 50% of them referred to the new human rights chapter shows that the revision has quickly gained momentum and the interest in the Guidelines as the only government-backed instrument for responsible business conduct with a built-in non-judicial grievance mechanism is as high as never before<sup>5</sup>. But, apart from numbers, does the revision live up to the substantial expectations it raised? Critics of the NCP system regularly address institutional and procedural issues. Institutionally, NCPs come in different shapes and sizes, some act as independent bodies (e.g. in Denmark, the Netherlands and Norway), others (the majority) are based in one or more departments of the government, sometimes following an interagency model (e.g. Canada, Germany, Switzerland, UK, US). Depending on the institutional set-up, stakeholders are included with different mandates as regular individual members of the NCP (Netherlands, Denmark, Norway); in a tripartite model for a ministry-based NCP (France), or as members of an advisory or steering board (such as UK, US, Switzerland). The extent to which stakeholders are included in the NCPs' decision making and

in specific instances procedures depends on the NCP. This institutional variety is reflected in equally diverse procedural guidelines, for instance regarding transparency, a potential adjudicatory role of the NCP or the possibility to appeal its findings. Some NCPs even have a mandate to become active themselves either by launching cases independently from a submitted complaint (Denmark, Netherlands) or by initiating topical discussions (France). Operationally, the Guidelines do not provide a uniform monitoring or follow-up scheme to secure compliance with NCP proceedings.

As a result, the NCP landscape is highly fragmented which leads to particular challenges when a submission relates to different NCPs because companies from different adhering countries are involved. The Guidelines only call on the respective NCPs to coordinate among themselves but do not provide detailed criteria.

With the incorporation of the UNGPs, the question of remedy has become more pertinent. However, at this stage, the Guidelines do not foresee an obligation for financial compensation or assistance for submitting parties. Indeed, in terms of financial compensation, remedy is still rare. This leads to the monitoring and enforcement of NCP procedures. Most NCPs do currently not have the mandate to require corporate participation in specific instances procedures nor can they enforce their findings or sanction non-compliance. Some NCPs have however undertaken first steps in this direction: for instance in Canada, the non-compliance with or non-participation in NCP procedures can result in the withdrawal of government support for export activities. Similarly, several recent National Action Plans (NAPs) for the implementation of the UNGPs combine governments' (soft) expectation of responsible business behaviour with tangible (hard) consequences.

In sum, despite substantial progress the intended change in paradigm to better include victims and provide them with remedy has not yet been fully implemented on the ground and coherence remains an issue.

## **POLICY COHERENCE AND EFFECTIVENESS: ARE ALL ROADS LEADING TO ROME?**

The myriad of standards on responsible business conduct share one common feature: criteria for corporate due diligence. Coherence among different standards as well as within the different chapters of the Guidelines is crucial for effectively implementing responsible business conduct on the ground. Within the OECD, two avenues have been pursued to further specify due diligence criteria and align existing standards: sector-specific due diligence guidance and good practices papers have been developed for the minerals, agriculture, garment and footwear supply chains, the extractive and the financial sector. In addition, a cross-cutting general due diligence guidance for responsible business conduct will be launched in June 2018. It applies to all chapters of the Guidelines except those on Science and Technology, Competition and Taxation<sup>6</sup>. The sector-specific and the general guidance were developed in a multistakeholder

process and contain general references to other international instruments. They aim at promoting a common understanding amongst governments and stakeholders on due diligence for responsible business conduct and thereby at fostering coherence.

While the importance of coherent standards for businesses is widely acknowledged there is less awareness for NCPs' challenges in assessing whether a specific standard that a party refers to is in line with the OECD Guidelines. A current example is a specific instance submitted by an Indonesian NGO to the Swiss NCP arguing that the Roundtable on Sustainable Palm Oil (RSPO) violates the Guidelines. Should the Swiss NCP accept the case, the question of the compatibility of the RSPO rules with the Guidelines may arise.

At the national level, NAPs play a particularly important role in aligning existing standards for responsible business conduct. So far, all 19 countries that have published a NAP are either OECD members<sup>7</sup> or adhere to the Guidelines<sup>8</sup> and with the exception of Lithuania, they all mention the Guidelines and the NCP system<sup>9</sup>.

Despite different conceptual approaches<sup>10</sup>, due diligence is the main anchor point for fostering coherence in NAPs. Several such as the German NAP<sup>11</sup> contain a review process to monitor business compliance with due diligence requirements. Others have already introduced (France<sup>12</sup> and UK<sup>13</sup>) or are discussing (Australia, Canada, Netherlands<sup>14</sup>, and Switzerland<sup>15</sup>) binding provisions on due diligence. All these initiatives for hardening soft law are driven by states' and stakeholders' common interests to specify coherent rules of the game which can be operationalised by business and trigger clearly defined consequences. Conceptually, they are in line with the Guidelines because they translate the existing binding state obligation in the Decision of the OECD Council on the *OECD Guidelines for Multinational Enterprises* into specific, now legally binding requirements for business. \

## PERSPECTIVES FOR THE FUTURE: IS BETTER GOOD ENOUGH?

Although substantial progress in fostering responsible business conduct was achieved over the last seven years further work is needed to implement two elements of the 2011 Revision which are key for the long term credibility of the Guidelines.

First, the application of supply chain-wide corporate due diligence beyond the human rights chapter is still in its infancy. In this context, the Dutch NCP is currently considering a submission by a group of NGOs asking for a review of ING Bank's disclosure policy on its and its clients' carbon emissions and the publication of a target limit for such emissions in accordance with the Paris Climate Agreement. Hence, the Paris Agreement on Climate Change (PACC) is not reflected in the Guidelines and there is currently no internationally agreed guidance or standard on what is expected from a financial institution with regard to climate-change specific due diligence and the related disclosure. As a result, the Guidelines hardly answer some of the pertinent questions that an NCP may be faced in such a context.

While the Guidelines are a living instrument, which leaves NCPs and eventually the Investment Committee<sup>16</sup> with some leeway for their interpretation, milestones such as the PACC will need to be adequately incorporated with the next revision. In addition, substantive efforts are necessary to operationalise risk-based due diligence in all matters covered by the Guidelines that are related to adverse impacts. So far, these due diligence requirements did not apply to the Chapters on Science and Technology, Competition and Taxation<sup>17</sup>. This finding will however have to be revisited given recent international developments. For the Science and Technology Chapter new regulatory developments, for example on intellectual property and access to medicine, will be relevant. For the Chapter on Taxation it needs to be assessed whether a consensus has emerged from recent discussions on tax avoidance and illicit flows. Potentially relevant work to be evaluated for consideration has been done for instance by the OECD/G20<sup>18</sup>, the Financial Actions Task Force, by several UN bodies<sup>19</sup>, and in the context of Target 16.4 of the UN Sustainable Development Goals (SDGs).

Ideally, such an update of substantial criteria for due diligence would go hand in hand with the discussion of tools for states on how to monitor compliance with due diligence. What could be relevant indicators? Are there examples from member and adhering countries that could serve as a first step to define best practices?

A second focus for the future will be the NCP system. It raised high expectations and one can discuss at length whether the glass is half full or half empty. As a matter of fact the expectations have so far only partially been fulfilled. The NCP system as it currently stands can – by design – not fulfil all the requirements for effective, state-based non-judicial remedies according to the UNGPs.

Institutionally, coordination in cases where several NCPs are involved could be improved by defining clearer procedures for coordination. This will trigger the related question to what extent NCP procedures may be further aligned with a view to levelling the playing field. Elements to be considered include the transparency of proceedings and the publication of initial assessments and final statements. An exchange among member states and adhering countries on the consequences of non-participation and/or non-compliance with NCPs' procedures could assist in identifying best practices for fostering the Guidelines' effectiveness.

Last but not least, as already George Marshall noted in his seminal speech in 1947, we need to know what the reactions of the people are. Do businesses know about the Guidelines? The Dutch<sup>20</sup>, Danish, Norwegian<sup>21</sup> and most recently the Swiss NCP as well as BIAC<sup>22</sup> conducted surveys to obtain a clearer picture. Despite their different methodologies, all these studies conclude that the Guidelines are not that well known, particularly among small and medium sized enterprises. The Swiss survey showed that the topics covered by the Guidelines are recognised by the majority of business but rather addressed under the umbrella of the much better known SDGs. One of the explanations offered is that the SDGs would pursue a more

positive, future and outcome-oriented approach than the Guidelines which were perceived as an instrument for sanctioning past behaviour. Obviously, such a conclusion overlooks the fundamentally different nature of the Guidelines as a business-oriented set of rules with a fully-fledged non-judicial grievance mechanism and the SDGs as a more programmatic policy instrument. It seems therefore clear from all the surveys that the promotion of the Guidelines needs to be intensified. Since almost all NAPs mention the Guidelines their implementation offers a window of opportunity for promoting the Guidelines.

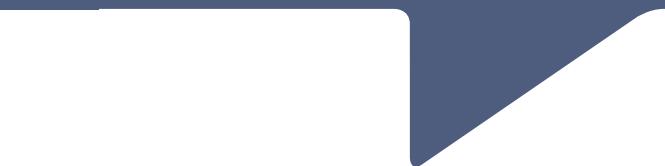
In conclusion, policies for responsible business conduct have substantially improved with the 2011 revision of the Guidelines. Thus, it seems safe to say that most of the equation's policy part has reached its objective; we do have better policies in place. However, these policies have not yet completely reached the rights-holders on the ground. This is where we should focus on now: *Bringing better policies to life*.

## NOTES

1. The opinions expressed in this article are the author's own and do not reflect those of the Swiss NCP or its Advisory Board.
2. OECD, 50<sup>th</sup> anniversary vision statement, C/MIN(2011)6, Paris, 25-26 May 2011.
3. Commentary on General Policies, para. 14.
4. G7, 'Leaders' Declaration G7 Summit' G7 Summit (Elmau 7-8 June 2015) 6.
5. Specific instances were filed under the revised Guidelines after June 2011: OECD database on specific instances (<http://mneguidelines.oecd.org/database/>).
6. Commentary on General Policies, para. 14.
7. Belgium, Chile, Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Poland, Spain, Sweden, Switzerland, United Kingdom, United States.
8. Colombia, Lithuania.
9. A list of national action plans to implement the UNGP can be found here: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.
10. For details see Christine Kaufmann, National Contact Points and Access to Remedy under the UNGP – Why Two Can Make a Dream so Real, in: Nicola Bonucci & Catherine Kessedjan (eds), *40 ans des lignes directrices de l'OCDE pour les entreprises multinationales* – 40 years of the OECD Guidelines for Multinational Enterprises, Paris 2018.
11. *Deutsche Bundesregierung, Nationaler Aktionsplan Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020* (German National Action Plan for Implementing the UN Guiding Principles on Business and Human Rights), p.12.
12. New Articles L225-102-4, L225-102-5 Code de commerce, introduced by the Loi 2017-399 (*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 27.3.2017), available (in French) at: [http://www.assemblee-nationale.fr/14/dossiers/devoir\\_vigilance\\_entreprises\\_donneuses\\_ordre.asp](http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp).
13. Modern Slavery Act 2015, <http://www.legislation.gov.uk/ukpga/2015/30/part/1/enacted>.
14. *Wet Zorgplicht Kinderarbeid* available (in Dutch ), [www.eerstekamer.nl/wetsvoorstel/34506\\_initiatiefvoorstel\\_kuiken](http://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken).
15. An unofficial English version of the initiative is available at: <http://konzern-initiative.ch/initiativtext/?lang=en>.
16. Amendment of the Decision of the council on the OECD Guidelines for Multinational Enterprises, 2011, para. II.4.
17. Commentary on General Policies, para. 14.
18. OECD/G20 Base Erosion and Profit Shifting (BEPS) Package.

19. Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights 15 January 2016, A/HRC/31/61; Committee on Economic Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24.
20. <http://www.vbdo.nl/files/news/VBDOReportOECDGuidelinesresearch.pdf>
21. NCP Norway: Knowledge of the OECD Guidelines and the NCP among Norwegian multinational enterprises, Ipsos MMI, August, 2013
22. <http://biac.org/wp-content/uploads/2015/06/FIN-15-06-BIAC-NCP-Survey-Discussion-Paper1.pdf>

# An external view of the OECD Working Party on Responsible Business Conduct and its Chair



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## INTRODUCTION

The OECD is today acknowledged to be one of the leading institutions, alongside the United Nations (UN), the European Union and the Council of Europe with a clear commitment for responsible business conduct (RBC). As this has not always been the case, it is useful to explore some of the key turning points and actors without whom this transformation would not have been possible. The essay will focus on the significance of the elaboration and provision of material content for RBC concepts and principles – the so-called unpacking of ideas and principles – under the guidance of the Working Party on RBC and its iconic Chair, Roel Nieuwenkamp.

Up until 2011, the approach of the OECD to RBC was a defensive and rhetorical one as reflected in the earlier iterations of the OECD Guidelines for Multinational Enterprises (Guidelines) alongside the failed Multilateral Agreement on Investment. This character and reputation of the OECD is similarly confirmed by its members' reaction to the proposal in the 1980s for the UN for a Code of Conduct for Transnational Corporations, which reaction, some scholars have suggested, provided the initial motivation for the original Guidelines in 1976. With the benefit of time, knowledge and good leadership, this rather unfortunate reputation has been transformed to the attractive and, one may argue sustainable role carved for the OECD today.

The difference since 2011 came with the adjustment of value emphasis from free market economic vision to one based on the humanization of the global economy. The change was motivated by a variety of factors including the lessons from the increasing integration of world economies and the policy consensus hatched by the UN under the Global Compact and the UN Guiding Principles on Business and Human Rights (UNGPs). Indeed, the major milestone in this respect is marked by the adoption of the fifth iteration of the Guidelines in 2011 in which corporate respect for human rights became a primary policy objective.

## MAKING RESPONSIBLE BUSINESS CONDUCT OECD-RELEVANT

As with many policy instruments, the Guidelines, including the 2011 revisions, set out broad concepts and general ambitions and expectations that require practical operationalisation. These broad ambitions and concepts need to be operationalised into practice and this is the point at which the contribution of the Working Party on RBC represents an important turning point in the role of the OECD. This is especially true because the RBC platform for the operationalization of the Guidelines represented an entirely nouvelle approach to the conduct of business for which internal policy coherence was critical. Communicating the value and significance of RBC within an organisation with a track record of representing and engaging with business in an entirely different way is a challenge in itself. Under the stewardship of its Chair, the Working Party transformed the profile and place of RBC from a peripheral matter into a central theme in the work of the OECD.

The credibility of the RBC strategy at the OECD rested on its alignment with other international initiatives such as the Global Compact and the UNGPs. In this respect, the structural and practical robustness of the OECD approach to the subject which the Working Party had crafted has been useful but it is the outreach to partners such as the UN Working Group on Business and Human Rights, the European Union institutions, the Council of Europe, the Association of Southeast Asian Nations and the Organisation of American States that helped to embed the OECD's RBC message in the activities of partner institutions. The effort and the success to establish such important partnerships has been the responsibility of the Chair of the Working Party who has travelled far and wide and participated in numerous meetings, workshops, conferences and forums to share the new OECD vision on RBC.

## UNPACKING

Whilst working to ensure policy coherence within the OECD as well as normative alignment with external partners, the Working Party has remained committed to its core mandate to operationalise its vision and strategy for RBC and for this it has kept a tight focus on the needs and expectations of its primary constituency, the member states. This is especially important because the member states in turn have responsibilities to local constituencies, in particular, multinational enterprises (MNEs). Keeping faith with its core mandate helped to define another important milestone in its effort to operationalize the general RBC standards by elaborating guidance of necessary actions for MNEs that seek to operate responsibly.

The Working Party made a firm determination that due diligence is a key concept in the effective operationalization of the RBC standards flowing from the Guidelines and so it set about to unpack this concept. This is particularly useful also because the decision responds to a clamour from stakeholders for guidance on the expanded meanings of these terms as set out within the RBC framework. The concept of due diligence as part of RBC faced a difficult challenge of looking beyond the traditional understanding of risks to business enterprise and also taking account of risks, dangers and challenges to other stakeholders including vulnerable groups. Due diligence in this context was therefore as much a benefit as it is a challenge to the enterprise itself. It acknowledges the underlying ideas for RBC discourse that the business enterprise itself can be a source of adverse impacts that need to be taken into account in the due diligence assessment. This entirely new representation of due diligence needed to be communicated effectively and convincingly if it was to be accepted by the constituents of the OECD.

In addition, there is further value in pressing for this wider understanding of due diligence because it is the only way to align the policies and strategies of the OECD with the emerging common understanding of the concept as it also appears in other international standards such as the UNGPs. This way, the business enterprises called upon to implement RBC standards in different contexts will have a consistent and unified task. Furthermore, the unpacking of the due diligence standard will contribute to levelling the business playing field.

The question arising from this decision to focus on due diligence as a starting point for the operationalization of the RBC standards by the Working Party took a nuanced and pragmatic understanding of the reality of modern business as delivered through supply chains. The Working Party further reflected on the importance of appreciating the differences in the expectations among different sectors and so proceeded with sector-specific supply chain due diligence guidance. The choice of emphasis was, no doubt, influenced by events in the global business environments such as Rana Plaza and the trading in conflict minerals. The Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear sector, the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas emerged from this process of unpacking the concept. Other Guidance such as the Guidance for Responsible Agricultural Supply Chains, developed in partnership with the Food and Agricultural Organization follow the same rationale.

The value of these due diligence guidances lies beyond the unpacking of their meaning and practical implications for business enterprises alone because they contribute to their legal and social significance as well. Three dimensions of tangible value come to mind in this respect. Firstly, the National Contact Points (NCPs) established to oversee the implementation of the Guidelines benefit from the interpretation reference point by which to assess the compliance of enterprises with their responsibilities. The interpretative guide that the elaboration of standards provides will help to ground the reasoning of the NCPs' decisions in clear and predictable arguments. This should in turn uplift the credibility and respect for the NCP system. As a source of remedy as envisaged in the UNGPs and similar instruments, the profile of the NCPs has been enhanced considerably on account of the vision and activities of the Working Party, especially with the introduction of the peer review system introduced at the behest of its Chair and on the recommendation of the Working Party.

Secondly, it is arguable that the core business enterprise constituency of the OECD makes the emphasis on due diligence predictable but there is more to RBC than due diligence and the Working Party has been acutely aware of this. In response, its Chair has guided the attention of interrelated significance of other aspects of RBC including access to remedy and National Action Plans (NAPs) with due diligence. Concerning NAPs, the Chair of the Working Party personally (but on behalf of the Working Party) initiated regular review workshops in collaboration with the UN Working Group, on the margins of the RBC Annual Conference to bring together government representatives, including the drafters and implementers of NAPs in the OECD member countries to share their experiences and lessons on the subject. Beyond the support and assurances that this provided the participants, the regular meetings enabled participants to join in the wider RBC conversation of the Annual Conference and so help mould and communicate the vision of the Working Party of the contribution of the OECD to the field. In this sense to emphasise the relationship between the OECD flagship of due diligence and the states' NAPs. From the perspective of the UN Working Group on Business

and Human Rights, the opportunity to co-convene and co-chair the annual NAPs meetings was especially valuable because of the evidence of progress it helped to gather and also to get a realistic understanding of what it takes, in practice, to develop and implement a NAP. More recently, the door to these OECD NAPs review meetings has been opened for non-OECD government representatives.

Finally, the project to unpack the concepts in the Guidelines has been a source of inspiration to international actors to complement or follow the work of the OECD towards a level playing field for all stakeholders.

## INSPIRATION

In the spirit of institutional alignment with the objective of achieving a level playing field, the OECD strategy of unpacking the RBC concepts has inspired other international mechanisms to follow the practice of the OECD. The UN Working Group on Human Rights has embarked on the unpacking of the UNGPs using its thematic reports and the development of Guidance for States and other stakeholders. In this respect, the UN Working Group has developed Guidance for NAPs and prepared thematic reports seeking to unpack UNGP 4 concerning the State-Business nexus and on UNGP 14 on the challenges facing small and medium-sized enterprises' implementation of the UNGPs. Similarly, a recent report prepared for the UN General Assembly has sought to unpack the concept of remedy in the UNGPs. The thematic reports currently under consideration by the UN Working Group on the subjects of due diligence, public procurement and the gender lens have all been inspired by the value of unpacking concepts.

## CONCLUSION

The world of business and human rights has a lot to be grateful to the Working Party on RBC and especially to its Chair, for the passion, commitment and the transformation of the field within the OECD and beyond. Under the visionary superintendence of its Chair, the Working Party has afforded the OECD more than a credible role in this field. Indeed, the OECD now has a leadership position in the field from where it commands the attention of other international institutions and all stakeholders. In addition, the vision and strategy has brought the OECD out of its previously parochial, defensive and rhetorical (and dare one say, unproductive) position to the more constructive and sustainable one that it has adopted today. Furthermore, with the support of the Working Party, the OECD is now a fully recognised and appreciated partner in the search for a sustainable approach to the conduct of business in the modern society. This represents an immense success in rather difficult and complex circumstances.

With the departure of Roel Nieuwenkamp as Chair, one may be permitted to ask the unavoidable question of what will become of the OECD's approach to RBC in the future. Fortunately, the success that has been achieved and the depth of foundations that have been laid for this subject, one may happily conclude that RBC now forms part of the core fabric of the identity and work of the OECD and so not so easily reversed. It is true that the loss of Roel Nieuwenkamp is a big one but the future of RBC at the OECD can today be said to lie beyond the actions of one individual. The hope is that the Working Party will continue to evolve in its ambition to contribute to balanced and sustainable RBC policies and guidance at the OECD that the rest of the world may emulate. This expectation is not an exaggeration because, whilst the next Chair of the Working Party has big boots to fill, they can be assured of the goodwill and support of other actors such as the UN Working Group on Business and Human Rights on account of the gains made over the last few years through Roel.

# The arc of triumph and transformation of the OECD Guidelines:

Quo Vadis Triumph?  
Into a era of transformation!  
Triumphi quo vadis?  
Temporibus transmutatio parere



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The year 2011 was indeed an auspicious year. It was marked by what would come to be understood as two germinal events. The first was the endorsement of the United Nations (UN) Guiding Principles for Business and Human Rights (UNGPs); the second was the revision of the OECD Guidelines for Multinational Enterprises (OECD Guidelines). These, together, marked the most visible effects of the “Revolution of 2011.” Both had their genesis in recognition of the substantial transformations of international business as the structures of globalization became clear after 2000. Both represented multi-year efforts and symbolized the transformation of the language and outlook of economic activity, of the enterprises that engaged in them, and of the states that to some extent regulated their conduct within (and to some extent beyond) their territories. Both also represented efforts to respond to criticisms by all stakeholders seeking some sort of regulatory coherence in an area that was both new and increasingly central to the legitimate operation of global trading and investment orders. The UNGP project was overseen by John Ruggie as UN Special Representative and Roel Nieuwenkamp, then Director of Trade Policy & Globalization for the Dutch Ministry of Economic Affairs, chaired the equally important effort of the 2011 update of the OECD Guidelines. It is now impossible to consider one without the other. While many thought at the time, despite substantial naysaying that these events signalled a fundamental shift in the approach to law, regulation, and the construction of supra national rules based economic orders, I do not think any of us understood the extent of the importance of these efforts, the influence of which is only now being understood.

The UNGPs have become the baseline standard around which the human rights obligations of states and enterprises are framed and through which business and human rights advances are measured. The OECD Guidelines provide the most comprehensive structures for responsible business conduct — the crown jewel of a complex baseline set of governance principles that includes the G20/OECD Principles of Corporate Governance (2015) and the OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015). The UNGPs catalyzed the 2011 revisions and the OECD Guidelines served an important guiding role for the development of the UNGPs. Both were meant to be situated within what was then (and is still now somewhat more contentiously) labelled the corporate social responsibility field (with its three areas of focus: philanthropy, sustainability and human rights). Both were meant to frame but not displace private platforms for action (for example, the UN Global Compact initiative), or private tools for implementing the development of tools for implementing corporate social responsibility related activity (for example, ISO 26000), or private initiatives (such as enterprise codes of conduct and due diligence systems).

Each has served as a catalyst to substantial transformations in ways states, enterprises and civil society approach issues of the duties of states, the responsibilities of enterprises and the obligations of individuals and civil society both within states and in the transnational space within which global economic orders are emerging. From each, states, enterprises and civil society organs have sought to adapt their own governance and to develop credible and effective systems of managing economic activity around human rights, sustainability and

ethical principles that weave together traditional national and public international law, with new and emerging systems of transnational governance, regulatory governance, and the self-regulatory systems of non-state organs. Roel played an instrumental role in this development during its critical formative stages and his handiwork will be felt for a long time to come. This is especially the case with respect to the most challenging aspect of the OECD Guidelines — the determined and clear-headed efforts to develop and offer a means of finding, if not remedy, then at least guidance, through the National Contact Point (NCP) Specific Instance process. If the OECD Guidelines are substantive principles in search of a jurisprudence, then the NCP mechanism ties to a substantive framework and the Specific Instance process promises a means of providing an engaged and legitimating environment in which shared principles can move from abstraction to application. That advance, the reconstitution of the NCP and its Specific Instance process, marks the greatest triumph, its greatest point of transformation, and the most significant unfinished business of the “Revolution of 2011.”

## MISSION ACCOMPLISHED?

At the time of its adoption, Hillary Clinton, then US Secretary of State, noted: “If you look at these guidelines, they will be helping us determine how supply chains can be changed so that it can begin to prevent and eliminate abuses and violence. We’re going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, is absolutely essential”).<sup>1</sup> She was right in several key respects. The first was the leadership role of the OECD Guidelines, especially after 2011. The second was the focus on supply chains rather than on enterprises, an extraordinary transformation of focus. The third was the limited role of states in the process of providing a regulatory base for operationalizing the OECD Guidelines. And the fourth was the central importance of using enterprises (not the state) as the organizational apparatus of the supply chain.

The OECD Guidelines are voluntary standards that are consistent with laws and international instruments to encourage responsible business practices. Though not legally binding on enterprises, many aspects of the OECD Guidelines can be regulated by governments. Though the OECD Guidelines should not act as a substitute for domestic regulation, they can serve as a basis for internationalised readings of state obligations, especially in those territories suffering conflict or weak governance. And that guidance is directed to the enterprises operating in those areas rather than necessarily or solely to those states (or others) (Concepts and Principles para 2). The ultimate objective is to provide a basis, necessarily grounded in international legal-governance frameworks, within which transnational enterprises may, like states, contribute to economic, social and environmental progress. This requires the establishment of partnerships between enterprises and states - and that, in turn, requires management at the supra national level. But that management cannot be understood so much as law but as governance, an international relation without law. It is in the framing of these relationships between dissimilar enterprises - states and businesses - that the OECD Guidelines are most

useful. "Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of enterprises, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration" (OECD Guidelines Preface). But that help cannot substitute for the OECD Guidelines themselves, and the construction and management of a governance space beyond the state.

The definition of *multinational* enterprises is not of concern for the OECD Guidelines. Multinational actors could represent public, private, or hybrid institutions. The distinction lies however in that the OECD Guidelines do apply to all organizational structures within a multinational enterprise. And though smaller and medium sized enterprises do not have the same economic advantages and resources as conglomerates, they also have the responsibility to adhere to the OECD Guidelines to the extent possible. And yet this blurred focus on the institution of the multinational enterprise makes it possible to shift focus from the institution, as the apparatus through which governance is organized, to the supply chain, which is the place where the objects of regulatory concern tend to occur. And indeed, from the kernel of conceptual transformation from enterprise to supply chain has come some of the most interesting new work of the OECD — its Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; its Responsible Supply Chains in the Garment and Footwear Sector; its OECD-FAO Guidance for Responsible Agricultural Supply Chains; its guidance on Responsible business conduct in the financial sector; and more to come (see <https://mneguidelines.oecd.org/duediligence/>).

All of this suggests a complex hybridity that itself aligns closely with the complexities of polycentric public-private governance that in the aggregate begins to outline the structures of global regulatory systems. The curious hybridity exemplifies how the OECD Guidelines operate. They are not law in the conventional sense, but represent a consensus of appropriate behavior norms for profit making enterprises. Like the Universal Declaration of Human Rights (<http://www.un.org/en/documents/udhr/index.shtml>), the OECD Guidelines have become the kernel around which consensus about international behavior standards for corporations have developed. They are overseen by the OECD member states through an agency designated for the purpose. But that agency applies the consensus norms represented by the OECD Guidelines, even where these may not be accepted within the domestic legal order of that state. The application facilitates private efforts by stakeholders who are free to bring complaints against companies that are mediated, using OECD Guidelines standards, for that purpose. States oversee programs designed to make it easier for private parties to determine violations of rules, which have no legal effect within the states whose governments now provide the remedial mechanisms for the determination of violations in accordance to standards and rules that are international and public in character. The result is a hybrid arrangement between domestic, international and private actors. "The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting" (MNE Guidelines 2011, Foreword, <https://mneguidelines.oecd.org/>).

## COHERENCE AND INTERMESHING WITH OTHER SUBSTANTIVE GOVERNANCE NORMS

This mission requires a framework for facilitation, but also one that is consonant with the philosophy and approach of the substantive elements of the OECD Guidelines themselves. To that end the NCP mechanism, in general, and the Specific Instance tool, specifically, provides an effective means. The NCP system working through layers of Specific Instance actions provided the necessary jurisprudence for a system of behavior conduct without a center. That this was commonly understood was evident by the strong focus on the NCP in the consultations leading to the 2011 revisions and thereafter to the assessments of those changes in the years following. But the form of the NCP mechanism itself required a delicate balancing. On the one hand, it could most usefully serve as a crucial element in fleshing out the normative standards that constituted the build of the OECD Guidelines themselves. By 2011, the NCP mechanism appeared to exhibit some of the characteristics of a jurisprudence in search of coherence. It had developed basic principles for application of its procedural rules, including rules of standing; some of its reports were published and widely circulated, and some of its reasoning was persuasive. The “output of quasi-judicial and interpretive statements … will continue to contribute, incrementally, to the institutionalization of transnational systems of multinational regulation; systems that will have legal effect whether or not this is law as classically understood. These cases continue an effective process of operationalizing soft law to produce the effects of hard law beyond the state, without directly challenging state authority. The OECD system is progressing through this form of institutionalizing quasi-judicial organs in parallel with other soft law operationalizing endeavors”.<sup>2</sup> On the other hand, the OECD Guidelines are not binding. They remain voluntary principles, “recommendations addressed by governments to multinational enterprises” (OECD Guidelines Preface). Key states would be likely to object to the juridification of the OECD Guidelines or to the establishment of global courts detached from the judicial branches of their domestic governmental apparatus.

By the middle of 2017, Roel Nieuwenkamp himself was able to state: “The successful outcomes of the Heineken, Kinross and Statkraft cases<sup>3</sup> have recently demonstrated that the National Contact Point system<sup>4</sup> for the OECD Guidelines on Responsible Business Conduct can be effective for providing access to remedy in the business and human rights domain”.<sup>5</sup> And on that basis he could conclude looking both back to the NCPs’ accomplishments and forward to the challenges that remained: “My conclusion on the effectiveness of NCPs as a non-judicial grievance mechanism on business & human rights is that the glass is half full, but we must take active steps to fill it to the brim. Functioning NCPs which currently have strong track records with respect to outcomes in cases can serve as mentors to those lagging behind. Furthermore, all NCPs can look to recent successes for lessons learned to ensure that remedy in the context of cases handled by NCPs is routine, rather than rare” (*Ibid.*).

And, indeed, it is as a remedy embedded within webs of national remedies, that the NCP Specific Instance procedures appear to have their greatest potential. The recent use of the NCPs as a means of effecting significant public-private partnerships and agreement, for example with the Dutch Banking Sector Agreement<sup>6</sup> suggests the future use of the NCP Specific Instance tool beyond the crafting of yet another quasi-judicial mechanism. But more interesting has been the use of the NCP mechanism as an aid to national litigation — the availability of higher profile NCP proceedings in OECD states is especially useful where the breaches of the OECD Guidelines (and local litigation) occurs out of sight of developing states and their media (for example Vedanta<sup>7</sup>).

## PROSPECTS FOR THE FUTURE

The prospects for the future build on the challenges of the present. And these, in turn, return us to the insights of then Secretary Clinton at the 50<sup>th</sup> Anniversary Commemoration of 2011. The leadership role of the OECD Guidelines, the focus on production chains rather than on the enterprises that oversee these chains, the limited though critical role of states, and the central role of the enterprise at the center of the nexus of transnational economic activity and the institutional apparatus through which the “soft” power of the OECD Guidelines can be hardened and globalized should serve as the framework for future revisions. These four foundational insights about the character and role of the OECD Guidelines, ushered in with the changes of the 2011 Revisions, can realize their transformative potential in any future revisions — can carry forward the vision of the “Revolution of 2011.”

The leadership role of the OECD Guidelines can be furthered in a number of ways. The first is through the ongoing project of keeping its provisions current. The current multi-stakeholder consultations on the future revision of Chapter IV, “Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes”<sup>8</sup> of the Transfer Pricing Guidelines, and the future revision of Chapter VII, “Special Considerations for Intra-Group Services”,<sup>9</sup> of the Transfer Pricing Guidelines serve as a useful template. But leadership also requires a greater ability to move NCPs toward common consensus on their role in general and on the use of Specific Instance proceedings in particular. That has been a key challenge with substantial potential adverse consequences — from the development of NCP “power centers” in states with strong and active NCPs, to the effective closing off of NCPs, which develop barriers to accessibility either formally or through their habits of practice. National variation around a core is the essence of leadership, but the absence of or a weak core undoes much good work since 2011. Lastly, greater leadership will be required to embed sustainability goals into the OECD Guidelines — and more importantly to enmesh sustainability into the core current substantive areas of OECD concern.

The focus on production chains has already begun to bear fruit. In a sense, the OECD Guidelines have always been about the coherent management of supply chains across borders. A future challenge will center on the need to move beyond the traditional relationships between law and a natural or juridical person on which it is applied, in this case the multinational enterprise, to a recognition of the importance of drawing a direct regulatory connection between law (broadly conceived) and crafting one between regulatory structures and production chains. The supply chain guidance is a strong step in the right direction. But the OECD may need to tackle the complex transformations of states (which now regulate and operate commercial enterprises), enterprises (that operate commercial enterprises and to which governmental responsibilities are being devolved) to civil society (which begins to serve as substitute representative bodies of key stakeholders in economic relations).

The OECD Guidelines will likely have to deal with the state. The state, of course, is the foundation of the OECD (itself a multilateral international organization). But the state, and the state system itself is changing. At some point, it will be necessary to consider the way that China's One Belt One Road Initiative and the US America First Project will substantially reshape the nature of global trade and trade regimes. Those changes will necessarily create opportunities for OECD Guidelines to fill gaps and serve to provide a framework for translation and coherence. And, of course, a number of important states require outreach.

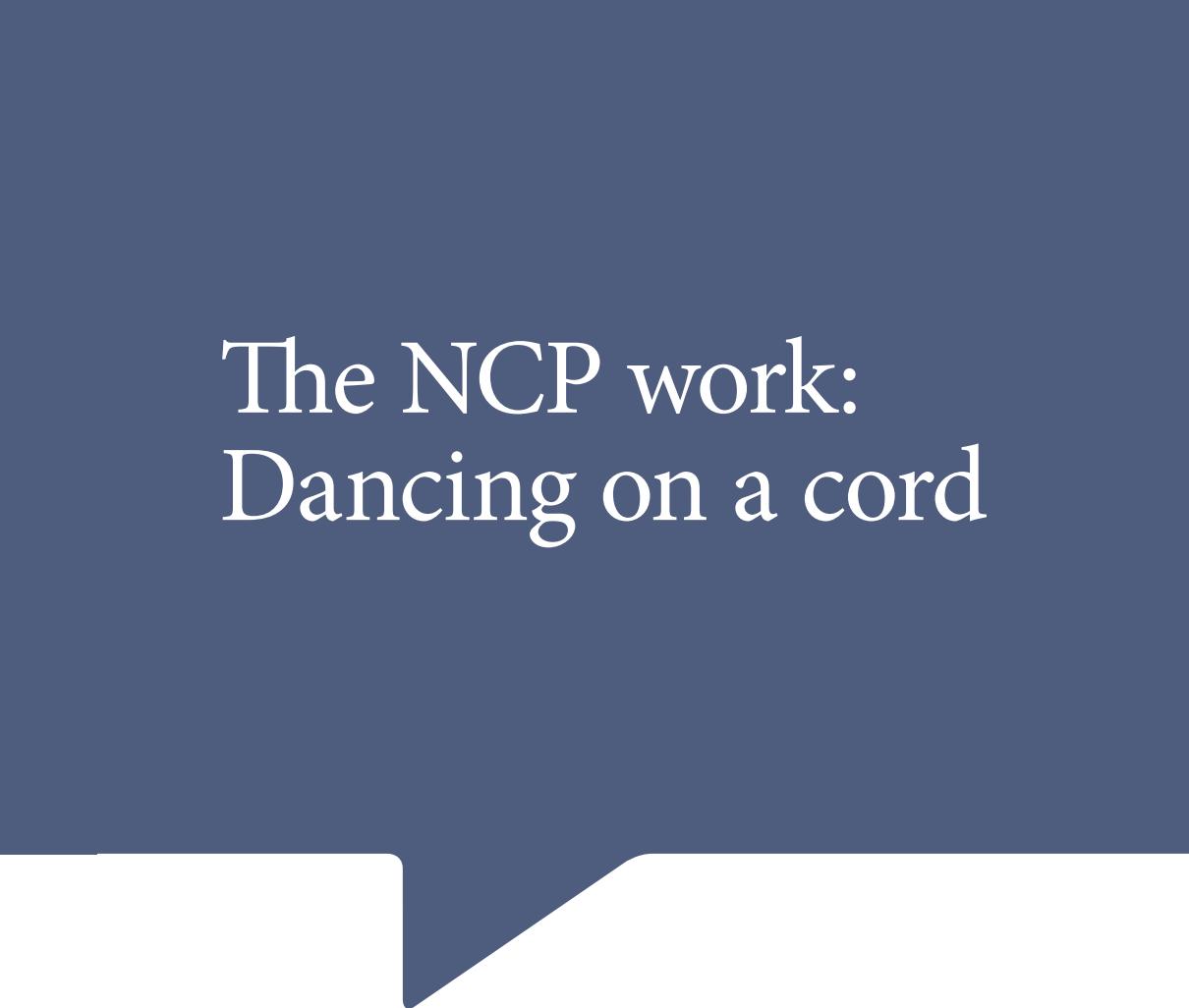
Lastly, the focus on the enterprise (within production chains) remains a central element of the OECD Guidelines. The trend toward governmentalization of multinational enterprises continues. Enterprises will continue to grow as centers for governance within their production chains. To some extent they will serve as important a role as states within the sphere of their control. For that reason, the rule of law principles at the center of state-based law legitimacy will likely have to find expression in enterprise governance regimes as well, including those of the OECD Guidelines themselves.

The governmentalized enterprise will also require heightened attention to accountability measures, foremost among them due diligence. And it is here that the essay comes full circle. One of the great sources of innovation for accountability and due diligence is the UNGPs, now written into that framework as human rights due diligence. And so one sees the seeds of the "Revolution of 2011" bearing fruit and the work for which Roel Nieuwenkamp laid the foundation now serving its instruments well to guide the project that is the OECD Guidelines into the next stage of its development.

## NOTES

1. Commemoration of 50<sup>th</sup> Anniversary of OECD Guidelines, Speech by Hillary Rodham Clinton, 25 May 2011, <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/05/164340.htm>
2. Backer, 2008 (10(1) Melbourne Journal of International Law 258))
3. Heineken (<http://mneguidelines.oecd.org/database/instances/nl0027.htm>)  
Kinross (<http://mneguidelines.oecd.org/database/instances/br0020.htm>)  
Statkraft (<http://mneguidelines.oecd.org/database/instances/se0004.htm>)
4. <http://mneguidelines.oecd.org/ncps/>
5. Outcomes from OECD National Contact Point cases: More remedy than you may think!, blog by Roel Nieuwenkamp, 12 May 2017. <https://www.permanentrepresentations.nl/latest/news/2017/12/5/blog--outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think>.
6. [www.ser.nl/~media/files/internet/publicaties/overige/2010\\_2019/2016/dutch-banking-sector-agreement.ashx](http://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx)
7. <http://lcbackerblog.blogspot.com/2009/11/part-ii-oecd-vedanta-indian-supreme.html>
8. [www.oecd.org/tax/transfer-pricing/scoping-of-future-revision-of-chapterIV-of-the-transfer-pricing-guidelines.pdf](http://www.oecd.org/tax/transfer-pricing/scoping-of-future-revision-of-chapterIV-of-the-transfer-pricing-guidelines.pdf)
9. [www.oecd.org/tax/transfer-pricing/scoping-of-future-revision-of-chapterVII-of-the-transfer-pricing-guidelines.pdf](http://www.oecd.org/tax/transfer-pricing/scoping-of-future-revision-of-chapterVII-of-the-transfer-pricing-guidelines.pdf)

# The NCP work: Dancing on a cord



*Dr. Maartje van Putten*

Chair National Contact Point, The Netherlands

**P**ortraits of the Royal couple of the Kingdom of the Netherlands prominent on the wall. The location is the central meeting room of the Dutch Embassy in Kampala Uganda. A delegation of the Dutch beer company Heineken from Amsterdam, a delegation of former workers of a Heineken subsidiary Bralima based in Bukavu in the Democratic Republic of Congo (DRC) and a team of the Dutch National Contact Point (Dutch NCP), are seated around the table and discuss a road map that finally should result in a solution for grievances expressed by the former workers. The atmosphere is good. Everybody agrees it has taken too long and they all want to settle and close an old and sensitive case, in OECD terminology a ‘Specific Instance’. I definitely recall a moment we were stuck with a very specific question concerning the interpretation of OECD procedures and how easy and convenient it was to pick up the phone and call Roel Nieuwenkamp in Paris.

These are the moments one realizes how important it is to have a strong ‘backyard’ or central secretariat for the National Contact Points (NCPs, or NCP), delivering substantial and coherent support to all the NCPs. The final result in this case was remarkable; an agreement between 150 former Bralima workers, dismissed during the genocide around 1992-1993 in Ruanda and the DRC, whose rights as former workers were allegedly ignored at the time. With a young generation of Heineken, and the desire of the workers to close the case, the Dutch NCP was able to assist the parties in such a way that an agreement was reached in 2017. The Dutch government provided a budget making it possible for the workers delegation and the NCP to travel to Kampala and do preliminary field research in Bukavu, the location of the factory. It is of crucial importance for NCPs to be able to physically go where the adverse impact occurred (*locus delicti*).

It is an achievement and even amazing that all OECD member governments as well as eight non-OECD adhering governments decided to further strengthen the function of the NCPs while adopting the 2011 OECD Guidelines for Multinational Enterprises (the Guidelines). It was agreed that the adhering countries ‘shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the issues that arise’. The NCPs are available for ‘the Business community, worker organizations, other non-governmental organizations (NGOs) and other interested parties’. The countries also agreed to ‘make available human and financial resources’ to the NCPs. However there is still a long way to go for most NCPs.

There are significant differences between the NCPs. In the Procedural Guidance of the Guidelines it is noted that countries have ‘flexibility in organizing their NCPs’. At one hand they have to be composed such that they can deal ‘with a broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner’. Thereafter the suggestion is given that ‘an NCP can have different forms of organization’ and some forms are spelt out such as: it can be a senior government official or a government office, an interagency group, a group of independent experts and representatives of the Business community, worker organizations and NGOs may also be included.

From then on many countries created their own NCP model and the outcome is rather divers. Most governments have a firm say in the functioning of the NCPs, not giving much room for independent outside stakeholders. Some countries probably do not have the 'right culture' or attitude to deliver the financial means for a well-equipped NCP that can do its work proper and impartial. The middle-income countries often have little financial resources available for the NCPs. It is questionable if similar cases always will be declared admissible by any NCP? In order to follow the OECD guidelines some governments appointed just one official (such as Sweden, Hungary and Colombia); an almost impossible position.

Other governments created a standalone probably more independent NCP while staff members and NCP management are government officials (such as the United States NCP). Somewhat similar is the NCP of the United Kingdom (UK). Government officials handle the cases, however there is an independent oversight Board, monitoring the work of officials. For the French NCP it is about the same. In some Northern European countries the NCPs core is a Panel of outside independent experts with different backgrounds (unions, employer's organizations, universities, et cetera). Staff members supporting the work of the Panel are government officials and their office is hosted by one of the Ministries (Dutch and Norwegian NCPs). The Dutch NCP has besides the four independent members advising members from four Ministries. The principal is to work in consensus however it is the independent Panel that takes the final decisions.

**I**n December 2016, following the 2015 G7 Leaders' Declaration, the German National Action Plan for Business and Human Rights adopted in that year and the feedback from stakeholders all together were the reason to restructure the German NCP. Today the German NCP has a staff of five officials based in a separate unit in the Federal Ministry for Economic Affairs and Energy. The separate unit provides a greater element of autonomy and more visibility. The NCP closely coordinates with an Inter-Ministerial Steering Group on all issues, including decisions on specific instances. The group is comprised of officials from seven Ministries. The German structure is somewhat similar to the Dutch structure with the difference there is not a core group of independent NCP members not being officials of government.

The substantial differences in the organizational structure, independence, final results of NCPs' efforts and financial resources ultimately is a risk of weakness for all. Multinational enterprises after all operate in a globalized world; an arena where the Guidelines, United Nations Guiding Principles on Business and Human Rights and other international standards should be standard. The Guidelines state that "NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence". The absence of an equal international level playing field in what one NCPs might declare a specific instance not admissible while another one does take up the case, is detrimental. The end results still differ a lot. To reach a standardized structure for all NCPs might take years if not decades. And it is crucial to have a strong OECD secretariat

in Paris to guide and support the NCPs globally. No doubt, this situation has triggered Roel Nieuwenkamp and members of the OECD Secretariat to work towards harmonization of the NCPs structure and work.

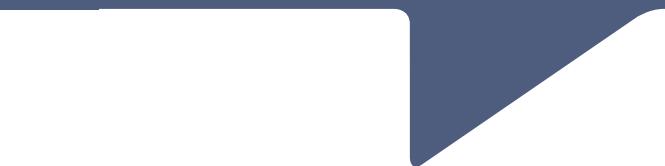
NCPs have become one of the most prominent non-judicial grievance mechanisms with the mandate to address notifications of 'specific instances' about the conduct of multinational enterprises. It was during the 2011 update of the Guidelines that the NCPs agreed to reinforce their joint peer learning activities including also voluntary peer reviews. The Dutch NCP was one of the first in 2011 followed by the Japanese NCP in 2012 and the Norwegian NCP in 2013. The objectives of the Peer reviews are two-fold. The first aim is to strengthen the performance and functioning of the NCP under Review by engaging with domestic stakeholders and peer NCPs, and secondly by contributing to the strengthening of the NCP system as a whole, by sharing lessons learned and good practices with the broader NCP community and in particular the NCPs contributing to the review process by sharing their comparative experiences during the Peer review week.

From its inception in 2001, the initial Norwegian NCP had a tripartite structure and consisted of members from Government (Ministries of Foreign Affairs and Trade and Industry), Industry (Confederation of Norwegian Enterprise) and other stakeholders (Confederation of Unions), located in the Ministry of Foreign Affairs. The 'Storting' (Norwegian parliament) changed the composition, administration and budget of the initial NCP. Since March 2011, a four-person expert panel operates independently from Government.

I have been involved in three reviews, Norway, Belgium and Germany and the review of Norway was the first. The Canadian NCP chaired the Peer review team with the Netherlands and Colombia as co-chairs and Belgium and the UK as additional members. As is today common in the peer review process, the team consulted relevant domestic stakeholders: government officials, union leaders, representatives of non-governmental organizations and last but not least large, middle and small businesses. These were well-organized closed sessions in the center of Oslo in what pretty frank and free discussions took place.

As mentioned above, it was a remarkable accomplishment that so many OECD countries agreed to establish an NCP. Fortunately the more independent NCPs remain independent in such cases. The impacts of international operating enterprises could be severe: in the field of human rights, the environment or for workers. The importance of such enterprises for their home countries (tax revenues, employment, prestige) makes it difficult for many governments to deal with it. And that is exactly the reason why the NCPs exist and should be supported by the OECD countries. The NCPs are the messengers and therefore need full support and the means from the OECD countries to do their work independently.

# Alternative approaches to strengthen the NCP function



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## INTRODUCTION

The OECD evaluation of the National Contact Point (NCP) function has identified interesting advantages. For example, NCP intervention has brought about many positive impacts such as agreements between parties (in one specific instance including payment of compensation and in other specific instances other forms of direct remedy), changes in management practices, clarification of the OECD Guidelines for Multinational Enterprises (Guidelines) and a catalyst for the use of leverage by the company involved.<sup>1</sup> That said, the NCP function also faces some challenges.<sup>2</sup> These are, amongst others, significant variations in the practice of NCPs in applying the guidance for specific instances, accessibility and overly stringent interpretation of criteria “material and substantiated” resulting in a high rate of non-acceptance of specific instances for further examination, overly restrictive definitions (such as the term “multinational enterprises”, “adverse impact”, “business relationship”), costs for parties to participate in mediation, good faith behaviour of the parties to the specific instance, parallel proceedings, delays, insufficient use of recommendations or determinations in final statements, and lack of clear or equitable procedures (OECD NCP Report, p.30 and pp46-56). Furthermore balancing confidentiality and transparency, cooperation between NCPs, and resource constraints are identified (OECD NCP Report, p.30). Most of these challenges are connected to the NCP procedure as such, except from cooperation between NCPs, parallel proceedings and resources issues.

This contribution will analyse alternative approaches, which means not regarding the NCP procedure as such, to enhance the NCP function. The NCP procedure as such has been analysed by many, including the OECD itself (OECD NCP Report). Thus, we will consider other avenues which may be connected to but do not regard the NCP procedure as such. One may consider these avenues as alternatives to the ones related to the NCP procedure as such. These alternatives approaches will be elaborated hereinafter. However, we will not discuss the resource challenges.

## TYPES OF ALTERNATIVE APPROACHES

### Referral to external dispute resolution options

The first avenue to strengthen the NCP function is the referral (with consent of the parties) to an external dispute resolution mechanism. This has been done by the Dutch NCP and the NCP of the United Kingdom (UK NCP). In the Privacy International v. Gamma International case, Gamma and Trovicor allegedly were selling –‘intrusive’- surveillance technology and training to the government of Bahrain, used against targeted named individuals to monitor their contacts through remote monitoring of their devices (human rights violations). The UK NCP was unable to assess whether the spyware products were sent to the named individuals and/or supplied by Gamma to the Bahraini authorities.<sup>3</sup> External mediation failed and no agreement was reached. Referred back to the NCP, it held that Gamma had not acted

consistently with provisions of the Guidelines and issued recommendations applying broadly to the enterprise's future trading, although Gamma had already stopped trading even though still formally incorporated in the UK. The NCP considered Gamma's overall engagement with the process unsatisfactory and in bad faith by providing no information. In the Heineken-case the Dutch NCP, after consultation with the parties, engaged an external mediator who has indeed reached agreement between parties.<sup>4</sup> The Dutch NCP found the complainants were seeking financial compensation. It made clear to the parties the NCP procedure is not a judicial procedure but a procedure aimed at reaching an agreement on the issues at stake and that the NCP did not have the power to decide on financial compensation. However, in its opinion facilitating a dialogue between the parties might assist in clarifying Bralima's responsibility towards its employees under the Guidelines. The same was true in connection with clarifying Heineken's independent responsibility under the Guidelines towards its subsidiary Bralima, in relation to the latter's operations in the DRC in the period 1999-2003.<sup>5</sup> The parties agreed to not disclose the content of the agreement. It has however been reported that the complainants received a total amount of USD 1.3 million from Heineken.<sup>6</sup> The case is internationally hailed as 'historical precedent'. This solution to externally mediate cases addresses the issue of the hybrid function of the NCPs on the one hand trying to find a solution between the complainant and the multinational enterprise involved and on the other issuing a final statement (which may include an analysis whether or not the multinational enterprise has complied with the Guidelines).

However, to date NCPs have only referred (with consent of the parties) to dialogue based mechanisms such as mediation. One may wonder whether referral to binding mechanisms may be an alternative too. Obviously, this would require consent of the complainant and the multinational enterprise involved. Such consent may be conceivable. For example, many large Dutch retailers are signatory to the Dutch International Responsible Business Conduct Agreement in the Textile Sector (Textile Agreement, or Agreement).<sup>7</sup> The signatories to this Agreement have accepted jurisdiction of the dispute resolution committee of the agreement.<sup>8</sup> It is well conceivable the complainant would also agree to engage in this mechanism. The dispute resolution committee issues a binding decision on the complaint.<sup>9</sup> The complaints committee will decide, having heard the parties, whether an adhering enterprise is acting in accordance with the agreement. Article 1.1 of the Textile Agreement refers to human rights due diligence as adopted in section IV.5 of the Guidelines and the OECD Guidance in the garment and footwear sector.<sup>10</sup> Thus, this mechanism assesses compliance with the Guidelines and supporting guidance and may even provide remedy through compensation for victims.<sup>11</sup> The Secretariat of the Agreement will monitor compliance with the decision as part of the assessment of the annual action plan of the enterprise involved.<sup>12</sup> Referral to other binding mechanisms may be conceivable as well. For example, the use of arbitration to solve human rights issues has been suggested.<sup>13</sup> Referral to arbitration may be an option too, if parties would agree to this (and the NCP may use its leverage to incentivize such agreement). It may be feasible agreement could

be reached in specific sectors on (contractual clauses for) a binding escalation mechanism, as happened in connection with the Dutch Responsible Business Agreements. Engagement in a binding mechanism may also be agreed upon by the parties to the dispute in connection with consent to engage in a non-judicial mechanism (such as the NCP) if this would prove to be unsuccessful.

### **Discovery, (external) fact-finding and the use of independent local facilitators**

Furthermore, an issue may be the assessment of facts in a specific instance. It is often hard for an NCP to assess facts in a foreign country where the alleged violation has occurred. The complainant and the multinational enterprise involved may have quite different views on these facts. For example, the Dutch NCP sometimes commits fact-finding missions to experts as it has done with environmental experts in the Shell-Philippines case. An interesting proposal has also been launched in connection with the Canadian Ombudsperson in the mining industry.<sup>14</sup> Fact finding by this ombudsperson may be facilitated through Canadian courts, as a complainant may file a request for discovery in order to substantiate its case with the ombudsman. If this request is granted the court will supervise this discovery and the results thereof may be used in the procedure with the ombudsperson.<sup>15</sup> This type of approach may also be implemented in connection with NCPs.<sup>16</sup> However, this approach may be feasible if documents in the domain of the multinational enterprise are needed to substantiate a complaint. Factual evidence regarding the situation on the ground and eyewitness statements may not be acquired in this way. A need may exist to acquire this type of information too.<sup>17</sup> Thus, the NCPs (or the procedural) rules may facilitate such an independent fact finding endeavour.<sup>18</sup> In connection with this one may consider a solution as is implemented in the Textile Agreement which entails provisions to hear witnesses in such a way they are protected from retaliation. This provision includes the use of an independent facilitator in exceptional cases.<sup>19</sup> The advantage of such a solution is that a local independent facilitator/investigator may be in a better position to generate trust with local inhabitants/victims and reach out to them in a manner consistent and appropriate with their local habits. This is pivotal to acquire meaningful input from these local inhabitants/victims. Thus, an opportunity for external fact finding or consultation by local facilitators may be an interesting alternative. Obviously this raises questions about resources for this type of approach, but we feel it may be worthwhile to consider. In connection with this information gathered through operational or local grievance mechanisms may also be used by NCPs if parties would consent to this.

### **The role of governments**

Governments of OECD member states may play an important role in strengthening the position of NCPs too. This is especially valid in connection with the participation of business in specific instances and the implementation of outcomes agreed upon. For example, governments may adopt policies which attach consequences to refusal of a multinational enterprise to engage with an NCP when a complaint is filed or to implement solutions that have been agreed upon.

This type of consequences may even be attached to the refusal to implement recommendations included in the final statement of the NCP if no agreement is reached. Consequences may comprise the non-eligibility for government subsidies or export credit insurance, exclusion of public procurement or trade missions. The Canadian government has indeed adopted this approach and excludes multinational enterprises for subsidies, export credit or public procurement if they refuse to engage in specific instances or to implement recommendations included in the final statement of the NCP. It may be an example for other governments to follow. Furthermore, governments may play a role in funding (part of) the costs of external mediation, collaborative fact finding endeavours or the use of local facilitators. For example, travel costs were covered by the Dutch government in the Heineken case. Meetings within the NCP process were held at the Dutch embassies in respectively Kampala and Paris and were monitored by the Dutch NCP (to the satisfaction of the parties). In Kampala, the meeting between parties took place with the expert mediator who was appointed by the Dutch NCP at the request of the parties. In Paris, the meeting between parties took place with an externally appointed expert in Congolese labour law.

## **Monitoring**

A further means to enhance the NCP function may be the monitoring of the implementation of the NCP recommendations put forward in the final statement. Although the commentary to the conclusion of procedure (of the NCP procedure) adopts the possibility, it has only been mentioned in seven specific instances since 2011.<sup>20</sup> However, some NCPs make it regular practice to follow up on recommendations they provide during specific instances. For example, follow-up is part of the UK NCP's rules of procedure for specific instances.<sup>21</sup> The Swiss NCP asks parties to report to the NCP on the progress of the implementation of the agreed outcome after a certain period (for example 6 months) after the closure of the specific instance. If the NCP does not see enough progress, the NCP can make recommendations and request further reporting.<sup>22</sup> The French NCP follows up with parties where appropriate and maintains contact for several years. This policy has resulted in successful outcomes of certain cases even if agreements were not originally reached through the specific instance process. For example while an agreement was not initially reached under the specific instance involving Michelin Group's operations in the Indian state of Tamil Nadu, the French NCP continued to follow up and in response Michelin Group reported regularly to the NCP on a series of measures taken to implement recommendations of the NCP.<sup>23</sup> The Norwegian NCP includes a clause regarding follow-up within a set time limit, often a year following a mediated outcome. The NCP notes that parties have expressed a wish for greater NCP involvement in follow-up, for instance to monitor whether the Guidelines are more effectively implemented by a company after the specific instance. However, the NCP is cautious about the potential resource implications of maintaining an on-going involvement with every specific instance. In addition, there is a risk of reopening specific instances that have been closed, or becoming involved in a follow-up role that had not been agreed to from the outset. The Norwegian NCP now advises parties to

include more detailed provisions about the implementation of the parties' agreement as part of the follow-up in any mediated statement, including the role of the NCP.<sup>24</sup> That said, it may be questionable, also in connection with available resources, whether NCPs are best equipped to perform this function in case parties do not ask for this. After all, for example courts or arbitral tribunals do not monitor the implementation of their decisions either, unless a new suit or claim is submitted on the implementation of an award. Furthermore, the question is which consequence an NCP may attach to the outcomes of monitoring. For example, if a company does not implement NCP recommendations the NCP may conclude so in a consecutive final statement, but apparently the previous one has not convinced this company to act. It may be questionable whether a next final statement will perform better in this regard. Thus, and also in connection with the role of governments mentioned previously the home government of the multinational enterprise may be better equipped to perform this function, for example by a supervisory body. This also enhances implementation as the government may avail over more compelling means to incentivize implementation, as has been elaborated previously.

### Cases of contribution or linkage

A further suggestion is connected to specific instances related to supply chains or other cases in which the multinational enterprise contributes or is linked to alleged violations of the Guidelines by other entities. For example, it may be conceivable a bank is involved in a specific instance in which its lender is accused of land grabbing.<sup>25</sup> In such cases the NCP recommendations to the bank which may also affect the borrower will only impact the situation on the ground through the contractual relationship with the lender. Thus, it may be difficult for the bank to implement specific NCP recommendations especially regarding the lender if the contractual arrangement does not allow this or discussion may arise whether the lender is obliged to implement relevant recommendations of the NCP. This issue could be solved by strictly confining recommendations to measures the bank is able to implement itself. However, this may not have sufficient impact on the alleged violation (which the complaint also and maybe even predominantly addresses) by the lender. In such instances the NCP recommendations may be considered to be weak in terms of impact. Moreover, the principal issue may not be addressed by these recommendations. A solution may be to incentivize buyers or banks to implement clauses in their contract obliging their suppliers or lenders to implement NCP recommendations which are of relevance for their conduct and which are included in the final statement rendered in a specific instance in which this borrower or bank is a party. One may wonder why a borrower or bank would be inclined to implement such a provision. This may be an issue, but as elaborated before, governments may incentivize this by requiring it in their public procurement, in subsidy requirements or through other means.

## International investment agreements

Finally NCP decisions and recommendations may play a role in investment disputes. International Investment agreements are primarily designed to protect investors' interests against (illegal)<sup>26</sup> seizure of their investments or measures comparable with it by host states.<sup>27</sup> Most investment agreements offer a dispute resolution option against host states which enables investors to instigate litigation against a host state, often by means of arbitration for example through the mechanism of the International Centre for Settlement of Investment Disputes (ICSID).<sup>28</sup> However, international investment agreements have been subject to criticism amongst others because they allegedly favour investor's interests over human rights or environmental protection.<sup>29</sup> Thus, if an investor has instigated a claim in an investment arbitration, this begs the question whether it is eligible for protection if it has violated the Guidelines. This question raises multiple issues. First of all, the host state should primarily point at such violations in these disputes. However, it might be difficult for especially developing host states to properly defend themselves (in ICSID arbitrations), for example by pointing at violations of the OECD Guidelines by investors, because of the number of cases, the cost connected to investment arbitrations in order to engage skilled counsel to represent them and the cost to avail over the expertise required.<sup>30</sup> In practice arbitral tribunals have chosen a jurisdictional and substantive approach to address these issues. The jurisdictional approach relates to the requirement in many investment agreements the investment has to be made in compliance with national laws or in good faith and this may include compliance with the Guidelines.<sup>31</sup> The substantive approach is connected to investors' obligations in order to be eligible for protection. The Guidelines may be considered to be international obligations an investor is bound by in order to be eligible for protection under an investment agreement.<sup>32</sup> However, it is quite unclear in practice whether these obligations exist and whether or not the investor has violated the Guidelines. Therefore, one might think of implementing the Guidelines for multinational enterprises as a requirement for protection in international investment agreements.<sup>33</sup> The advantage of this (including supporting guidance in specific sectors) is that these guidelines are well known to governments and avail over a complaint mechanism in the form of national contact points (NCPs). The acceptance of dispute resolution by a NCP and implementing the result thereof or its recommendations if no agreement is reached may be made a requirement for protection if complaints are filed in connection with the project the investor searches protection for. The advantage of this may be legitimacy in the eyes of the states as it is an OECD instrument established by states, embedded in state structures and often run by independent officials.<sup>34</sup> The requirement for protection under an investment agreement should than be that the investor implements the Guidelines in its operations and is prepared to implement either solutions agreed upon in the NCP process or recommendations made by the NCP if no agreement is reached. Thus, international investment agreements may also be used to strengthen the NCP function.

## EVALUATION AND CONCLUSION

We have discussed alternative approaches to strengthen the NCP function beyond the NCP procedure as such. The approaches are (i) referral to external dispute resolution options, (ii) external avenues to assess facts or the use of external independent local facilitators, (iii) an enhanced role of governments, (iv) improving contractual mechanisms to enhance the implementation of NCP recommendations in cases in which a multinational enterprise contributes or is directly linked to an alleged violation of the Guidelines and finally (v) implementing an obligation in international investment agreements (as a requirement for investor protection) to comply with the Guidelines and engage with the NCP procedure if complaints are raised and to implement NCP recommendations either agreed upon or included in the final statement if no agreement is reached.

Some of these approaches are already used, such as the referral to mediation or other external dialogue based processes. However, this is not yet done in connection with binding dispute resolution mechanisms (parties may agree upon). This may be worth consideration too. Some NCPs have used independent consultants in fact finding missions. However, amongst others because of resource constraints this is not often done. It may be worthwhile to use this option more often including the use of independent local facilitators to relate to local communities/workers in order to acquire meaningful input from those witnesses/victims. Another interesting option has been adopted in Canada (however, not in connection with the NCP procedure) which allows a local court to grant discovery in order to substantiate a complaint with the national ombudsman. This may also be worth consideration for NCP complaints, but this will be more distant future for many other OECD members.

OECD member states may strengthen the NCP function quite easily by implementing a requirement to engage with an NCP in case of complaints or to implement the NCP's recommendations in for example subsidy, export credit and public procurement requirements. Some OECD members have already done so. However, to date most of them have not used the relatively easy way to strengthen the NCP function.

The two alternatives discussed last are more challenging to implement and will need further elaboration. However, this does not mean they are not worthwhile to consider because their potential impact may be quite large.

## NOTES

1. OECD NCP Report, p. 43-45.
2. Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2005-2015, p. 30 (hereinafter: OECD NCP Report), <https://mneguidelines.oecd.org/oecd-report-15-years-national-contact-points.pdf>.
3. See Privacy International v Gamma International UK Ltd, Final Statement after examination of complaint, UK NCP, December 2014 and its Follow up Statement February 2016 which can be accessed at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502420/bis-16-127-uk-ncp-follow-up-statement-privacy-international-gamma-international.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502420/bis-16-127-uk-ncp-follow-up-statement-privacy-international-gamma-international.pdf) and [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/402462/BIS-15-93-Final\\_statement\\_after\\_examination\\_of\\_complaint\\_Privacy\\_International\\_and\\_Gamma\\_International\\_UK\\_Ltd.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/402462/BIS-15-93-Final_statement_after_examination_of_complaint_Privacy_International_and_Gamma_International_UK_Ltd.pdf)
4. See the Final Statement of August 18, 2017, which can be accessed through <https://www.oecdguidelines.nl/documents/publication/2017/08/18/final-statement-notification-bralima-vs-heineken>.
5. *Ibid.*, paragraph 5, Scope of the assessment.
6. <https://www.nrc.nl/nieuws/2017/08/18/heineken-betaalt-congolezen-na-klacht-12563201-a1570284>, and [http://www.lemonde.fr/afrique/article/2017/08/18/en-rdc-une-poignee-d-ouvriers-fait-plier-le-geant-heineken\\_5173706\\_3212.html](http://www.lemonde.fr/afrique/article/2017/08/18/en-rdc-une-poignee-d-ouvriers-fait-plier-le-geant-heineken_5173706_3212.html)
7. This agreement can be accessed through [https://www.internationalrbc.org/agreements?sc\\_lang=en](https://www.internationalrbc.org/agreements?sc_lang=en).
8. See section 1.3 of the Textile agreement and for the procedural rules [https://www.internationalrbc.org/garments-textile/agreement/method/complaints?sc\\_lang=en](https://www.internationalrbc.org/garments-textile/agreement/method/complaints?sc_lang=en).
9. See section 1.3 of the Textile Agreement. However, before this complaint may be lodged, the complainant (or its representative) first have to try to solve the case amicably. See section 1.3 of the Textile Agreement.
10. See for the latter OECD Due Diligence Guidance on responsible supply chains in the garment and footwear sector, which can be accessed through <http://mneguidelines.oecd.org/oecd-due-diligence-guidance-garment-footwear.pdf>.
11. The decision and its reasoning will be published, observing confidentiality where required for reasons of competition sensitivity and/or the protection of business confidentiality. Section 1.3 of the Textile Agreement.
12. Section 1.3 of the Textile Agreement.

13. This builds on commercial arbitration rather than investment arbitration. See for this proposal and a questions and answers document, which can be accessed through <https://business-humanrights.org/en/pdf-an-international-arbitration-tribunal-on-business-human-rights-version-five>, and <https://business-humanrights.org/en/qas-on-proposed-intl-arbitration-tribunal-to-resolve-business-human-rights-abuse-disputes>.
14. Who should be discerned from the Canadian NCP. Obviously, this raises the question whether the Canadian NCP should not avail over comparable instruments.
15. See on this [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&\\_ga=2.3601200.1892813925.1523092391-860716557.1521809049](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&_ga=2.3601200.1892813925.1523092391-860716557.1521809049), <https://www.canada.ca/en/global-affairs/news/2018/01/the-government-of-canada-brings-leadership-to-responsible-business-second.html>, <https://www.canada.ca/en/global-affairs/news/2018/01/the-government-of-canada-brings-leadership-to-responsible-business-second.html> and <http://www.miningweekly.com/article/canadian-miners-welcome-new-federal-business-ethics-ombudsman-2018-01-18>.
16. This may also be true in connection with other ombudsperson functions such as collaborative fact finding.
17. Cf. also in connection with other mechanisms such as the RSPO complaint mechanism. A review of the Complaints System of the Roundtable on Sustainable Palm Oil 2014, p. 31 and 43 which can be accessed through <https://www.rspo.org/news-and-events/announcements/a-review-of-complaints-system-of-the-rspo-final-report>.
18. As is adopted for the Dutch NCP. See the Dutch National Action Plan, p. 35, which can be accessed through <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>. That said, it is not quite clear under which conditions such investigations will be conducted and whether independent investigators/facilitators will be engaged. It may even be conceivable a NCP in another country conducts this research or these NCPs that may even investigate on their own volition.
19. Articles 23 and 24 of the procedural rules.
20. OECD NCP Report, p. 58.
21. OECD NCP Report, *Ibid.*
22. OECD NCP Report, *Ibid.*
23. OECD NCP Report, *Ibid.*
24. OECD NCP Report, *Ibid.*
25. See for example the Final Statement of the Dutch NCP in the Rabobank Specific Instance, which can be accessed through <https://business-humanrights.org/en/netherlands-oecd-natl-contact-point-final-statement-on-complaint-against-rabobank-over-palm-oil-supply-chain-policy-0>.

26. This implies an expropriation has to have a public purpose, should be conducted in a non-discriminatory manner, on payment of prompt, adequate and effective compensation, and in accordance with due process of law. See e.g. Suzanne Spears, The quest for policy space in a new generation of international investment agreements, *Journal of International Economic Law* 13(4) 2010, p. 1049.
27. Cf. Eric De Brabandere, *Investment Treaty Arbitration as Public International Law*, Cambridge, Cambridge University Press, 2014 p.136; Kevin Crow and Lina Lorenzoni Escobar, International Corporate Standards, Human Rights, and the Urbaser Standard, *Transnationalen Wirtschaftsrecht*, heft 144, p. 6, which may be accessed through <http://telc.jura.uni-halle.de/sites/default/files/BeitragTWR/Heft%20144.pdf>.
28. The ISDS mechanism is the prevailing mechanism. See e.g. Joachim Pohl, Societal benefits and costs of International Investment Agreements, OECD 2018, p. 7, which can be accessed through <http://www.oecd-ilibrary.org/docserver/download/e5f85c3d-en.pdf?expires=1518001777&id=id&accname=guest&checksum=F8E897DDF68E218926B2D2209BA49908>.
29. Cf. Katharina Hausler, Karin Lukas and Julia Planitzer, Non-Judicial Remedies, In: *Human Rights in Business* (Juan Jose Alvarez Rubio et al. (eds.)), Routledge:London 2017, p. 108; Joachim Pohl, Societal benefits and costs of International Investment Agreements, OECD 2018, p. 42, which can be accessed through <http://www.oecd-ilibrary.org/docserver/download/e5f85c3d-en.pdf?expires=1518001777&id=id&accname=guest&checksum=F8E897DDF68E218926B2D2209BA49908>.
30. Zeng Huaqun, Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice, *Journal of International Economic Law*, 2014, p. 317, 321 and 322. Cf. Pohl 2018, p. 45.
31. See for this approach e.g. the Metal-Tech v. Oezbekistan case which is accessible through <http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf>.
32. See for this approach e.g. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. Arb/07/26, Final Award, 8 December 2016, available at [https://www.italaw.com/sites/default/files/case-documents/italaw8136\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf).
33. Cf. Crow and Escobar 2017, p. 26.
34. Cf. Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements, Leuven 2017, p. 87.



# Effective or not? The crucial role of effectiveness in specific instances



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## INTRODUCTION

Almost four decades ago, in 1979, ‘Contact Points’ first emerged on the international plane as the precursors of what are now better known as National Contact Points (NCPs). Bereft of any formal powers, NCPs were initially expected to, amongst others, ‘usefully contribute to the solution of problems relating to the [OECD] Guidelines [for Multinational Enterprises]’ (Guidelines).<sup>1</sup> Thenceforth, NCPs have evolved considerably. NCPs are assigned with a broad range of themes to deal with and received legal recognition in the OECD Council’s decisions, obliging adhering states to set up an NCP.<sup>2</sup>

Despite progress made, the NCPs’ effectiveness is being questioned by scholars and advisory bodies to the OECD. Arguably, not all NCPs have been a ‘picture of success’,<sup>3</sup> their performance is rated as ‘uneven and in all too many cases poor’<sup>4</sup> and claims have been made that – in general – NCPs are ‘not achieving their central objective, which is to further the effectiveness of the Guidelines’.<sup>5</sup> Renowned international bodies, such as the Council of the European Union, UN Working Group on Business and Human Rights and G7, have emphasised this pressing need for effective NCPs, a ‘comprehensive improvement’ of their effectiveness, and have shown commitment to enhance their effectiveness.<sup>6</sup>

In response to the general outcry for more effective NCPs, we venture to find an answer to what we exactly mean when we speak of ‘effective NCPs’. Diverging views on what effectiveness entails adds to the confusion on this theme. In this contribution, we first try to reconcile these diverging views and set out to define effectiveness (Section 2). We particularly focus on the grievance mechanism put in place by NCPs, namely the specific instance procedure. Subsequently, we investigate how effectiveness has been measured in practice in order to get an idea of its application (Section 3). We conclude with a set of recommendations that may aid future revisions of the Guidelines (Section 4).

## DEFINING EFFECTIVENESS

### Effectiveness in ADR literature

When looking into alternative dispute resolution (ADR) literature, a multitude of definitions are used to define effectiveness. Effectiveness is defined as resolving disputes,<sup>7</sup> ending contention over the issue(s) in question, reaching an agreement between conflicting parties, and as ending future conflicts between the parties in conflict.<sup>8</sup> Although these definitions may resemble each other, the nuances may lead to very different conclusions when assessing the effectiveness of dispute resolution. If an NCP’s effectiveness is for instance assessed by the numbers of agreements reached, it may come as no surprise that the outcome may be very different to when the touchstone of an NCP’s effectiveness is ending *future* conflicts between parties.

## **Effectiveness according to the OECD Council**

Effectiveness forms the bedrock of NCPs. The OECD Council's decision, not the Guidelines, highlights the paramount importance of effectiveness for NCPs, and turns it into a legal obligation for adhering states. Interestingly, the focus is not on NCPs or its specific instance procedure, but on the Guidelines. In other words, NCPs are primarily tasked to further the effectiveness of the *Guidelines*. Achievement of this aim can be stimulated through 'undertaking promotional activities, handling enquiries and contributing to the *resolution of issues* that arise relating to the implementation of the Guidelines in specific instances [emphasis added]'.<sup>9</sup> Following from their primary task, one can infer that NCPs, via their specific instance procedure, must help resolve issues within the purview of the Guidelines, with the ultimate aim to further the effectiveness of the Guidelines. We are left in the dark as to what 'the effectiveness of the Guidelines' exactly means, but the procedural guidance to the OECD Council's decision does stipulate that for specific instances NCPs should act in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines as well as to take into account that they act consistent with the core criteria of visibility, accessibility, transparency, and accountability (to ensure functional equivalence between NCPs).

## **Effectiveness criteria of UNGP 31**

Following his extended mandate,<sup>10</sup> former Special Representative for Business and Human Rights to the UN Secretary-General, John Ruggie, operationalised and implemented the three pillars of the 'Protect, Respect and Remedy' framework by drafting 31 Guiding Principles (GPs), which were unanimously endorsed by the UN Human Rights Council.<sup>11</sup> GP 31 defines a number of effectiveness criteria for non-judicial grievance mechanisms (NJGMs) and specifically address NCPs. NCPs act effectively if they meet the following criteria: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, a source of continuous learning.<sup>12</sup> Note the resemblances and dissimilarities with the core criteria for NCPs and specific instances. A certain amount of coherence is reached between GP 31 and the criteria laid down in the OECD Council's decision, but some criteria, for example legitimacy, can only be found in one of the two frameworks.

## **Effectiveness according to OECD Watch**

OECD Watch has acted at the forefront of the movement for more effective NCPs. Within the context of its campaign 'Effective NCPs now! Remedy is the reason', OECD Watch has published a number of critical effectiveness factors. To stimulate parties to engage in a mediation, OECD Watch proposes two 'sticks': (i) through governments by attaching consequences to decisions of NCPs; and (ii) through NCPs by enabling/forcing them to make determinations. OECD Watch reiterates that NCPs are also bound by the procedural guidance of the Council's decision that stipulates the effectiveness criteria discussed earlier: visibility, accessibility, transparency, accountability, impartiality, predictability, equitability, and compatibility with the Guidelines.<sup>13</sup>

## A synthesised definition

Taking into account the aforementioned definitions, effectiveness purportedly consists of various elements. In line with the Guidelines, the primary task of an NCP during specific instances is to resolve issues with the aim to further the effectiveness of the Guidelines. Reaching agreement between parties should therefore be the primary focus. Important mechanisms to ensure that agreements are reached are making determinations whenever parties fail to reach an agreement and policy coherence to make sure that certain consequences may be attached to unwanted behaviour. During specific instances, NCPs must meet the criteria laid down in GP 31 as well as the Council's decision to strengthen its effectiveness, *i.e.* NCPs must meet the criteria of visibility, accessibility, transparency, accountability, impartiality, predictability, equitability, compatibility with the Guidelines, legitimacy and a source of continuous learning. Put together, we define effectiveness of a specific instance as 'reaching agreements between parties within the framework of the Guidelines with respect of the core criteria stipulated by the OECD Council's decision and GP 31'.

## MEASURING EFFECTIVENESS

### Van Eyk's effectiveness questions

Literature on effectiveness criteria for NCPs is hard to find.<sup>14</sup> A notable exception is the dissertation of Van Eyk. Van Eyk assessed the effectiveness of NCPs from a legal perspective during the 1990s. In order to assess the effectiveness of NCPs, she developed a set of effectiveness criteria in the form of questions to be answered. All seven questions are enumerated in Table 1. The questions follow a hierarchical order. When assessing the effectiveness of NCPs, one must therefore start with the first question, then answer the second, and so on.<sup>15</sup>

### Effectiveness by providing remedy

OECD Watch asserts that effectiveness is measured by the provision of remedy. Its report 'Remedy remains rare' largely hinges on the idea that remedy should be the central output of an NCP. Based on an analysis of 250 cases, OECD Watch found that in merely 35 cases some sort of remedy was obtained, which is commensurate with NCPs failing to meet their primary obligation, *i.e.* 'to further the effectiveness of the Guidelines'.<sup>16</sup> Thus, effective specific instance procedures are equated with the effectuation of remedy. Its legal grounding is found in the OECD Council's decision stipulating that NCPs are primarily tasked to further the effectiveness of the Guidelines. To a certain extent, OECD Watch's view resonates well with Ruggie's perspective that NCPs 'have the potential to provide effective remedy'.<sup>17</sup>

**Table 1. Questions to assess the effectiveness of NCPs**

EFFECTIVENESS QUESTION	DESCRIPTION
Which entity is the supervision <b>aimed</b> at?	Supervision may be aimed at states or multinational enterprises, but also at instruments such as codes of conduct.
What is the <b>legal character</b> of the instrument of supervision?	The legal character of the supervisory instrument can be either legally binding or not legally binding.
What is the composition of the <b>organ involved</b> in supervision?	The supervisory organ may for example be composed of judges, arbitrators, (in)dependent experts or government officials.
On which <b>level</b> does the supervision take place?	Supervision can take place on the national, intergovernmental and international level.
What is the <b>function</b> of the supervision?	Three functions are possible. First, whether behaviour is in conformity with a system of norms (review function). Second, if behaviour is not in conformity with a system of norms, the supervisory mechanism must be able to impose sanctions (corrective function). Third, supervisory mechanisms must be able to clarify existing rules or to create new rules if necessary (creative function). A combination of functions may also exist.
Which <b>instrument</b> of supervision is used?	An instrument of supervision can relate to all three functions (review, correction or creative).
What is the <b>level of effectiveness</b> of the particular form of supervision?	Effectiveness is assessed by examining the results of the supervision. All previous questions must be answered first. Then it must be assessed whether: (i) the norms which have to be supervised are adequate; (ii) the supervisory procedure is adequate to meet the objectives of supervision; and (iii) the supervisory organ can function adequately.

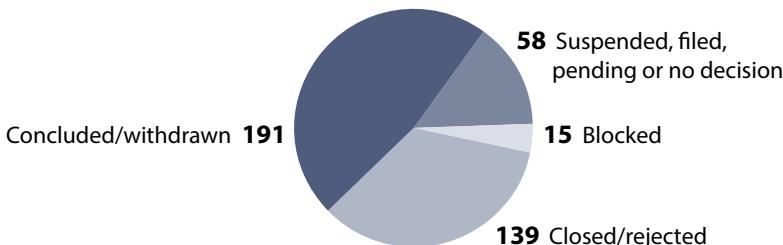
Source: Eyk, S.C. van (1995), *The OECD declaration and decisions concerning multinational enterprises. An attempt to tame the shrew, Ars Aequi Libri: Nijmegen*, pp.77-78 and 84-86.

## Effectiveness by concluding agreements

Sometimes, effectiveness of specific instances is defined as the number of times that agreements are concluded.<sup>18</sup> This definition seems to be consonant with the Guidelines insofar as the Guidelines stipulate that NCPs need to contribute ‘to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances’.<sup>19</sup> Resolving issues in a non-adversarial manner during specific instances is a key task assigned to NCPs.

Khoury and Whyte<sup>20</sup> analysed the outcomes of 403 notifications submitted by NGOs and trade unions between 2002 and 2016. They found that in more than half of all instances, the notifications were either rejected, blocked, suspended or were awaiting a decision or did not receive any decision at all (see Figure 1). In the remaining 191 instances, parties did manage to conclude the procedure. Of these 191 instances, 102 brought about unfavourable results for one or more parties leaving them unsatisfied. In 49 of the 403 instances, parties managed to broker a mutually agreed deal. On an annual basis, this accounts for three to four cases whereby both the corporation as the complainant were satisfied with the outcome. These findings lead to Khoury and Whyte’s conclusion that the specific instance procedure is ‘largely ineffective’.

**Figure 1. Outcomes of 403 notifications by NGOs and trade unions between 2002 and 2016**



Source: Khoury, S. and D. Whyte (2017), *A Cautionary Tale of Regulating Corporate Human Rights Abuses*, University of Liverpool; Khoury, S. and D. Whyte (2017), *A manufactured consensus*, in: *Corporate Human Rights Violations*, Routledge: Oxon.

In a similar vein, the OECD assessed the effectiveness of specific instances between 2011 and 2015. It concluded that in approximately 50% of all the instances, i.e. 26 specific instances, an agreement was reached between parties. This finding should be caveated, because the OECD only included notifications that were accepted for further examination and instances that were concluded, excluding all notifications that were rejected.<sup>21</sup> By including the latter group of rejected notifications, the percentage of agreements reached would be most likely substantially lower. Hence, the discrepancy with the findings of Khoury and Whyte.

In its annual reports, the OECD also gauges effectiveness through the number of agreements reached. In its 2016 annual report, the OECD reported that of the 38 specific instances, 14 were not accepted. Of the accepted cases, eight resulted in an agreement via the

specific instance procedure accounting for 34 per cent of all instances.<sup>22</sup> Compared with a year earlier, whereby parties reached an agreement in 44 per cent of all accepted instances,<sup>23</sup> the effectiveness rate of NCPs went down with 10 per cent.

## CONCLUSION

In the advent of a possible revision of the Guidelines in 2021, it would be wise to include a clear definition of effectiveness of specific instances in the Guidelines or in the Council's decision (preferably the latter). We conclude that the present situation does not offer sufficient clarity: effectiveness is measured in different ways and a mismatch exists between the effectiveness criteria of the OECD and GP 31. We defined effectiveness of specific instances as 'reaching agreements between parties within the framework of the Guidelines with respect of the core criteria stipulated by the OECD Council's decision and GP 31', but it will be best if the core criteria of the OECD Council's decision and GP 31 are unified. Attention needs to be paid to the role of determinations and remedy within specific instances as well as the need for policy coherence.

Even though procedural guidance is given, no guidance is given on remedy, keeping NCPs in limbo whether remedy is a necessary precondition for effective specific instances. Including provisions about remedy in the procedural guidance would be welcomed and may stipulate in which cases remedy is warranted (for example financial compensations cases versus policy changes). Procedural guidance is also needed on determinations. Currently, determinations are prescribed when deemed 'appropriate',<sup>24</sup> leaving it to an NCP's discretion whether or not to include a determination in its final statement. Guidance can be given in which instances determinations are mandatory for NCPs.

A possible revision of the Guidelines and the related Council decision, sets us at a critical juncture offering the opportunity to fundamentally revise the concept of effectiveness enshrined within the Council's decision. Literature provides ample direction as to how to reinforce this concept of effectiveness. Promulgating recommendations, making available human and financial resources,<sup>25</sup> stimulating the political will of NCPs to start procedures, more coercive powers for NCPs,<sup>26</sup> independent NCP structures, consistency in decision-making, reducing physical barriers for parties involved, peer reviews between NCPs,<sup>27</sup> transparency of procedures and concomitant media attention,<sup>28</sup> creating oversight bodies, lowering thresholds to access the specific instance procedure<sup>29</sup> – all are just a few recommendations given in literature to increase effectiveness.

The time has come for the new Chair of the OECD Working Party on Responsible Business Conduct to step up the plate by seizing a unique opportunity to enhance the Guidelines and its related decision. The new Chair may draw on formidable work done by its predecessor Roel Nieuwenkamp and can work towards even stronger and more effective Guidelines. It is our hope that more attention will be paid to the concept of effectiveness and that it will form the cornerstone of the specific instance procedure. If we have a clearly delineated definition and a comprehensive set of criteria, we are convinced that specific instances may become more effective in the long run.

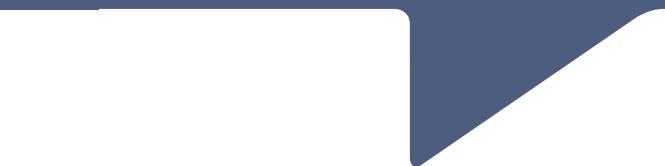
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23. OECD (2016), Annual Report on the OECD Guidelines for Multinational Enterprises 2015, p.28.
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25. Council of the EU (2016), Council Conclusions on Business and Human Rights (10254/16), par.17 and Annex, par.53.
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# The voice of affected persons in the OECD Guidelines and guidance documents



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In his impressive work with the 2011 revision of the OECD Guidelines for Multinational Enterprises (Guidelines) and the follow up, Roel Nieuwenkamp has always been a person who has listened to the voices of stakeholders – the persons who should be involved in a process. What better topic, then, as a tribute to Roel, than discussing how the voices of affected persons should be identified and brought forward under the Guidelines, and, especially, under the new OECD Due Diligence Guidance Documents that have been shaped and adopted under Roel's leadership.

Why is it important to include the voices of those affected? As is well known, the activities of multinational enterprises can affect many people worldwide positively or negatively. How this happens is often difficult to predict. People should be heard because their input could get the facts straight, could raise the values that should be considered and, most of all, would clarify and present the interests and rights of local communities and individuals that need to be taken into account.

Among the most important new features of the 2011 revision of the Guidelines, chaired by Roel, was the introduction of a human rights chapter, the general due diligence requirements and company responsibility for supply chains. The combination of a general due diligence requirement and the new chapter on human rights as well as supply chain responsibility introduced a new method for companies' management of their activities.<sup>1</sup> After 2011, the work of the Working Party on Responsible Business Conduct in the OECD has focused much of its effort on implementing this through the development of specific guidance documents. The most recent is the Due Diligence Guidance for Responsible Business Conduct to be launched in June 2018. This is a general guidance document on the use of due diligence processes while all the previous guidance documents have been sector specific.

The starting point is the provision of the Guidelines on due diligence which states that enterprises should "Carry out risk-based due diligence, [...], to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed."<sup>2</sup> Alongside this, a separate provision was introduced with respect to stakeholder engagement. Enterprises should 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."<sup>3</sup>

With respect to due diligence, the official commentary to the Guidelines provides that the "nature and extent of due diligence, such as the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts."<sup>4</sup> The context of the operations is key to what sort of stakeholder engagement that is necessary. On stakeholder engagement, the Commentary explains that it "involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings". It is further said that "[e]ffective stakeholder engagement is characterized by two-way communication and depends on the good faith of the participants

on both sides". It is said to be "particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities".<sup>5</sup>

In the Guidelines themselves, nothing more is said about stakeholder engagement. The intended relationship between stakeholder engagement and the due diligence process is not made clear.<sup>6</sup> Should stakeholder engagement be part of or supporting the due diligence process? In the subsequent diligence guidance documents, however, the stakeholder engagement activities have been included as important parts of the due diligence process. This has happened in an interchange with the due diligence thinking related to the United Nations Guiding Principles for Business and Human Rights.<sup>7</sup> The document which is devoted exclusively to stakeholder engagement, the *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Extractive Sector Guidance, or Guidance), refers explicitly to the two provisions of the Guidelines on stakeholder engagement and on due diligence quoted above when explaining the background of the document.<sup>8</sup> In the other due diligence guidance documents, stakeholder engagement is also included as part of the process, albeit a little differently in the individual documents, at least partly because of the different contexts in which the sector activities will take place.

Including stakeholder engagement in the due diligence process raises questions about who the stakeholders are and how they should be involved. Answers to these questions are most extensively provided in the Extractive Sector Guidance just mentioned. The document is comprehensive with its 118 pages. Before looking into that, however, it is important to say something about the drafting process of the guidance. It was drafted by the OECD secretariat of the Working Party on Responsible Business Conduct, supported by an important Advisory Group. This group consisted of representatives of some OECD member state governments, industry representatives from relevant business organizations, as well as representatives from some important companies in the sector like AngloAmerican and Shell, some civil society representatives, some representatives from international organizations like the International Labour Organization and the International Finance Corporation, and finally representatives from the Sami, Ogoni and Kamchatka communities.<sup>9</sup> Such a manner of working is normally called a multi-stakeholder process. That name demonstrates also the vagueness of the stakeholder concept. Most of the interests represented were not people who would be affected by extractive sector activities. It is important to note however that representatives of three indigenous peoples were included. The idea of working in this manner is that different perspectives will be included and improve the document while at the same time establishing a buy-in into the outcome by several interested parties, thereby also furthering the distribution of the document when finalized. The wide participation by important actors demonstrates the convening power of the OECD.

Who are the stakeholders? That is explained in the Extractive Sector Guidance as “persons or groups who are or could be directly or indirectly affected by a project or activity”.<sup>10</sup> A non-exhaustive list is provided that covers potentially impacted local communities (including nomadic communities, communities living near an extractive concession, downstream from a river near the site, or along a transport route or near associated infrastructure such as energy grids or processing plants), indigenous peoples, farmers, workers (including local and migrant workers), artisanal miners, host governments (local, regional and national), and, local civil society organizations, community-based organizations and local human rights defenders. All of these are potentially directly affected by an extractive industry project in the mining or oil and gas sectors.

On the same page, there is also another list of so-called “Additionally interested stakeholders”. That group may include non-governmental organizationss, industry peers, investors/shareholders, business partners and the media. That these parties are included within the stakeholder concept, demonstrates the difficulties with that as a concept. There is a fundamental difference between these two groups since the first group covers those persons or organizations that are directly vulnerable, the potential victims and their own representatives, while the other group covers what we could call other interested parties. It is the voices of the first group that should be important in the due diligence process. Some of the stakeholders are also identified as rights-holders. The Guidance uses the term “rights-holders in the context of stakeholders subject to real or potential human rights impacts” because that is the language of the Guidelines themselves.<sup>11</sup> Depending on how broadly one interprets some human rights, also environmental impacts may be human rights violations.

**H**ow should stakeholders be involved? That is the most important part of the Extractive Sector Guidance. Here, there is only room for looking into a few aspects. The Guidance is organized with tables assisting the enterprise in the different steps of the stakeholder engagement. Step 2 is about identifying priority stakeholders and interlocutors. As an example, Table 4. *Identifying potential human rights impacts of extractive activities*, lists 10 issues, from resettlement via security and cultural heritage to environmental degradation and gives examples of potential human rights impacts as well as factors increasing the likelihood of impacts and the relevant types of stakeholders.

At the core of the Guidance, covering 18 pages, is step 4 titled *Designing appropriate and effective stakeholder engagement activities and processes* with its Table 6. *Identifying and applying best practices to engagement activities*. Here different stages of the engagement are analyzed and issues to consider as well as best practices identified. The different stages are Information Sharing, Consultation/Learning, Negotiation, Consent, Implementing Commitments, Adressing Adverse Impacts and Benefit Sharing. Here it is for example explicitly stated with respect to information sharing that the target audience should be able to access the information and be able to understand it, that use of collected information should be accessible by those that provide it, that negotiations should take place under equitable terms,

that conditions of consent and for withdrawing consent should be clearly defined, that misalignment in expectations should be addressed as soon as possible et cetera. In another table, at page 72 of the Guidance, capacity constraints are addressed and it is suggested to provide direct support to a local community to make the group able to participate in consulting and negotiations.

A special important feature of the Extractive Sector Guidance is the annexes that address specific topics when engaging with indigenous peoples, with women and with workers and trade unions. All of the annexes emphasize how to understand the respective context. With respect to indigenous peoples, customary land rights are mentioned. In the annex on engaging with women, it is pointed out that some impacts may affect men and women differently and examples are given. When engaging with workers where trade unions are not established, special advice is given.

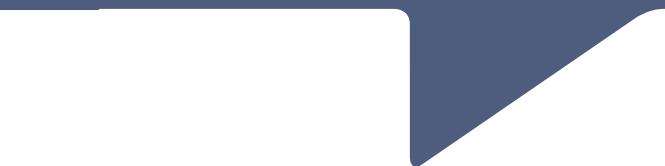
Also in the other sector guidance documents on conflict minerals, agriculture, garment and footwear and to some extent, the guidance on Responsible Business Conduct for Institutional Investors and the new general Due Diligence Guidance for Responsible Business include stakeholder engagement in the due diligence processes. In some cases, they also refer to the more developed coverage of the Extractive Sector Guidance.

How can we characterize the story outlined above? The development of the stakeholder engagement thinking from the few lines of the 2011 Guidelines to the integrated role and the extensive practical advice that we find in the hundreds of pages of guidance documents is astonishing. When the Guidelines were adopted in 1976 it was as a quid pro quo for increased investment liberalization. If a country opened up for more foreign direct investment, the multinational enterprises should behave themselves.<sup>12</sup> The change of perspective in the Guidelines and the guidance documents from the enterprise and host country dualism to the inclusion of the affected persons with their own interests and rights is striking and demonstrates a changed way of thinking about companies and their roles. Through striving to give voice to, among others, the most vulnerable people, the OECD has made an important effort to smoothen some of the negative consequences of globalization. Now, the job is to make these guidance documents work on the ground.

## NOTES

1. See OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, where Paragraphs 10 – 14 of Chapter II. General Policies are new compared to the previous 2000 revision.
2. OECD (2011) Chapter II, paragraph A10.
3. OECD (2011) Chapter II, paragraph A14.
4. OECD (2011) Commentary Paragraph 15.
5. OECD (2011) Commentary Paragraph 26.
6. In the Commentary there are some remarks about dialogue and engagement with respect to remediation as part of the human rights due diligence process, see OECD (2011), Commentary Paragraph 46 at p. 34.
7. The United Nations Guiding Principles for Business and Human Rights (2011) contains some provisions on engagement with “potentially affected groups and other stakeholders” as part of the due diligence process, see Guiding Principle 18 (b) and Guiding Principle 20 (b) (“affected stakeholders”).
8. OECD (2017), OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, OECD Publishing, Paris, p. 3.
9. OECD (2017) p. 3.
10. OECD (2017), OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, OECD Publishing, Paris, p. 19.
11. See OECD (2017) p. 20 and OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing Chapter IV Paragraph 45.
12. For the context and a somewhat more nuanced analysis, see Peter T. Muchlinski, *Multinational Enterprises & the Law*, 2ed. Ed. OUP 2007 pp. 658-660.

# The road to remedy under the OECD Guidelines



*Dr. Joseph M. Wilde-Ramsing*

The third pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs) recognizes the critical need for appropriate and effective remedy when human rights are breached through a failure of state duty or business responsibility.<sup>1</sup> Among the avenues to remedy outlined in the UNGPs, Principle 27 calls on states to provide access to state-based non-judicial grievance mechanisms (NJGMs) for the remedy of corporate-related human rights abuses. The National Contact Point (NCP) system of the OECD Guidelines for Multinational Enterprises (Guidelines) has the potential to be that state-based mechanism. From 2011 to 2018, with Dr. Roel Nieuwenkamp as Chair of the OECD Working Party on Responsible Business Conduct (WPRBC), the NCP system made important improvements to its handling of cases. While Roel has got NCPs started in the right direction, there is still a long way to travel on the road to remedy. In order for the NCPs to truly be considered a provider of effective access to meaningful remedy, critical reforms are needed.

## NCPS WITHIN THE “BOUQUET OF REMEDIES”

In 2017, the UN Working Group on Business and Human Rights proposed that rights holders should be able to access a “bouquet of remedies,” both judicial and non-judicial, to meet their particular circumstances, needs, and desires.<sup>2</sup> We have previously used the metaphor of the human anatomy to describe the remedy system. Judicial mechanisms function as the backbone: rule-based, they uphold the core standards of the system, handling the most serious cases and ensuring a backstop for the essential requirements of accountability. Simultaneously, NJGMs function as the fingertips. They are sensitive, able to reach challenges inaccessible to the spine and respond flexibly and creatively to evolving problems. Without the spine, the system cannot survive – but the fingertips are also essential, ensuring responses to harms that would otherwise go unanswered, and often preventing small problems from becoming disasters.

Among NJGMs, the NCPs hold a unique place with clear potential to provide access to remedy for victims of corporate abuse. First, the NCPs are state-run: governments adhering to the OECD are bound under international law to establish an effective NCP and provide them sufficient funding and resources to meet the responsibilities set out for them. The mandatory engagement of states in the complaints procedure offers potential for stronger accountability for wrongdoing, and paves the way for wider normative and legal shift in cognizance of corporate human rights harms. Second, the NCPs have broad scope: they must be open to complaints pertaining to a wide array of corporate misconduct, concern businesses across the gamut of sectors and value chains, and identify harms to people beyond the national or jurisdictional borders of the NCP host country.

## CURRENT STATE OF REMEDY THROUGH THE NCPs

Especially in recent years, governments around the globe have increasingly recognized the NCPs as a critical tool for ensuring access to remedy. In 2014, Roel Nieuwenkamp led the way by observing that the NCP mechanism's specific added value in the international corporate accountability arena is "through providing access to remedy."<sup>3</sup> In 2015, G7 leaders committed themselves to "strengthening mechanisms for providing access to remedy, including the NCPs."<sup>4</sup> In 2016, the Council of Europe linked the Guidelines to remedy and urged EU members to further enhance their NCPs for this purpose.<sup>5</sup> And in 2017, the G20 leaders cited the NCPs in relation to remedy,<sup>6</sup> while the European Union Agency for Fundamental Rights issued an opinion that NCPs "[have] the power to offer remedy."<sup>7</sup>

The Commentary to UNGP Principle 25 clearly defines "remedy" to include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions," as well as "the prevention of harm through, for example, injunctions or guarantees of non-repetition."<sup>8</sup>

During Roel's tenure as Chair of the WPRBC, a handful of cases have achieved outcomes meeting that definition. For example, in 2017, a complaint filed with the Dutch NCP resulted in Congolese beer factory workers receiving an apology as well as compensatory damages in excess of US\$ 1.3 million from Heineken.<sup>9</sup> Another recent NCP complaint prevented a destructive oil drilling project from going forward in a World Heritage Site in the Democratic Republic of Congo.<sup>10</sup>

Despite these few bright spots in the NCP remedy landscape, the fact remains that most NCPs have not come close to affording complainants access to the array of remedies outlined in the UNGPs. In fact, many NCPs have interpreted their specific instance mandate so narrowly as to exclude real remedy altogether, encompassing mere facilitation of discussion on alleged breaches of the Guidelines.<sup>11</sup> This is a serious problem, for to be "rights-compatible" a grievance mechanism must provide remedies that are "appropriate to the severity of the harm suffered."<sup>12</sup>

## REFORMS NEEDED TO ACHIEVE REMEDY

What reforms are needed, then, to help NCPs accomplish their mission to provide effective access to remedy for victims of corporate abuse?

For one, NCPs must be organized in such a way as to encourage impartial decision-making. Evidence has shown that NCPs consisting either of a panel of independent experts, a multipartite organization with participants from several stakeholder groups, or an entity overseen by a steering board, are more likely to achieve positive outcomes. Such was the case in both of the two bright-star cases cited above.<sup>13</sup>

In addition to appropriate structure, NCPs need sufficient resources. This includes funding for basic office operations, including full-time staff, external trained mediators, and fact-finding field visits. It also means resources to help indigent complainants use the

mechanism, such as assistance with language translation or travel to mediation.<sup>14</sup> A little flexibility can go far, such as through holding mediations in embassies, or providing web-based meetings.

Resourcing seriously impacts NCPs' accessibility to complainants – and indeed access is a third area of reforms critically needed at NCPs. To start, NCPs must increase the visibility of their services through better websites and outreach to the civil society groups that support claims.<sup>15</sup> NCPs must also eliminate undue barriers to eligibility – such as a material and “proven” standard of harm, bars on cases concerning future harms, or unfair statutes of limitations.<sup>16</sup>

Another challenge impacting access is complainants' fear of reprisals. Community members and human rights defenders have experienced threats and harassment for filing NCP complaints.<sup>17</sup> This is a growing problem worldwide, and NCPs must do their own part to protect users of the mechanism by adopting safety protocols and emergency response procedures.

To afford real remedy, NCPs must also be transparent and predictable. NCPs must set and follow reasonable timelines for processing complaints, and communicate regularly with both parties on complaint status. They must base their final statements only on material available to both parties. And they must seek a meaningful balance between protecting trade secrets and respecting the impact civil society campaigning has in righting the power imbalance between parties and bringing corporations to the mediating table.<sup>18</sup>

Sixth, governments must require NCPs to follow-up on case outcomes. Few NCPs monitor whether parties actually implement the recommendations given them.<sup>19</sup>

But perhaps the most critical areas of reform are in the mind-sets and approaches that governments take to interpreting and implementing their NCP mandate. If NCPs are serious about providing victims good offices to resolve allegations of corporate-related human rights harms, then NCPs must be willing to assign consequences to businesses that refuse to mediate. Consequences can include exclusion from trade promotion privileges, public procurement contracts, export credit guarantees, and investment missions.

Similarly, if NCPs are serious about meeting their legal responsibility to promote adoption of the Guidelines, then they should make clear determinations of non-compliance with the OECD Guidelines when mediation does not result in an agreement. Evidence shows that an NCP's willingness to make determinations of non-compliance increases the chances of successful dispute resolution, encouraging parties to meaningfully engage in mediation.<sup>20</sup>

## THE ROAD TO REMEDY

The NCP grievance system has significant potential to respond to and reverse harms caused to individuals by business activity. To get there, governments must explicitly recognize that remedy is the reason for the NCP mechanism. With that understanding as a firm foundation to the pursuit for functional equivalence at NCPs and to the upcoming revision of the Guidelines, NCPs will progress on the path to remedy.

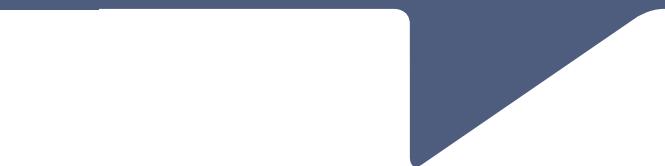
## NOTES

1. UNGPs pg. 1.
2. UNWG on the issue of human rights and transnational corporations and other business enterprises, 18 July 2017, A/72/162, p12
3. Roel Nieuwenkamp, 'OECD's Human Rights Grievance Mechanism as a Competitive Advantage', 4 November 2014, Institute for Business and Human Rights.
4. 'Think Ahead. Act Together'. Leaders' Declaration G7 Summit, 7-8 June 2015, Schloss Elmau, Germany.
5. Council of Europe Recommendation of the Committee of Ministers to Member States on human rights and business, 2 March 2016.
6. 'Shaping an interconnected world', G20 Leaders' Declaration 7-8 July 2017 Hamburg, Germany.
7. 'Improving access to remedy in the area of business and human rights at the EU level', Opinion of the European Union Agency for Fundamental Rights Vienna, 10 April 2017.
8. The UNGPs are in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly Resolution 60/147, 16 December 2005)
9. OECD Watch case database, 'Former employees vs Heineken' <[https://www.oecdwatch.org/cases/Case\\_446](https://www.oecdwatch.org/cases/Case_446)> and SOMO, 'Historic agreement between Heineken and former Congolese workers seeking remedy in labour rights dispute' 18 August 2017, <<https://www.somo.nl/historic-agreement-heineken-former-congoleseworkers-seeking-remedy-labour-rights-dispute/>> accessed 17 October 2017
10. OECD Watch case database, 'WWF vs SOCO', [https://www.oecdwatch.org/cases/Case\\_307](https://www.oecdwatch.org/cases/Case_307), accessed 17 October 2017
11. For example, in rejecting a recent OECD Guidelines case, the Canadian NCP went out of its way to avoid associating itself with the notion or the purpose of remedy. In its eight-page final statement, the NCP described itself more than a dozen times as a 'dialogue facilitation mechanism' or a 'forum for constructive dialogue'. Remedy is only mentioned once in the entire statement, in the context of the NCP insisting that if the complainants are seeking remedy, they should seek remedial measures that are 'reasonably within the operational control and ability of the company to deliver or influence', ostensibly because not doing so would make 'constructive dialogue' impossible. See Canadian NCP, 'Final Statement – BMF vs Sakto' 11 July 2017, [https://www.oecdwatch.org/cases/Case\\_471](https://www.oecdwatch.org/cases/Case_471), at §2, §9, and §14.4.

12. UN Working Group on Business and Human Rights, 'Report of the working group' (UNOHCHR 2014), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/26/25, p10](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/25, p10).
13. *Ibid.*
14. *Supra* note 1 at 22-24.
15. OECD Watch, Our Campaign Demands.
16. *Supra* note 1 at 24-32.
17. *Supra* note 1 at 22-23.
18. *Supra* note 1 at 37-41.
19. *Supra* note 1 at 47-49.
20. *Supra* note 1 at 41-44.

# Quo Vadis, USA?

## The United States and the OECD Guidelines since the 2011 review



*Lance Compa*

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**A**merican labour law and labour relations culture pose special challenges to the OECD Guidelines for Multinational Enterprises (OECD Guidelines, or Guidelines). They also test the United States' National Contact Point (US NCP, or NCP) when it considers cases of global firms' labour violations in the United States. Understanding and addressing this challenge is important, since a large majority of cases in the United States arise under the Guidelines chapter on employment and industrial relations. This essay discusses policy coherence and effectiveness in light of the U.S. national labour law and labour relations framework, and offers a perspective for advancing the Guidelines' goals via-à-vis the United States in a possible future review.

## POLICY COHERENCE AND EFFECTIVENESS

The 2011 Review increased the Guidelines' scope, rigor, and effectiveness. It pushed the United States and its NCP to improve performance compared with earlier years. The NCP adopted more forthright approaches on parallel proceedings and supply-chain relationships, with positive effects in specific instances taken up in recent years. The NCP also greatly enhanced its website and launched new "proactive" outreach and education efforts on the Guidelines. To this extent, mission accomplished. However, in key respects – especially in the labour rights arena – the United States is still falling short of a fully functioning and effective role in the system.

The US NCP has brought its policy and practice more in line with the purposes of the 2011 review and approaches of peer NCPs. Nonetheless, persistent shortfalls in the US NCP's application of the Guidelines have allowed companies to continue evading accountability in the employment and industrial relations area.

The biggest challenge is the universal refusal by companies violating workers' rights in the United States to accept the NCP's offers of mediation, with no consequences attaching. Foreign firms' American management "stonewall" the NCP with impunity while the parent companies wash their hands of the matter.

The central challenge to coherence and effectiveness in the Guidelines' application to labour-related matters in the United States is the disconnect between US labour practices and the Guidelines' incorporation of the International Labour Organization's core standards on freedom of association. American labour law and policy allow employers openly and aggressively to interfere with workers' organizing and collective bargaining rights. But such interference is contrary to the Guidelines and to the UN Guiding Principles on Business and Human Rights (UNGPs), which the Guidelines incorporated in the 2011 review.

Employers' interference permitted by US labour law include requiring employees to attend forced-listening "captive-audience meetings" filled with vitriolic denunciations of trade unions, scorn for collective bargaining, and suggestions of dire consequences – especially workplace closure – if workers choose union representation. Management sends the same message in letters and CDs to workers' homes, aimed equally at employees' spouses and family members.

In captive meetings, managers convey these warnings through scripted speeches, power point presentations, films, and even by live actors portraying management and union representatives. The actors make unionists appear to be ignorant thugs only interested in getting dues money from workers, and managers to be enlightened leaders with workers' best interests at heart. Interference also takes the form of required one-on-one meetings between workers and their immediate supervisor, with supervisors trained and scripted in advance by anti-union consultants who specialize in derailing union organizing efforts.

In both settings – captive-audience sessions and one-on-one meetings – management also declares that they can and will permanently replace workers who exercise the right to strike. Permanent replacement of workers who strike is allowed by a Supreme Court decision in 1938.<sup>1</sup> The ILO Committee on Freedom of Association has ruled that the striker replacement doctrine violates Convention No. 87, one of the core ILO conventions.<sup>2</sup>

The US NCP has been powerless against the use of such tactics by foreign-based companies in their American workplaces. Local managers say they are simply availing themselves of practices permitted under US labour law. Meanwhile, parent-company management say that US labour law is too complicated for them, so they leave it to their American managers and lawyers. For its part, the NCP does not insist that parent company management answer for the actions of their subordinates.

Reliance on national law and practice is not a defence to a violation of the OECD Guidelines. Where national law fails to comply with international standards, multinational enterprises should conform to international standards as long as such conformance does not put them in outright conflict with national law.

The OECD Guidelines make this point at the outset, in Chapter I on Concepts and Principles: *[S]ome matters covered by the Guidelines may also be regulated by national law...[I]n countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.*<sup>3</sup>

Foreign firms in no way would violate domestic US labour law by halting captive-audience meetings and anti-union propaganda campaigns, no longer threatening to permanently replace workers who exercise the right to strike, and no longer perpetrating other forms of interference with workers' organizing rights. American employers themselves concede that US labour law and practice contravene ILO standards. The very organization which represents US employers at the ILO, the U.S. Council for International Businesses, states: *U.S. law and practice conflict with many of the requirements of the ILO standards, preventing U.S. ratification of some of the core labour standards....U.S. ratification of Conventions 87 and 98 would require particularly extensive revisions of longstanding principles of U.S. labour law to conform to their standards....U.S. ratification of the convention would prohibit all acts of employer and union interference in organizing, which would eliminate employers' rights under the NLRA to oppose unions.*<sup>4</sup>

## THE NISSAN CASE

An important case exemplifies this problem. In April 2014, the United Auto Workers union (UAW) and the global union IndustriALL submitted a complaint to the US NCP on Nissan Motors' interference with employees' trade union rights at its Canton, Mississippi factory. Since opening the plant in the early 2000s, Nissan managers kept up an aggressive anti-union campaign driving home a central message that workers' jobs would be in jeopardy if they formed a trade union.

Contrary to ILO core labour standards and core conventions incorporated into the Guidelines, Nissan undertook a systematic campaign of interference with employees' organizing efforts. Management tactics included:

Telling employees when they are hired that "Nissan is totally non-union and "Nissan has never had a union," despite the fact that Nissan recognizes and bargains with unions at facilities all around the world, and telling employees that "unions make plants close";

- Holding mandatory captive audience meetings with videos, films, PowerPoint presentations and speeches vilifying trade unions in general, and the UAW in particular, and implying that Nissan will close the Canton plant or not bring new product lines into the plant if workers choose union representation;
- Training and instructing supervisors on how to convey implicit threats to workers in one-on-one meetings between a supervisor and an individual employee, with no one else present to witness what the supervisor tells the employee;
- Denying employees the right to hear from UAW representatives inside the workplace (in a time and manner that does not interfere with production), as called for under international standards on freedom of association.

Management's anti-union campaign also contravened the long-standing position of the OECD reflected in the following decision by the Committee on Investment: *[I]n specific instances, active efforts may have been undertaken to discourage organising activities of employees. The Committee regrets that such situations continue to exist or arise and takes the present opportunity to stress again the provisions of the Guidelines as these apply to the question of employee representation. The Committee has therefore reaffirmed the view already expressed in both the 1979 and 1984 Review Reports that the thrust of the Guidelines in this area is towards management adopting a positive approach towards the activities of trade unions and an open attitude towards organisational activities of workers in the framework of national rules and practices.<sup>5</sup>*

The “framework of national rules and practices” in no way exculpates management’s actions. Nothing in US labour law and practice encourages poisonous anti-union campaigns like the one that Nissan managers launched against workers’ organizing efforts. Indeed, a “positive approach” and “open attitude” are entirely lawful, and indeed widely practiced by many employers in the United States when workers engage in trade union formation.<sup>6</sup>

Notified of the unions’ submission and asked to respond, Nissan’s American lawyers first told the national contact point that engaging in mediation would put Nissan in violation of American labour law.

The NCP rightly rejected this argument, saying, “the US NCP strongly disagrees and is not aware of any applicable law or procedures that would weigh against offering its good offices in this case.”<sup>7</sup>

Nissan’s attorneys also argued that unions’ merely notifying their members about the filing of the specific instance violated confidentiality requirements. The unions did not disclose the text of their complaint, nor any of the further exchanges in the specific instance process.

The US NCP correctly denied this claim: *With respect to the parties’ differing positions regarding whether the unions’ acted consistently with the confidentiality provisions of the U.S. NCP procedures by publicizing the submission of the Specific Instance, it is the position of the U.S. NCP that public reference to the filing of the Specific Instance is not inconsistent with those provisions such that it would warrant further NCP action or breach of confidentiality by the parties.*<sup>8</sup>

The NCP found that the matters raised were bona fide and merited further examination. After more exchanges with the unions and the company, the NCP offered its good offices to encourage a mediation process for a mutually agreeable resolution of the dispute. It proposed that the Federal Mediation and Conciliation Service (FMCS) conduct the mediation, and asked the parties to meet with FMCS officials about procedures. The unions accepted the NCP’s offer and met with FMCS representatives. Nissan rejected the NCP’s offer and refused to meet the mediators, bringing the case to a close.<sup>9</sup>

## THE FINAL STATEMENT

The US NCP issued a Final Statement describing the course of events and expressing regret at Nissan’s unwillingness to participate in the process. The NCP also made two recommendations: (i) that Nissan conduct a corporate-wide labour rights review, and (ii) that Nissan consider alternative methods of mediation or otherwise engaging with the unions to seek a resolution to the issues raised in the OECD complaint. Nissan has not reacted to or implemented these recommendations.

The NCP's expression of regret and recommendations were as much as it could muster in the fact of Nissan's recalcitrance. The unions could point to these elements of the NCP's final statement to inform other labour groups, NGOs, socially responsible investors, journalists, government officials and other potential allies in the court of public opinion about what they see as Nissan's failure to comply with the Guidelines. But they could not point to a determination that Nissan violated the Guidelines.

The National Contact Points of the Netherlands, United Kingdom, Norway and others make findings about companies' compliance with the Guidelines. That is, while they cannot compel firms to accept their offers of mediation, these NCPs will determine whether companies have or have not violated the Guidelines, based on all the information gathered in the specific instance process. These are not judicial findings exposing companies to legal liability, since the Guidelines reflect a "soft law" system without hard-law enforcement. But they make a powerful statement about the Guidelines and expectations of firms' compliance.

In contrast, the US NCP limits itself to deciding whether issues raised in a complaint merit further attention, without determining whether companies complied with or violated the Guidelines. As the NCP stated in the Nissan decision: *The U.S. NCP does not make a determination whether the party is acting consistently with the Guidelines, and the U.S. NCP does not have legal authority to adjudicate disputes submitted under this process. Acceptance of the Specific Instance is in no way an acknowledgement of or determination on the merits of the claims presented, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties in voluntarily, confidentially, and in good faith, reaching a cooperative resolution of their concerns.*

The US NCP's failure to determine whether Nissan was acting consistently with the Guidelines neutered their coherence and effectiveness in this case. Other cases involving labour rights violations in the United States by foreign multinational companies came to the same dead end.<sup>10</sup>

## ADVANCING THE GUIDELINES' GOALS IN A POSSIBLE FUTURE REVIEW

A future review of the Guidelines can clarify that all National Contact Points should make findings about companies' compliance with or violations of the Guidelines when they refuse to accept a National Contact Point's offer of mediation. Making this an available tool can help persuade firms to accept mediation or, if they refuse, serve as a justified rebuke within the Guidelines' soft-law system.

A future review should also allow submitting parties alleging violations of the Guidelines by subsidiaries in a host country of parent companies in a home country to have their case handled by the National Contact Point of either country or both. The National Contact Points should jointly and co-equally administer the case. If they believe that an offer

of mediation is appropriate, each should make the offer to the corporate office in its jurisdiction: one to the firm's management in the host country, one to the parent company management in the home country. In the United States, at least, this will address the problem of the headquarters office "washing its hands" regarding labour violations by U. management.

The 2011 review's attention to "due diligence" creates an opening for such a move. Nissan is a Japan-based multinational company, but France-based Renault owns a controlling interest in Nissan. Renault and Nissan formed a strategic alliance in 1999 which is incorporated in the Netherlands.

A key issue in the Nissan case was the failure of due diligence by Nissan management in Japan, Renault management in France (the controlling interest in Nissan), and management of the Renault-Nissan Alliance in the Netherlands. Parent company executives knew of their American management's actions and failed to act to stop it. In a framework articulated in the UNGPs, they:

- Failed to assess actual and potential impacts on workers' freedom of association;
- Failed to avoid causing or contributing to adverse impacts on workers' freedom of association;
- Failed to prevent or mitigate adverse impacts on workers' freedom of association that are directly linked to their operations.<sup>11</sup>

Local management's conduct in the United States is the backdrop to these cases, but the real issue is failure of due diligence by controlling parent-company management. The place where top management makes the decision to allow American managers and lawyers to stonewall the NCP is the locus of the violation of the Guidelines. The US NCP should insist that counterpart National Contact Points work jointly to bring parent company management into the mediation process, not allowing them to say "we're leaving this to our American managers." A future review should make such joint-case handling imperative.

## CONCLUSION

The OECD Guidelines and the NCP mechanism provide a viable, accessible international forum in which civil society actors can make rights-based claims beyond a national legal framework. To its credit, the US NCP does as much as it can, within the constraints of the non-determination policy, to find complaints to be bona fide and worthy of further treatment, to offer mediation, to make substantive recommendations, to refute specious employer arguments about confidentiality, and so on. This at least allows advocates to refer to these steps when they seek to hold companies accountable for violations.

However, the soft-law nature of the Guidelines and the NCP mechanism allow no further recourse when a global firm refuses to engage in the process. In labour cases especially, the US NCP's handling of specific instances contains dissonant results. While it finds that issues are bona fide and merit an offer of arbitration, its refusal to comment on a firms' compliance or non-compliance with the Guidelines vitiates the force of its decision and leaves companies "off the hook" for their actions, even when evidence of violations is ample and compelling.

Nothing in this comment intends to criticize individual US government officials carrying out the functions of the national contact point. The US NCP post has always been held by civil servants whose job is not to make policy but to implement it. Primary responsibility for the US NCP rests with senior political appointees who have failed to give it stronger tools to hold multinational companies accountable for violations of the Guidelines. A future review of the Guidelines can go far to strengthen the Guidelines' impact in the United States and the role of the US NCP.

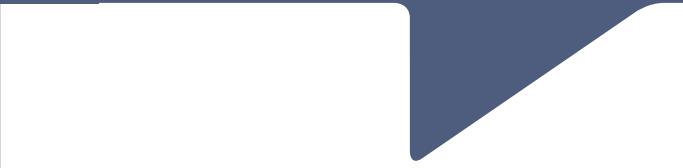
## NOTES

1. See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).
2. See ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992).
3. See OECD Guidelines Chapter I, *Concepts and Principles*, paras. 1-2, at p. 17.
4. USCIB, “U.S. Ratification of ILO Core Labour Standards”, *Issue Analysis*, April 2007 (emphasis added).
5. See OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic texts, DAFFE/IME(2000)20, [https://one.oecd.org/document/DAFFE/IME\(2000\)20/en/pdf](https://one.oecd.org/document/DAFFE/IME(2000)20/en/pdf).
6. For discussion, see James J. Brudney, “Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms,” 90 Iowa Law Review 819 (2005).
7. See U.S. National Contact Point, *Final Statement UAW-IndustriALL and Nissan North America, Inc. for operations in the United States*, January 30, 2015, at <https://www.state.gov/e/eb/oecd/usncp/specificinstance/finalstatements/273155.htm>.
8. *Ibid.*
9. See Bernie Woodall, “Nissan rejects U.S. government offer to mediate Mississippi UAW row,” Reuters U.S. Legal News, February 2, 2015, at <https://www.reuters.com/article/nissan-uaw/nissan-rejects-u-s-government-offer-to-mediate-mississippi-uaw-row-idUSL1N0VC1VC20150202>.
10. In December 2016, the unions filed simultaneous submissions with the NCPs of Japan, France, and the Netherlands (See “Trade unions file OECD case against Renault-Nissan Alliance in three countries,” IndustriALL Global Union, December 20, 2016, at <http://www.industriall-union.org/trade-unions-file-oecd-case-against-renault-nissan-alliance-in-three-countries>). According to UAW representatives, the two European country NCPs deferred to the Japanese, which refused to accept the case for review (interview with UAW representative, December 2017).
11. See UN Guiding Principles on Business and Human Rights, Sections 12, 13, 15, 17, 18.



# China, the OECD and responsible business conduct: 10 years on

A piece dedicated to Roel Nieuwenkamp,  
One of the “RBC brothers”



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## THE FIRST CONTACT

In November 2007, Mr. Ken Davies, the OECD's China investment expert, conducted a research mission to China with the support of the Chinese Ministry of Commerce. Included in his destinations in China, were four textile and garment factories in Guangdong province. According to Mr. Davies, the visits "were organised by the China National Textile and Apparel Council (CNTAC). The OECD team was accompanied by a lawyer from CNTAC..."

Yes, I was the "lawyer" from CNTAC, but I was not acting as a lawyer *per se* during that visit. Before Mr. Davies's visit, I had been working at the Office for Social Responsibility of CNTAC - first of its kind in China - for two years. It was the time when "corporate social responsibility (CSR) in China" was being translated into "CSR of China", and one of the milestones of such transition was the release by CNTAC in 2005, the CSC9000T, China's first standardised social responsibility management system and code of conduct. By the time Mr. Davies paid his visit to China, various local CSR initiatives were being fermented, stirring up excitement and uncertainty. And actually, two months after Mr. Davies's visit to China, the Chinese State-owned Assets Supervision and Administration Commission of the State Council (SASAC) issued its groundbreaking *Guidelines for State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities*.

It is not surprising, however, that the OECD had left no footprint in this transition. For one thing, the conservative or resistant perception on CSR still remained at a certain level of resonance within the Chinese political circle. As late as in 2005, CSR was still labelled as a means of western protectionism by some Chinese officials and media. For another, the OECD, its Guidelines for Multinational Enterprises (Guidelines), along with the concept of responsible business conduct (RBC) that it was upheld as a synonym of CSR, were practically strangers to the Chinese business society. As a result, the OECD had literally no impact on the first generation of Chinese CSR initiatives. Mr. Davies reported later in 2008 that the OECD Guidelines were "reportedly used as references in the development of" the Shenzhen Stock Exchange's *Social Responsibility Instructions to Listed Companies*, but no report or document or interviews from that time could support his claim. Despite frequent meetings, talks and visits by the OECD on the topic of RBC in China in 2005-2007, the OECD was away from the actual practice of RBC/CSR of the Chinese business.

This is why the 2007 OECD trip to the textile and garment factories in Guangdong facilitated by CNTAC was extraordinary: the four factories were pilots of a major CSC9000T implementing program, and hence the visit was the first close look of the OECD at an operating Chinese CSR/RBC initiative on the ground. As rightly put by Mr. Davies himself, "the intention of visiting them was to see what is possible in existing Chinese conditions". Although, after the visit, Mr. Davies believed these factories "should not be seen as typical Chinese factories" as they "were selected for observation", which we did not do, his general conclusion was rather encouraging. Mr. Davies concluded that "to the extent that high standards of RBC are exhibited in these workplaces, they may serve as models for other Chinese enterprises to follow".

## THE SECOND BOTTLE OF CHAMPAGNE

Seven long years had passed before the OECD would touch base again with the Chinese business CSR/RBC practitioners in 2014. In these years, social responsibility, or sometimes responsible business, was frequently referred to by the Chinese state leaders, and more Chinese business associations had developed their own CSR or sustainability guidance or standards, including those of international contractors, electronics, banking, and mining sectors et cetera. I was one of the key drafters of most of these guidance or standards. I know that many different international documents or standards were referenced by these Chinese sectorial initiatives, but not the Guidelines, although in most cases, I shared the Guidelines among the drafting teams. The reason for this exclusion remained a political one: China is not part of the OECD, which is a club for western and developed countries.

Meanwhile, the inception of the RBC Unit of the OECD - the team of Mr. Roel Nieuwenkamp - would change this predicament by making RBC a topic of common interest between the Chinese government and the OECD. In late 2014, the RBC Unit visited China at the invitation of the Chinese Ministry of Commerce, and had talks with CNTAC and the Chinese Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters (CCCMC), which was just about to finalise its *Guidelines for Social Responsibility in Outbound Investment*. Two rather diplomatic moves were made during this visit: the OECD invited CNTAC to join its advisory group of the *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, and a Memorandum Of Understanding between CCCMC and the OECD to promote RBC and due diligence was signed. The CCCMC also invited the RBC Unit to provide comments on its Guidelines being finalised.

Premier Li Keqiang's historic visit to the OECD in July 2015 set a milestone for the cooperation between China and the OECD. Included in the *Joint Programme of Work for 2015-16* signed between the Chinese government and the OECD during this visit were two important action items: the OECD was to support CCCMC in developing the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*, and Chinese business associations, such as CNTAC and CCCMC, were to establish a cross-sectorial platform for promoting RBC. This should be seen as the beginning of a new era for the collaboration between China and the OECD on RBC.

As the lead Chinese expert in the development of the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*, I had the opportunity to work with the OECD RBC team, led by Mr. Roel Nieuwenkamp, for a whole year. Their knowledge, professionalism as well as devotion have made it possible for the Guidelines to be completed by the end of 2015. It was the ever-first Chinese CSR initiative that has publicly made reference to its OECD counterpart, and was actually, a joint effort between the OECD RBC Unit and Chinese business and their stakeholders. At a reception celebrating the launch of the Guidelines, Mr. Roel Nieuwenkamp presented to Mr. Sun Lihui, the brain and arms of CCCMC's RBC team, a bottle of French champagne, and he told us that when such guidelines for the Chinese textile and garment industry were produced, "let's celebrate it with a second bottle!"

## THE THIRD PILLAR

The collaboration between the OECD and Chinese businesses in the past three years has gone much further than developing guidance or standards. The most important development from codification has been how to operationalize and implement international RBC norms as well as the Chinese standards, with a focus on establishing remediation mechanisms - the third pillar of the UN Guiding Principles on Business and Human Rights.

The establishment of a RBC platform in China - something similar to the National Contact Points in the OECD countries - has been the centrepiece of the China-OECD collaboration in the RBC area. Such a platform can serve as a knowledge and exchange hub, capacity building centre, initiative incubator and an alternative resolution mechanism for RBC disputes, which is missing in China. The OECD RBC team first presented the idea to the leadership of both CNTAC and CCCMC in 2015, which was well received, and was later included in the *Joint Programme of Work for 2015-16* between the Chinese government and the OECD.

In the following two years, CNTAC and CCCMC have explored ways to set the foundation for the platform, including securing an independent and competent institution that can host the platform, while the OECD RBC team has voiced their support for the platform on various occasions. For some time, the concretion of the platform idea has encountered difficulties and delays due to reasons at different levels, but both the OECD and the Chinese initiating organizations believe such a platform is crucial for the popularisation and implementation of RBC in China, especially for Chinese businesses investing around the globe. Currently, the OECD RBC team is working closely with CNTAC and CCCMC to solve legal and resource barriers for the initiation of the platform.

Another significant action of the third pillar jointly taken by the OECD and Chinese businesses as well as international companies concerns the adverse impacts including child labour along global cobalt supply chains. As the first step to handle this huge challenge, CCCMC joined hands with the OECD and held a discussion meeting with companies of different sectors along the supply chain, which resulted in a set of principles guiding collective actions of the companies, including systemic remedial interventions in the Democratic Republic of the Congo. Being the chief advisor of CCCMC on this matter, I have witnessed how the remarkable network, expertise as well as diplomacy of the OECD RBC Unit have moved companies from different countries and sectors, big and small, to commit in joint actions for the same responsible end, and how such joint actions have finally evolved into an industrial RBC initiative, the Responsible Cobalt Initiative, first of its kind in the industry, as well as the first international responsible business organization originated from China with a legal entity and membership of international and Chinese companies.

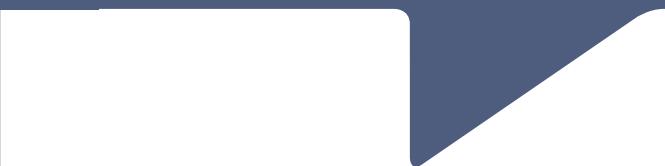
## REFLECTIONS ON THE FUTURE

There is a long way before China adheres to the OECD Guidelines. However, the political will of the Chinese government to learn from and exchange with the OECD, including in the area of RBC, is as clear and strong as the determination of the Chinese business. It shall be stressed that the “business case” of RBC is of fundamental importance for the Chinese government to step closer to the OECD standards. Hence, at least in the medium term, it is suggested that the OECD RBC Unit puts its focus on Chinese business, other than the public sector.

To conclude, as put by a Chinese saying, “human effort is the decisive factor”, the future of the collaboration between China and the OECD on RBC is no doubt in the hands of people with a clear vision, strong belief, and good patience, with Mr. Roel Nieuwenkamp being an outstanding example.



# India and the OECD Working Party on Responsible Business Conduct: finding synergies



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The 2030 Agenda for Sustainable Development and the commitment of political leaders in Paris in 2015 for achieving a 1.5°C compatible world are especially relevant for India. We can safely assume that the (non) achievement of these goals and agreement in India will have implications and consequences globally, not just for India. Businesses role and responsibilities in (non)achievement of these global goals and Nationally Determined Contributions (NDCs) is critical. This is particularly critical for multinational enterprises (MNEs), both from India and from the advanced countries operating in and/or sourcing from India. Responsible business conduct (RBC) and business sustainability connects closely, and in various ways, with the day-to-day activities and operations of businesses anywhere in the world, including India, and with the ambitious global goals, targets and agreements. Hence, RBC and businesses sustainability are no longer just optional, or an additional, extra features.

With US \$2 trillion economy in 2017, some argue that India is expected to be world's third largest economy by 2028<sup>1</sup>. However, the World Bank's Poverty and Shared Prosperity 2016 report suggested that although over half the world's poor live in Sub-Saharan Africa, Indians accounts for one in three poor people worldwide. The largest number of people (224 million) in India live under the international US\$1.90-a day poverty line<sup>2</sup>. Also, while India's emissions are much lower than Western countries (and China), and only one-third of the global average in per capita terms, but with over 4.5 percent of global greenhouse gases (GHG) concentrations, India is among major emitters in absolute terms<sup>3</sup>. The Indian economy relies on coal for over 60 percent of its electricity generation, and fossil fuel continues to be vital in India's long-term energy strategy<sup>4</sup>.

The OECD Guidelines for Multinational Enterprises (the Guidelines) - with over 40 years history and experience, aiming to guide the MNEs on RBC - are perceived and promoted as "the world's most comprehensive multilateral agreement on business ethics"<sup>5</sup>. The Guidelines are fairly well established as and amongst the authoritative global corporate responsibility instruments. India, however, is not an OECD member, nor a signatory to the OECD Declaration on International Investment and Multinational Enterprises of 1976 (MNE Declaration). Also, in OECD's official terminology, India is referred to as a non-adhering country for the Guidelines. Nevertheless, with growth expectations and challenges illustrated above, now India matters...and its presence in OECD is both required and important – for the mutual benefit of both India and the OECD (and its members countries). William Antholis, a former White House and State Department official, argued in his book, "To manage the biggest challenges facing the planet, China and India must be at the table. Steering the world economy, combating poverty, slowing global warming, preventing nuclear war – these are big and hard problems. You cannot get there from here without going through these two giants"<sup>6</sup>.

The Indian connection in the local and global business landscape is hard to miss. The global economic, business and social situations have made a full 360 degree turn since the Guidelines were adopted in 1976. As the Western countries, led by the United States,

become increasingly inward-looking, emerging giants - India (and China) - are stepping up and assuming significant roles in the world order. The context in 1970s, in which the MNE Declaration and the Guidelines were developed and adopted – to legitimize MNEs and promote and protect the investment and investors from Western countries, aiming to enter the developing countries, from host countries' potential national policy discrimination - has substantially changed over time. The developing countries then were keen on protecting their domestic policy turf<sup>7</sup>. Today India (and China) are championing multi-polarisation and economic globalisation and challenging the US stand on increasing trade related tariffs. Global trade situations have much changed, including the outward foreign direct investment (FDI) from India (and from China), as well as the attitudes of Indian policymakers and political leadership towards foreign investors, investments and MNEs. The attitudes towards RBC too need rethinking - both in India and in the OECD world. With this note, I focus attention on outlining some opportunities, challenges and strategies for enhancing the engagement with India on RBC by the OECD Working Party on Responsible Business Conduct (WPRBC). The OECD, through its Enhanced Engagement Programmes, is anyway keen to strengthen co-operation with India, with a view to a possible membership<sup>8</sup>. Below I set out the opportunities first.

## OPPORTUNITIES FOR THE WPRBC TO ENHANCE ENGAGEMENT AND CO-OPERATION WITH INDIA ON RBC

Since the new government assumed power in 2014 elections, India's foreign policy witnessed a paradigm shift. Prime Minister Narendra Modi's aggressive<sup>9</sup> international diplomacy - referred by some commentators as Modi Doctrine<sup>10</sup> - focuses mostly on India's economic growth through promotion of trade and investment relations and economic cooperation. Increased focus on bilateral interactions for improving international relations, including for instance with Israel and countries in the middle east, much differentiates the current foreign policy regime from the past. Flagship programme such as 'Make in India' and policy reforms for India achieving higher ranking in the World Bank's 'Ease of Doing Business'<sup>11</sup> are all aimed at attracting foreign investors and MNEs.

The desire of Indian political leaders to play roles in global governance too has grown substantially. India is now an important member of G20 - influencing the reshaping of the world order<sup>12</sup>. While seat in the United Nations (UN) Security Council and membership of the elite Nuclear Suppliers Group have been elusive for different reasons, however, Indian government has been successful in securing India's membership of the non-proliferation regimes - Missile Technology Control Regime (MTCR) and Wassenaar Arrangement in 2016 and 2017 respectively<sup>13</sup>. Active role in the formation of BRICS bloc - the grouping of five major emerging economies (Brazil, Russia, India, China and South Africa) - is yet another example of India's strong desire to play active role in global governance and its institutions.

In March 2017, India joined the International Energy Agency (IEA) as an Association country. The IEA stated “As India moves to the centre of global energy affairs, the new institutional ties with the IEA mark a critical addition to the IEA’s global outreach”<sup>14</sup>. At the Paris Summit in 2015, India and France jointly announced the International Solar Alliance (ISA<sup>15</sup>), an inter-governmental organisation under the UN Charter, aimed to accelerate the deployment of solar energy in 121 sun-rich countries situated between the Tropics of Cancer and Capricorn, representing 73% of the world’s population. Prime Minister (PM) Modi and French President Emmanuel Macron launched ISA in March 2018 in New Delhi. ISA is considered to be one of the most promising coalitions to combat climate change and the first international organization hosted in India, with its headquarter situated in Gurugram, in outskirts of New Delhi. The Alliance set a target of producing 1 trillion watts of solar power by 2030 and to achieve its objectives, the Alliance aims to implement financial instruments to mobilize over \$1 trillion in solar energy investment by 2030<sup>16</sup>. India pledged to fulfil at least 40 percent of its energy needs from renewable sources by 2030<sup>17</sup>. Over the last few years, Indian policymakers have transitioned “from a protest voice on the fringes of global climate policy to one that is actively shaping international efforts to combat climate change”<sup>18</sup>. The growing population of India, once seen as ‘demographic disaster’, is now viewed as ‘demographic dividend’<sup>19</sup>. That makes India a huge market for consumption and growth<sup>20</sup>. However, the growing Indian middle class is expected to contribute to increased consumption and energy demands. The Indian policy-makers and businesses will need to balance the associated sustainability challenges.

The OECD monitors and understands India’s desire for a proactive role in global governance and has been working with Indian policymakers and other stakeholders over the years to support several initiatives of India<sup>21</sup>. The OECD in general, and the WPRBC and the Guidelines in particular, can support Indian policymakers and stakeholders in meeting the ambitions of balanced, sustainable and inclusive economic growth, help India deliver on the promises made in global platforms, as well as help secure roles in global governance. The OECD’s strong government linkages may be attractive for Indian policymakers, political leaders and stakeholders interest on international diplomacy. I outline some challenges for the WPRBC in the following section.

## CHALLENGES FOR WPRBC TO ENHANCE ENGAGEMENT AND CO-OPERATION WITH INDIA ON RBC

The Guidelines can be considered a pioneer, inspiration for, and the mother of all corporate social responsibility (CSR)/RBC and business sustainability related Multi-Stakeholder Initiatives (MSIs) and transnational voluntary regulation (TVR) movement globally. Several MSIs and TVR instruments are supported by the governments of OECD member countries. However, the distinctiveness of the Guidelines remains and is further strengthened post the 2011 Review. The periodic reviews and updates continue to keep the Guidelines relevant with changing times, structural changes in international business and FDI, and with geo-political

global developments. Further, with close coordination and alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), and launch of several sector guidelines, we can claim that among the major achievements of the Guidelines, has been meeting the promise of the 2011 Review – be comprehensive in scope and application and demonstrate the potential for a soft law to be as effective as hard law. The current Chair of the WPRBC, Dr. Roel Nieuwenkamp calls it “soft law with hard consequences”<sup>22</sup>. Dr. Nieuwenkamp has worked hard, since he assumed the Chair in 2011, and strengthened the operational mechanism and practices of the National Contact Points (NCPs). Besides, the NCPs also offer the necessary support to the implementation of other international instruments such as the International Labour Organization’s Declaration and the UNGPs. With the backing of the adhering country governments, an able steering by OECD Secretariat and the WPRBC, NCPs are expected to grow in esteem, experience, strength, and effectiveness over the coming years and reviews.

As an implementation mechanism associated with voluntary guidelines, the NCP was a very smart idea. While NCPs complements and supports, but still differentiate the Guidelines from all other MSIs and TVR initiatives. Another major differentiation of the Guidelines, from other MSIs and TVR initiatives, is the support and backing of the good offices of adhering country governments. Many MSIs and TVR initiatives, while supported by government (and by other stakeholders), nevertheless largely depend on the MNEs and the forces of the market for their uptake, effectiveness and impacts, which can be unreliable at times, depending upon the conditions of the market and individual firms. Hence, the legitimacy and credibility of MSIs and TVR initiatives is often in question, and they are both praised and criticized for several reasons, though recently there have been shriller voices towards latter<sup>23</sup>. The hopes and excitement around the potential of MSIs/TVR initiatives, generated during the incubation phase, seem to be waning and concerns around their fragmentation, independence, duplicity, lack of harmonization, costs, impacts, and business model raised<sup>24</sup>. Emerging scholarly and policy evidence demonstrates significant variations in forms, methods and nature of relations among the constituting and supporting actors, in procedural rules, and in their impacts and effects. Such evidences suggest that the MSIs/TVR are yet to take a coherent institutional form<sup>25</sup>, unlike the Guidelines and the NCPs.

Additionally, most of the MSIs/TVR are targeted at the supply chains, usually in developing countries, with implications and consequences for supplier entities for non-compliance. The liberal trade regimes have supported India’s economic rise and surge in the global Indian middle class. The Indian policymakers, industry and stakeholders have traditionally perceived such TVR as non-tariff barriers (NTBs). Largely influenced by its domestic politics, India’s core concerns, raised on several occasions at multilateral forums such as the World Trade Organisation, relate to the protection of its manufacturing entities, farm sector, food security and trade in services, and these concerns often place India at odds with developed countries<sup>26</sup>. However, it is important to note that the source of over sixty per cent of GDP is estimated to be the unregistered business units of India<sup>27</sup>.

Harris-White offer interesting statistics and analysis, “Forty per cent of manufactured exports are produced in India’s gullies and alleys; just under half the economy is black, involving factor and property incomes that should be reported but are not and 90 per cent of all jobs are unregistered and without work rights.<sup>28</sup> In absolute terms, India has the largest casual labour force in the world. While between 40 and 80 per cent of the labour forces in the public and private corporate sectors are estimated to be subcontracted to private agents - in turn on casual, verbal contracts - the corporate sector employs well under half as many people as the non-corporate sector. In 2007, partial-equilibrium modelling led to the conclusion that it was the latter that was driving the growth of both GDP and livelihoods. While data updated to 2015 has not yet been used for cause-effect statements, it is known that, in manufacturing, about three quarters of the labour force is unregistered, a proportion that has been ‘remarkably constant’ since 1995...it is unlisted firms and micro and small enterprises that are the engines of both growth and profit”<sup>29</sup> in India. The Indian policymakers have the need to balance efforts to boost economic development and growth (for jobs creation) along with sustainable and inclusiveness (to reduce inequalities). Usually, the agenda of economic development and growth takes precedence over RBC and business sustainability issues.

The Indian policymakers view any interference in domestic affairs by foreign funded non-governmental organizations (NGOs), and other foreign institutions, as efforts towards harming the economic interest of India<sup>30</sup> and stalling the Indian economy.<sup>31</sup> Historically, post the colonial experience, Indian political leaders have been cautious with foreign interventions and interferences and took pride in being self-reliant and self-sufficient, and therefore followed a mixed economy model<sup>32</sup>, created the Non-Aligned Movement, and supported New International Economic Order<sup>33</sup>. Apparently, the experience of the failed UN Code of Conduct on Transnational Corporations, and the perceived role of the OECD in the failure of the UN led effort, with the MNE Declaration and the Guidelines, made Indian policymakers and leaders wary of the Guidelines.<sup>34</sup> The investment-nexus of the Guidelines is about protecting the investors and the investment, and hence the stance of Indian policymakers on protecting their own industry, investors and investments may be seen at odds with OECD efforts on MNEs and supply chains related RBC.

Also, sustained and structural targeting of Indian manufacturers/suppliers on human rights and workers issues over the last few decades by certain international campaigning groups and NGOs, cause alarm among Indian policymakers, when thinking about the Guidelines. After a prolonged litigation on one such issue (between 2005-2008), involving a supplier of the Dutch brand and campaigning groups, Indian government banned the entry of certain Dutch professionals through a tightened visa regime.<sup>35</sup> This case also contributed to the deterioration of diplomatic ties between India and the Netherlands<sup>36</sup>. While efforts made from both ends since, the bilateral ties are not fully normalised until now. The Indian CSR law (Section 135 of Companies Act 2013), differently focused on developmental issues, is driven by the needs of local challenges and politics, and enjoys widespread local political and stakeholder support. It

is hard to imagine if the Indian policymakers, while drafting the CSR mandate as part of the Companies Act Bill, were not conscious of the global underpinnings of CSR/RBC and business sustainability. The underlying message of the CSR Mandate - for firms and stakeholders in India, and beyond – could be read as: Indian policymakers are more concerned about what happens to the profits made by the firms, not how profits are made. This message is diametrically opposite of the primary concern of the WPRBC, the Guidelines, the UN bodies, and most of the policymakers, thinkers and scholars globally vis-à-vis RBC and business sustainability.

Although, with ambitions for roles in global governance, commitments made globally on sustainability, as well as the growing Indian private sector, Indian policymakers will need to engage in serious thinking about RBC and business sustainability. The balanced views of the WPRBC on the Guidelines – on risk, due diligence, mediation, and disengagement from supply chains as a last-resort option<sup>37</sup>, and with multi-stakeholder based institutional implementation framework of NCPs - are well positioned to support the Indian policymakers and stakeholders on such issues.

Appropriate engagement with the Indian policymakers and stakeholders by the WPRBC can bring better clarity about the Guidelines, and will surely help. Dr. Nieuwenkamp's favourite cautionary tale from James Cameron's movie Avatar<sup>38</sup> indicates his passion for the Guidelines and is unique for creatively capturing the attention and imagination of businesses towards RBC. Such creativity is perhaps required for engagement with Indian policymakers and other stakeholders also to help them forge frameworks for RBC and business sustainability in a rapidly growing economy, amidst the global competition for resources and investments. Drawing from the opportunities and challenges discussed so far, I now turn to outlining some possible strategies for the WPRBC in the following section.

## **STRATEGIES FOR WPRBC TO ENHANCE ENGAGEMENT AND CO-OPERATION WITH INDIA ON RBC**

The 'Active with India' report developed by OECD in 2016 cover and highlights OECD engagement with India on several issues.<sup>39</sup> However, a review of this report suggest that barring few exceptions, most of the OECD engagement with the Indian government/officials seem to be in/at central level in New Delhi. PM Modi has been promoting and emphasising the idea of "Competitive Cooperative Federalism".<sup>40</sup> Given the size of India and need for growth across the country, there is encouragement, interest and growing policymaking capacity at the sub-national level – federal states/provinces and cities - for engagement in international relations and diplomatic issues, particularly with an aim to attract investments. Pant and Tewari<sup>41</sup> argue that the state governments, rather than central government in India, are better equipped to plan and meet the challenges, and "to undertake diplomatic measures in areas of trade, commerce, foreign direct investment, education, cultural exchanges and also outsourcing of business". Pant and Tewari<sup>42</sup> developed the case for para-diplomacy in India by arguing that

the sub-national actors as formal legal personality “are necessarily more likely to engage in international activities designed to promote and protect local and international interests and prerogatives”. Pant and Tewari<sup>43</sup> also suggest that there could be difference in positions of the central and state governments on various issues, due to ideological or political reasons, and that could stall or delay important decisions.

William Antholis developed an “inside out” perspective on India (and China) and advised Western policymakers to engage not just with the political and stakeholder leaders’ in New Delhi (and Beijing) but also with leaders and stakeholders managing and administering and influencing the country-sized provinces.<sup>44</sup> Many of the local provincial leaders are regular participants at global forums. Antholis argue, when negotiating, it is important to recognize and appreciate that if national leaders are unwilling to move or sign agreements that may seem relatively straightforward to outsiders, perhaps “it may be not so much that China’s or India’s central leaders do not want to act. Rather, their greater concern may be that they do not have the power to act”. Echoing same sentiments, Alyssa Ayres also argued, “India’s vibrant democracy encompasses a vast array of parties who champion dizzyingly disparate policies.<sup>45</sup> And India isn’t easily swayed by foreign influence; the country carefully guards its autonomy, in part because of its colonial past. For all of these reasons, India tends to move cautiously and deliberately in the international sphere”. However, with renewed foreign policy orientation, central government officials and leadership may in fact be happy with the WPRBC engaging with sub-national leaders and supporting with RBC and business sustainability as well as associated investments in India.

Similarly, the WPRBC may consider encouraging the OECD’s institutional stakeholders the Business and Industry Advisory Committee (BIAC), the Trade Union Advisory Committee (TUAC) and the global network of civil society organisations - OECD Watch) to increase their membership in India. Much like OECD, the BAIC too seem to have restricted itself to New Delhi based industry associations (Confederation of Indian Industry and Federation of Indian Chambers of Commerce & Industry). There are several strong regional and sectoral industry associations across India. They may be happy to engage and associate with BIAC and the OECD, and learn and promote RBC issues among their member companies. Also, OECD Watch membership of NGOs in India too seem to be limited currently to the friends of SOMO (Dutch NGO hosting the secretariat of OECD Watch). Thousands of NGOs in India may not be even aware of the OECD, the Guidelines and OECD Watch. A wider outreach by OECD Watch should be encouraged to increase and diversify its membership in India and adding new voices from India on RBC, the Guidelines and the NCP processes.

Additional industry associations and chambers of commerce and industry (as members of BIAC), NGOs (as members of OECD Watch) and trade unions (as members of TUAC) from India may also be instrumental in generating wider awareness among business and stakeholders and influencing government policies vis-à-vis RBC and business sustainability issues in general and on the Guidelines in particular.

Eradication of poverty, economic growth, employment creation, full and productive employment, and equal pay for work of equal value are an important and integral part of the decent work for all agenda in the UN Sustainable Development Goals (SDGs). Government of India, provincial leaders, and several other stakeholders have committed themselves to contributing to the achievement of these goals in India, and are in the process of setting up policies, infrastructure and awareness for the same. While strengthening the NCPs across the adhering countries, the WPRBC may consider identifying an appropriate NGO in India for leading on setting up of an independent, multi-stakeholder governed NCP. There is a big void in alternative forums for access to justice, remedy, and grievance mechanisms for millions of workers. The Indian judicial system is overburdened, and in some cases, difficult to access and overwhelming for many voiceless workers<sup>46</sup>. An independent NCP may serve the purpose and create wider awareness and positive environment for the Guidelines, besides supporting India's march towards the SDGs.

A broader focus on both the Indian businesses (large and small) and advance country MNEs operating and/or sourcing from India, and not just the supply chain entities, may also help spread the right message and allay the fears that the OECD is a 'rich-men's' club, and interested only in safeguarding investments and investors of its members, and mitigating risks in their supply chains. The Indian domestic market itself is huge and trade is less than 40 percent of the GDP, and that too substantial part of it is in services<sup>47</sup>. Focus only on the supply chains entails the danger of the Guidelines being perceived as NTBs - by the government, industry and other stakeholders in India.

A wider outreach, contact campaigns and consultations for awareness on the Guidelines, and sector guidelines would also help. In 2015, the OECD in partnership with the Centre for Responsible Business (CRB) held a consultation<sup>48</sup> in India on the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas. This consultation led to generation of internal demand for the Guidelines in the gold industry in India<sup>49</sup>.

## **CONCLUSION**

There can be no arguments and debates on the issue that the whole world and the humanity will suffer the consequences of the lack of RBC and business sustainability. The regulatory capacity of the state is diminishing globally. Conventional institutions are overstretched almost everywhere to be able to regulate and monitor every activity of businesses. Self-driven and voluntary RBC and sustainability strategies and action of all enterprises are important, not just of MNEs. OECD should rethink and reconsider the 'MNE' and 'investment-nexus' in the next review phase of the Guidelines. Also, in the face of global challenges, the forward-looking 2030 Agenda for Sustainable Development and the Paris Accord offer hope to the world. As a global and authoritative corporate responsibility instrument, with a unique implementation mechanism of NCPs, the Guidelines should be aligned with these commitments of global leaders

in the next review phase. Such an alignment will surely offer assurance to the global leaders, firms and stakeholders about the continued relevance of the Guidelines, and facilitate them to integrate into national policies and actions.

With the challenges and opportunities discussed earlier, and growing prominence and influence of India, it is evident that India - a country of the size of a subcontinent - need different and focused strategies for promotion and uptake of RBC and business sustainability. While diplomatic level efforts with central and provincial actors need to be intensified in India by OECD, WPRBC and other arms of OECD, the WPRBC should also identify relevant and strong non-state actors as partners in India to take the agenda of RBC and business sustainability forward. CRB's annual conference in November – India and Sustainability Standards: International Dialogues and Conference<sup>50</sup> – offers a great neutral platform to the WPRBC and the OECD to plan wider outreach, contact campaigns and consultation with several stakeholders at one place every year. Few other such platforms and institutions exist in India, which can also be leveraged by the WPRBC and the OECD, particularly for sectoral deepening of the Guidelines and the sister due diligence instruments.

A clear message about the changed and differentiating characters and defining features of the Guidelines, its strengths, and relevance for India should be communicated to Indian policymakers, firms and stakeholders during focused national and regional level convenings. Such convening initiatives will help spread the message that the Guidelines, unlike several other MSIs and TRVs, is not just about mitigating risks in supply chains, but its deeply concerned with India, and the development, growth, and sustainability there; supply chain aspect is indeed there in the Guidelines, but that applies to all business entities, including the suppliers of supplier entities - RBC in the Guidelines is about behaviour and actions of all firms in India, as globally.

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# Responsible business conduct at a turning point: from compliance to a positive contribution



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## LOOKING BACK: HOW THE OECD GUIDELINES HAVE ADVANCED CORPORATE TRANSPARENCY AND ACCOUNTABILITY

### The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (OECD Guidelines, or Guidelines) are the oldest and only multilaterally agreed code of responsible business conduct (RBC) that governments have committed to promoting. These recommendations by governments to multinational enterprises encourage corporate accountability and responsibility through transparency, as do the Global Reporting Initiative (GRI) Standards (GRI Standards). The similarities and areas of strategic collaboration between the two instruments are multiple.

The Guidelines, which govern economic, social and environmental issues, are designed to be relevant at the global level and to reflect multi-stakeholder inputs, and are intended for voluntary use. GRI offers a reporting framework based on normative principles that are fully compatible with those expressed in the OECD Guidelines. At their inception, the Guidelines included a reporting recommendation, a very progressive measure for the time. And, as early as 2005, the OECD Guidelines referenced the use of the GRI Guidelines – the instrument that would later become the GRI Standards. The OECD Guidelines apply to all sectors of the economy: small and medium sized enterprises are also encouraged to observe the recommendations. The GRI Standards are also designed for use by all organizations regardless of their type, size, sector or location, including in the non-for profit and public sectors.

Throughout five revisions, the OECD Guidelines have continuously adjusted to global changes while advancing the RBC agenda. They have expanded to reflect the growing scope of corporate responsibility, considering both positive and negative business impacts on society. The OECD Guidelines have evolved to address substantive areas with respect to business ethics and have been aligned with major global instruments.

There are several examples of the functional alignment and strategic fit between the OECD Guidelines and the GRI Standards. For instance, GRI was invited to every open session organized by the OECD (for example, the annual forum) and was heavily consulted for the 2011 revision. In addition, the OECD Secretariat was invited and actively participated in the GRI Government Advisory Group from its beginning in 2008. The OECD members were Carolyn Irvin, Director Investment, and Roel Nieuwenkamp, Chair of the OECD Working Party on RBC. This reflects, on the one hand, the fit between reporting guidelines and normative guidance and, on the other, the synergy between the global corporate network of GRI and the governmental network of the OECD.

## The National Contact Points

The OECD Guidelines are the only corporate responsibility instrument with a proper built-in grievance mechanism, known as National Contact Points (NCPs), and all adherents to the OECD Guidelines are required to set up their own. These act as a forum for discussion for all matters relating to the OECD Guidelines and contribute to the resolution of issues that arise relating to their implementation by governments. The purpose of NCPs is to ensure the effectiveness of the OECD Guidelines by undertaking promotional activities, handling complaints and enquiries and contributing to the resolution of specific issues that arise.

The role of NCPs was clearly strengthened during the last update of the OECD Guidelines in 2011. From that point on, they function as a stronger grievance mechanism for both business and human rights issues. In its input to the OECD Investment Committee, GRI committed to provide information, generic support and advice to the NCPs regarding the GRI Standards and the role that this framework could play in promoting and facilitating the effective use of the OECD Guidelines.

## LOOKING AROUND: THE DRAMATIC CHANGE IN THE ROLE OF BUSINESS IN SUSTAINABLE DEVELOPMENT

### The Rio+20 Conference

The main objectives of the 2012 UN Conference on Sustainable Development in Rio de Janeiro, also known as Rio+20, was to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the previous summits, and address emerging challenges. A significant outcome was the agreement to launch a government-led process to create a set of universal Sustainable Development Goals (SDGs) that would become the international framework for stakeholders to better target and monitor progress on sustainable development.

During the formal roundtable on the Green Economy, GRI presented a proposal for the Rio+20 Conference to adopt a policy framework on sustainability reporting. This framework would be based on the “report or explain” approach to sustainability reporting, and envisioned a significant role for policy and an outcome recommending soft and flexible regulation. Such an approach would be flexible enough that businesses would be best able to decide whether to report or explain why if they do not. It would also give governments flexibility in policy implementation. The result would be more information about the sustainability performance of organizations becoming available worldwide, enabling organizations to manage and improve their own sustainability performance.

As a result, Paragraph 47 of the Rio text opened the door for policy and regulation on reporting. The Paragraph recognises that corporate sustainability reporting is truly global, and that governments should both support and stimulate reporting. During the Rio Conference, a group of leading governments joined together in support of Paragraph 47 of the Rio+20 outcome document “The Future We Want.” Brazil, Denmark, France and South Africa formed the “Group of Friends of Paragraph 47” to advance corporate sustainability reporting and invited GRI and the United Nations Environmental Programme (UNEP) to support the group as its Secretariat.

### **The SDGs as the new sustainable development framework**

The UN 2030 Agenda resulted from the convergence of two separate processes: the Millennium Development Goals track and the sustainable development track. The former dealt primarily with social development, and had poverty eradication as its primary objective, while the latter was introduced into the discussions during the first Rio Summit in 1992. Input from both tracks was brought together in the context of the post-2015 process to form a transformative development agenda – the 2030 Agenda for Sustainable Development, which called for a new approach based on a number of principles guiding its implementation – the SDGs.

The SDGs embrace a universal approach to sustainable development. They establish a more active role for the private sector in global development, both in delivery, as well as financing and building partnerships (Goal 17). They call on business to innovate, to address development challenges, and recognize the need for governments to encourage sustainability reporting. To align with the SDGs, businesses need to incorporate the goals not only into their strategic planning and business development plans, but also in every activity across the supply chains.

In practice, RBC is not widely associated with the SDGs, as the former is generally seen as a compliance issue, rather than a comprehensive way for the private sector to contribute to the SDGs. Discussion has mostly centered on new business and financing models, social impact investing and entrepreneurship. This way of looking at the subject fails to take into account that RBC goes beyond compliance. For example, the stated purpose of the OECD Guidelines is to “encourage the positive contributions that businesses can make to economic, environmental and social progress and to minimize the difficulties to which business operations may give rise.”

The link between RBC and the SDGs should ultimately be made at all levels. Implementation of RBC principles and standards, like the OECD Guidelines and the UN Guiding Principles on Business and Human Rights, can be a transformative, albeit still underused means for businesses to interact with the SDGs and maximize their contribution. Some businesses are using RBC as a baseline for their SDG contribution, but there is a need to scale up these practices.

## The role of the private sector in advancing sustainable development

RBC is vital to promote sustainable trade and investment across supply chains. Under the OECD Guidelines, both businesses and the responsible investment community are encouraged to engage in risk mitigation to promote inclusive growth and development. The SDGs have a similar purpose, as they aim to provide a bold global development agenda and framework for economic growth that protects humanity and the planet. Both are a call for action for all actors in society to take shared responsibility for a better future – with the private sector leading the way.

GRI and its Sustainability Standards can be the bridge between businesses and governments, enabling them to make positive contributions to the SDGs. Business and government leaders may agree with international principles, but little can be accomplished without guidance to best implement them. GRI helps organizations to align big picture, principle-based approaches with the reality of data-driven reporting. As such, GRI champions a strong role for the private sector in the development of the SDGs and is mobilizing businesses to understand and contribute towards making them a reality. GRI also engages with investors to use finance as a tool to promote better business behaviour. Our work ultimately empowers the sustainable decision-making needed to achieve the SDGs.

As private sector actors increasingly engage with the SDGs, they reduce negative impact to the environment and society – while increasing positive impact by developing innovative solutions:

- Businesses need to approach the SDGs with a “do no harm” attitude, to minimize and/or avoid negative impacts. They can use due diligence to avoid pursuing actions that can cause harm to the public or the environment and should directly address adverse impacts. Private sector actors can consider the business risks related to each goal and adjust their conduct accordingly to avoid doing harm and undermining the SDGs.
- The SDGs indicate market gaps, development needs and investment priorities. The issues addressed in the SDGs provide a roadmap for businesses to seek opportunities, develop solutions, and manage risks. They also provide a vision for sustainable, long-term growth. According to the Better Business, Better World report, developed by GRI and the United Nations Global Compact, achieving the SDGs opens up US\$12 trillion of market opportunities for the private sector, and could create 380 million new jobs by 2030. The SDGs offer a compelling growth strategy and open up new market opportunities that private sector actors can seize.

## LOOKING FORWARD: TOWARDS A BETTER ALIGNMENT OF THE OECD GUIDELINES

### Due diligence in the light of the business proactive sustainability agenda

This is a pivotal moment for sustainability. Transparency has become embedded in how business is conducted: carrying out due diligence to address negative impacts is now a part of doing business. The OECD has always played an essential role in providing guidance on due diligence – explaining what businesses are expected to do while considering the particularities of their supply chains.

The OECD Guidelines call on businesses to conduct due diligence on their operations and throughout their supply chains to identify, prevent and mitigate actual or potential adverse impacts and account for how negative impacts are addressed. Some leading companies are building on their supply chain due diligence to articulate their SDG contributions by, for example, identifying materials risks in the supply chain and connecting them to the SDGs on an operational level.

One salient example of this is how operations related to mineral supply chains or the extractive sector have contributed to redefining risks and impacts across industry sectors and global supply chains.

The link between responsible sourcing and human rights issues largely entered the global dialogue via the violence and human rights infringements associated with sourcing conflict minerals – tin, tungsten, tantalum, and gold (grouped as 3TG) – in the Democratic Republic of Congo (DRC). Following the OECD's Due Diligence framework, regulatory efforts such as the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, the EU Conflict Minerals Regulation (to be enforced in 2021), and a multitude of other initiatives and assurance schemes, have demonstrated the importance of the topic to a variety of stakeholders, as well as the need for better quality reporting on the topic.

In view of increasing attention to the adverse social impacts of mineral and metals sourcing, GRI, in partnership with the Responsible Minerals Initiative (RMI), has embarked on a project to develop advanced resources for reporting on mineral and metals sourcing impacts and due diligence that builds on and accompanies not only the GRI Standards, but also the OECD Due Diligence Guidance for Responsible Mineral Supply Chains from Conflict-Affected and High Risk Areas.

However, the topic of responsible sourcing warrants a broader definition beyond 3TG from the DRC. This is demonstrated by the wide focus of the OECD's Due Diligence Guidance and the multitude of sourcing related conflicts around the world. Adverse impacts result from mining 3TG in other regions or other minerals and metals in the same region; importantly, the sustainability impacts associated with mining cobalt, mica, gold, and gems in Africa, Asia, and South America are gaining more attention from stakeholders – including regulators, civil society organizations and investors. Through the disclosures on due diligence related aspects, GRI encourages the shift to a more holistic approach that addresses the global

risks of business impacts on society and the planet. Broadening the scope of human rights in the OECD Guidelines reflects that a business' operations and supply chain are intertwined with social positive and negative impacts.

### **The OECD as a catalyst for innovation: disclosure for enhanced responsible business conduct**

Due diligence sets the basic conditions and baseline for businesses to "do no harm." More importantly, while carrying out due diligence assessment, businesses are also able to identify opportunities to "do better." It is therefore essential to guide companies carrying out their due diligence process towards identifying opportunities to contribute to sustainable development. The idea behind such progress is to envision transparency as a tool to further enhance RBC.

The OECD can act as an incubator of responsible business innovation. The Guidelines and their revisions are a useful tool to innovate and create a facilitating policy environment. They are a vehicle to enhance corporate sustainability and reporting policies in the OECD countries.

Through the sustainability reporting process, companies select the challenges and risks that are most relevant to them and incorporate them into their strategy with the goal to acknowledge, avoid and mitigate real and potential negative impacts. This results in greater transparency of information, which enables better decision-making by organisations. It also helps to communicate how companies assess and manage their non-financial risks and ultimately helps to build trust in the marketplace.

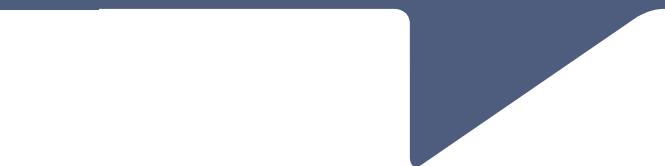
The rigor of sustainability reporting, through the use of clear methodologies, is crucial to foster responsible conduct among businesses. All private sector actors should have immediate access to relevant information that is concise, consistent, current and comparable – i.e., decision-useful. The GRI Standards are already used by a wide range of organisations all around the world to communicate information that matters to them and their key stakeholders.

Sustainability reporting should be considered a useful tool to assess impacts, current and potential, as well as a driver for improving performances on RBC. GRI encourages to further refer to the use of disclosure and sustainability reporting in the OECD Guidelines.



# Future perspectives: doing good but avoiding SDG-washing

Creating relevant societal  
value without causing harm



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## INTRODUCTION

Since their adoption in September 2015 by the United Nations (UN) General Assembly, the Sustainable Development Goals (SDGs) have led to two main strands in the literature and practice-oriented debates. One asks how companies can contribute to implementing the SDGs as a way to contribute value to society through doing good<sup>1,2</sup>. Concerned with ‘SDG-washing’, a second and more critical strand voiced by company leaders, international economic organisations such as the OECD practice-oriented experts<sup>3</sup> and scholars<sup>4,5</sup> warns that contributing to the SDGs cannot justify deviating from the ‘do-no-harm’ approach that has spurred much theory and practice on responsible business conduct (RBC). Concern has been raised that economic actors’ shift of focus *from* not doing harm *onto* SDG interventions aiming to do good may occur without adequate assessment of potential risks of adverse impacts. Concern has also been voiced that companies may engage in ‘cherry-picking’ rather than contribute to needs that are contextually relevant and salient. Recently, the CEO of the Global Compact has joined these voices, highlighting the need for companies to consider the full spectrum of their impacts and continue paying attention to the Global Compact Principles and the UN Guiding Principles (UNGPs) on Business and Human Rights.<sup>6</sup> Among the various calls for a comprehensive approach to the SDGs this is perhaps the most striking. It re-introduces an emphasis on not doing harm after the UN Global Compact Office since 2015 has focused much of its communication through its website (which is the initiative’s main communication channel) to the SDGs and the emphasis of SDGs on business opportunities for innovation and contributions to doing good.



These views indicate a need for methods and guidance for combining the moral imperative to do no harm with the ‘do good’ approach that informs the SDGs and in particular SDG 17. Whereas SDGs 1-16 concern a range of public policy objectives and are addressed to states, SDG 17 is addressed to business enterprises.<sup>7</sup> It calls upon them to contribute to the implementation of SDGs 1-16 in support of governments and create value for society through their knowledge, expertise, technology and financial resources. Target 67 under SDG 17 makes explicit reference to the UNGPs as a foundation for a dynamic and well-functioning business sector that does not cause harm. Hence, the connection between the SDGs and RBC is already present in principle. But the concerns noted above indicate that it needs to be operationalised.

Given the practice of the OECD to issue guidance for economic actors in regard to RBC in accordance with the OECD Guidelines for Multinational Enterprises (Guidelines) and the policy support its work in the field enjoys, the OECD is well placed to develop guidance for implementing the SDGs in a manner that does not cause harm. As this short piece describes, this may also offer opportunities to help companies identify SDG interventions that are contextually relevant. As outlined below, this may be done through a comprehensive approach to risk-based due diligence (DD), a practice that is prescribed by the Guidelines. The main lines of such an approach are set out in here and can be elaborated through a multi-stakeholder process towards a guidance instrument.

## RISK-BASED DUE DILIGENCE AND BUSINESS CONTRIBUTIONS TO HUMAN RIGHTS AND PUBLIC GOODS

The SDGs and debates on their implementation complement two theory-currents related to RBC: business-and-human-rights (BHR) and political corporate social responsibility (PCSR). While BHR scholarship emphasises that companies should avoid causing harm, the PCSR literature takes its cue from the capacity of business to contribute to society by complementing governments in the delivery of public goods.

Originating with the 2008 UN ‘Protect, Respect and Remedy’ Framework (UN 2008, ‘Framework’), risk-based DD was elaborated by the UNGPs and adopted by the OECD through its 2011 revision of the Guidelines, extending DD beyond human rights to several other RBC issues. Motivated by a pragmatic aim of reaching a normative product likely to be adopted, the Framework and the UNGPs adopt a ‘do-no-harm’ focus and offer risk-based DD for firms to identify, prevent, mitigate, account for and remedy their adverse human rights impacts.<sup>8</sup> The construction of risk-based DD is a significant contribution to recent year’s RBC literature and practical guidance.

Pre-empting the SDGs, some scholars have been arguing for increased emphasis on how business enterprises may contribute to the fulfilment of human rights<sup>9,10</sup> and delivering public goods in a more general sense<sup>11,12</sup>. PCSR scholars have advanced the latter argument, based on the theory’s argument that companies should help fill governance gaps in various ways. Based on an idea of companies thereby assuming roles that are technically governmental (or ‘political’), PCSR theory has, however, been argued to be lacking in practical operability for companies to identify social needs and act where governments fail<sup>13,14</sup>. From this perspective, the SDGs can offer direction, especially if companies apply themselves to using their strength to help advance needs related to SDG 1-16 that arise due to lack of governmental activity or presence. However, risks remain that companies may cause or contribute to harm as they aim to do good. Studies demonstrate that businesses can contribute to human-rights-related social needs and policy objectives, such as education and health services, but the human rights relevance is rarely explicated.

Many SDGs relate to human rights of a socio-economic nature (such as food, education, health services, non-discrimination, employment, working conditions (SDGs 2-6, 8) and the provision of related public goods. Some SDGs may spur increased activities that are known for causing human rights risk (for example land and community rights in the agricultural industry for non-carbon-based energy (SDG 7)).

## IDENTIFYING OPPORTUNITIES FOR DOING GOOD WHILE MANAGING RISKS OF CAUSING HARM

Human-rights impact-assessment is a core element of risk-based DD, according to the Guidelines. As explained in the following, companies can benefit from this to identify human-rights-related needs, which they can turn into action to help fulfill human rights. The risk-based DD process includes complementary actions of assessing actual and potential human rights impacts in context, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. The process should involve meaningful consultation with potentially affected groups and other relevant stakeholders, taking into account the nature and context of the operation. Interestingly, social-impact-assessment theory finds that broad stakeholder consultation helps identify adverse impact as well as potential benefits of an operation, such as local needs that can be addressed.<sup>15</sup>

Consistent with the UNGPs, the Guidelines prescribe that when a company identifies a risk of contributing to an adverse impact (for example in its supply chain), it should use its leverage (influence) to require or stimulate changed practices with business partners or governments to which the company is directly linked through its operations, product or services.

The fulfilment of human rights and provision of public goods can be affected by institutional defects. These may be addressed by training and capacity building based on systems that companies have in place, or are able to develop in innovative collaboration with local companies, authorities or experts. This applies for example to occupational health and safety (OHS) and related work-place training, or local administrative capacity to deliver and distribute socio-economic and other human rights in non-discriminatory fashions. Building OHS capacity can contribute to fulfilling rights to health, at the same time increasing up-times and production and lowering health-related expenses for the individual, the community and governments. Building administrative capacity with local authorities can contribute to individuals gaining access to public goods without discrimination, in line with the fundamental idea that human rights be enjoyed without distinction of any kind, such as race, gender, national or social origin, property, birth or other status.

To identify such opportunities, companies can extend DD with a dual focus: from a process to identify and manage potential or actual harm, into also identifying societal needs to be translated into business potential for SDG contributions. Obtaining a broad understanding of societal needs allows the company to maximise the resources it already invests in the DD process. The assessment may identify contextual problems that cause or may enhance human rights risks. Considering context and the dynamic character of societal risks can enable the company to identify governance gaps that are within its capacity to address, possibly in collaboration with experts (consistent with the Guidelines). Once potential SDG-contributions have been identified, an impact assessment of planned activities should be made to ensure that no human rights risks are caused, and to adapt the activities if required.

Consider the following examples: reacting to deficient OHS practices in the supply chain need not be limited to leverage addressing business relations. It could be turned into training programmes for extended audiences, such as sectoral clusters in the community. Assessment of risks of causing adverse health impacts through emission of product-redundancies into fresh-water sources may find local processes for rinsing water deficient, or that wells are simply lacking. These problems can raise the company's own human rights→ risks because access to water is already precarious. The company can help build knowledge with communities, local companies and authorities of appropriate filter processes, complemented by capacity building for measurements and maintenance and the planning and establishments of wells.

The dually focused DD process constitutes a continuum with three connected focal points, leading to a new similar continuum: at one end are societal risks that the company may cause or contribute to. These must be addressed directly. In the middle, adverse impacts that the company is linked to through operations, services or products of its business relations. These require the company to exercise leverage with private or public actors, whether acting in economic or governance capacities. Finally, human-rights-needs non-related to the company but potentially within its capacity and contextual strength, offering potential SDG contributions. The 'do-good' element of the continuum connects back to the 'do-no-harm' element through an assessment of human-rights-risks of proposed contributions, leading to a new process assessing risks of causing or contributing; business-relations-related risks that call for leverage; and SDG-opportunities.

## CONCLUSION

This short piece has shared some thoughts on how the Guidelines may help companies navigate the risk of SDG-washing by ensuring that their SDG-efforts are both meaningful to society and do not cause harm. In regard to business contributions to the SDGs, it has been argued that companies should take point of departure in institutional and governance gaps that constitute risks of adverse societal impacts, and proceed on that basis to help address the gaps. Comprehensive engagement with the Guidelines' risk-based DD approach can help companies not only identify and manage risk of adverse impacts, but also identify potential ways in which they may contribute to society and ensure that such interventions, in turn, are designed in a manner so as not to cause harm.

Developing guidance for this may provide opportunities for the OECD, in collaboration with UN human rights experts, to advance the contributions of the Guidelines in a manner that complements the SDGs while ensuring respect for other key instruments on RBC, not least the UNGPs.

The Guidelines (Chapter V) already cover companies' contributions to local employment and capacity building. Extending guidance to include a dual DD perspective offers opportunities to further combine the Guidelines' 'do-no-harm' and 'do-good' objectives. As identifying contextual risks is already part of DD, expanding the focus to a contextual needs-assessment can help generate more value for the company as well as society. Contributing to handling governance gaps and societal needs may even help the company manage risks of adverse impacts. The brevity of this chapter does not do justice to the complexity and inter-connectedness of such actions, but future OECD guidance may do so.

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# Bottoms up? OECD Guidelines and the race to the bottom or to the top



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## INTRODUCTION: A RACE TO THE BOTTOM OR A RACE TO THE TOP?

The international regulation on the (un)sustainable behavior of Multinational Enterprises (MNEs) has advanced along two ambitions:

- [1] Prevent a race to the bottom: setting minimum standards on sustainability and due diligence procedures to check on their implementation by (multinational) enterprises. In ethical terms these standards are principle-based and aimed primarily at “avoid doing harm”.
- [2] Stimulate a race to the top: setting joint ambitions on sustainability to stimulate companies (jointly with other stakeholders) to “do good”. These approaches are more ‘process’ and ‘goal based’ and less ‘norm based’!<sup>1</sup>

Assessing the effectiveness of each of these approaches, first of all, requires a basic understanding of the international context in which initiatives for sustainable corporate activities (can) develop. What looked like an undisputed trend towards higher degrees of ‘globalization’ and global convergence in regulation - strongly influenced by the activities of MNEs - has over the past decades become more ambiguous and volatile. The American Military College introduced a term for this context: a VUCA world – one in which Volatility, Uncertainty, Complexity and Ambiguity prevail. This new reality also increasingly defines the conditions under which any approach towards regulating the behavior of MNEs can be considered to be effective. The result of this particular chain of events has been that the number of ‘risks’ MNEs have to address in their strategies has seriously increased. In a sample of 70 leading MNEs for instance we counted a twofold increase in risk categories disclosure over the 2002-2012 period. From 7 to 15 identified risks; of which ‘sustainability’ issues have become identified as a risk as well as a risk-mitigation factor.<sup>2</sup>

MNEs that are serious about implementing sustainability take – in an increasingly challenging international arena – have two basic approached at their disposal:

- (1) A relatively reactive approach in which companies abide by international voluntary regulation such as the OECD Guidelines on MNEs (OECD Guidelines, or Guidelines) or the Ruggie Principles (UNGPHR). Most of these rules are aimed at the basic principle of ‘do no harm’ and at limiting reputational and other risk factors that are related to their international activities.
- (2) Take a more strategic and (pro) active approach beyond legal and moral obligations in their home as well as (some) host bases and set up new rules of the game – often together with other stakeholders - that contribute to the (global) ‘common good’.

**Table 1. Spaces for Strategy formulation and implementation by MNEs**

MNE STRATEGY AIMED AT...	REGULATORY ENVIRONMENT AIMED AT....	
	Preventing race to the bottom [negative duty]	Stimulating race to the top [positive duty]
Avoid doing harm [rights & principles]	Reactive: risk of tactical considerations and liability orientation  <b>Initiatives:</b> OECD Guidelines (early iterations); Base Erosion and Profit Shifting (BEPS)	Active-reactive: risk of adverse selection and risk aversion strategies; ticking boxes exercises  <b>Initiatives</b> ISO 26000; GRI3+4; UNGPCHR; OECD Guidelines (post 2011)
	Doing good [responsibilities & intentions]	Reactive-active: risk of SDG or blue-washing (in case no due diligence exists)  <b>Initiatives:</b> GRI1+2; Paris Climate Agreement; Global Compact; publish what you pay  Pro-active: create joint goals, ambitions and hyper norms  <b>Initiatives:</b> Sustainable Development Goals (SDGs); sectoral coalitions (WBCSD; WEF)

## INTERACTION EFFECTS

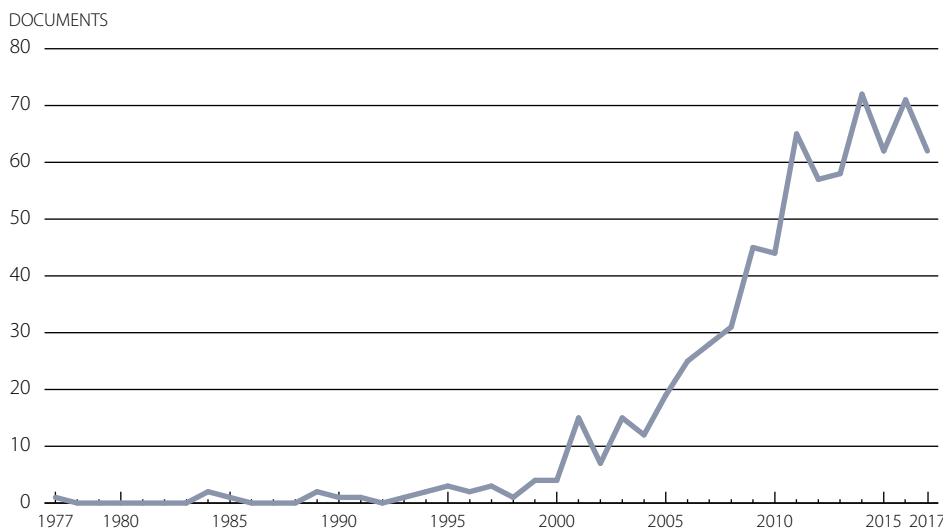
The interaction between corporate strategies and regulatory initiatives creates a variety of operating spaces (Table 1). Operating in each space involves different tactical and strategic motivations for MNEs. The proactive space, in particular, provides what Donaldson and Dunfee<sup>3</sup> call the ‘moral free space’ for internationally operating companies. Their social contract theory talks about hyper norms, in which companies might (actively or proactively) go beyond what has been agreed upon by governments in laws and international treaties to reap a competitive advantage based on ‘positive duties’. International norms always represent a compromise or have a voluntary status that is difficult to implement. In the reactive space, companies have to deal with negative duties and ‘rights’ as elaborated in many of the international treaties. The rights-approach is very much related to reactive motives of persons, companies, and countries, whereas the responsibilities-approach makes room for active and even proactive motives.

The rights-and-negative duties approach has been universally accepted through the adoption of various versions of the Universal Declaration of Human Rights (first version in 1948). But such an approach has also been argued to have limited effect on the life of people and the actual operation of companies.<sup>4</sup> It proves difficult to enforce rights in an internationally competitive environment and prevent a ‘race to the bottom’. Many observers still consider the implementation of these measures at best as ‘patchy’.<sup>5</sup> An example of the problematic effectiveness of initiatives aimed at preventing a race to the bottom in core areas of economic regulation are the efforts on tax rates. The OECD’s BEPS initiative concentrates on tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. But this practice only addresses part of the root causes of the global race to the (tax) bottom. According to World Bank data, corporate taxes globally still decreased from 54% in 2005 to 41% in 2016.

## THE OECD GUIDELINES RAISED THE NEGATIVE BOTTOM LINE

The OECD Guidelines provide a more interesting step forward in preventing a race to the bottom. It took a long time though – and various iterations since their inception in 1976. Nieuwenkamp characterizes them as ‘soft law with hard consequences’.<sup>6</sup> Recently, the implementation and strengthening process of National Contact Points (NCPs) has gained some momentum, which prompts Nieuwenkamp to consider the glass as “half full”<sup>7</sup>. The scientific discourse on the effectiveness of the Guidelines, presents a comparable (mixed) picture. Using Scopus as a source, we can see that first generations of the OECD Guidelines, got hardly noticed in the scientific discourse (Figure 1). But since the mid-1990s the number of scientific papers that referred to the Guidelines grew exponentially. In earlier phase the OECD Guidelines were used as a check on the introduction of codes of conduct with MNEs.<sup>8</sup> Later on they have been widely used as reference point of collaborative governance<sup>9</sup> as part of ethics research<sup>10</sup>, as example of the struggle for corporate accountability<sup>11</sup> or also (still) as an approach ‘for lack of anything better’.<sup>12</sup> Slowly some research is maturing on the working of the NCPs, but primarily from a legal point of view.<sup>13</sup>

A recurring question remains, therefore, how to make ‘open norms’ - related to ‘avoiding harm’ - effectively change the behavior of the MNEs. Kun<sup>14</sup> concludes that the effective operationalization of open norms is not necessarily predetermined by the given legal form (hard or soft) but by a number of factors such as clarity and legal infrastructure surrounding the norm. Perhaps more interestingly, Kun concludes that an open norm will have greater chance of operationalization and implementation if it has ‘some kind of a business case in addition to its function of moral suasion’.<sup>15</sup>

**Figure 1. Scientific publications including the OECD Guidelines**

Source: Scopus

### THE OECD GUIDELINES ALSO TRIGGERED ANOTHER BOTTOM LINE

A negative duty approach never suffices to define the sustainability ‘business case’ nor can it stimulate a race to the top. The ‘openness’ of the norm needs to be complemented by a clear and positive goal. This is the realm of alternatives based on a responsibilities-and-positive duties approach. At a global scale, positive duty/responsibility approaches have only recently been initiated. The experience of the OECD Guidelines triggered these efforts in two respects: (i) the Guidelines showed the limitations of a ‘negative duty’ approach, in particular the limitations of the use of NCPs and complaint mechanisms in creating positive change; and (ii) the Guidelines also created a more principled bottom line for the international discourse. Noticeable was the introduction in 1999 by a group of opinion leaders under the auspices of UNESCO of a draft ‘declaration of human duties and responsibilities’.

‘Multi-stakeholder initiatives’ were initiated in which representatives of civil society, firms and governments participated – and in which mostly the Guidelines were taken as starting point. Some of these initiatives remain largely voluntary such as the ISO 26000 guidelines. The transition from Global Reporting Initiatives from a general framework (GRI1+2) to a more specific framework with a higher degree of materiality (GRI3+4) also illustrates that some organizations were able to raise the bar beyond the OECD Guidelines and help

stakeholders (including NGOs and sometimes governments) to developed more process oriented frameworks. The conclusion of the SDGs in September 2015 highlight the most recent and most all-encompassing type of approach: it defines a positive agenda for change (with 17 targets) and invites companies, NGOs, governments and knowledge institutes to work together on this common agenda. This effort is aimed at creating convergence in ambitions (for the year 2030). Whether this can be achieved depends on the mobilizing effect this ambition has on stakeholders around the world. The SDGs have also prompted – or reinforced - a number of other initiatives aimed at creating a race to the top. It reinforced for instance the effort of the World Business Council on Sustainable Development). It also prompted initiatives like the Business and Sustainable Development Commission – part of the World Economic Forum. In January 2016, leaders from business, finance, civil society, labor and international organizations discussed the business case for realizing the SDGs. They concluded that “achieving the SDGs opens up US12 trillion dollar of market opportunities in the four economic systems examined by the Commission, (...) which are food and agriculture, cities, energy and materials, and health and well-being. They represent around 60 percent of the real economy and are critical to delivering the SDGs”.<sup>16</sup>

## CONCLUSION: BOTTOMS UP?

Did the introduction of the OECD Guidelines stop the “race to the bottom” through better behavior of MNEs? One can certainly argue that the OECD Guidelines have had an effect on most of the ‘Western’ MNEs. But in the 40 years of existence, the Guidelines have also been struggling more with a new breed of MNEs from emerging markets like China, Russia and India. They and their countries have not really been supportive of the Guidelines (no NCPs for instance).<sup>17</sup> Furthermore, it is increasingly realized that a ‘negative duty’ approach to corporate responsibility issues does not suffice in particular because it does not provide a positive impetus to ‘do good’.

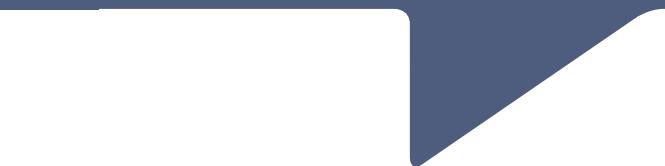
On a more positive note however, we can also argue that the OECD Guidelines created a solid ‘bottom’ for the race to the top. Abiding to the basic idea of the Guidelines in the international discourse has become the ‘new normal’. So the Guidelines created a ‘defense mechanism’ for those companies that wanted to proceed farther and faster than other companies. Even when the Guidelines were not implemented fully, companies felt more free to proceed and try to move ‘beyond compliance’ and ‘avoid doing harm’.<sup>18</sup> The danger of ‘SDG washing’ looms however – using the SDGs by some companies to market their position contribution to some SDGs while ignoring their negative impact on others. Nieuwenkamp<sup>19</sup> sees this danger and argues correctly: “ultimately, companies should do their due diligence on all SDGs to avoid undermining these goals. This is the essential baseline. Just think about what not having child labor in the supply chains would mean for the SDGs. A focus on managing the negative impacts on the SDGs is most urgent. This approach, taken together with the focus and positive impacts on certain SDGs, is a recipe for businesses to maximize their contribution to the SDGs.”

These are exiting as well as confusing (VUCA) times. MNEs have to decide what type of principles they adopt for their operations and whether they consider rights and responsibilities a trade-off, a dilemma or something else. If they see this as an opportunity, they are more pro-actively motivated. There are plenty of MNEs that are convinced of the opportunities related to making the SDGs work.<sup>20</sup> If MNEs, however, engage in international developments primarily with a risk-management strategy, they will probably only be concerned with liabilities and rights as covered by laws, international treaties and voluntary guidelines. The OECD Guidelines remain the guarantee – weakly enforced as they may be – that the SDGs' effort will not fall prey to 'adverse selection' and SDG washing effects - the participation in name of companies that are not serious about really implementing the SDGs. The Guidelines are actually the only guarantee that the 'bottom' will not be reframed as the 'ceiling' of sustainable development – otherwise the SDGs will not be achieved as well. A worthy cause.

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# The academic network of the OECD Guidelines for Multinational Enterprises



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## BACKGROUND

The goal of this short recall is to narrate an important development which occurred in 2013 around the time of the First Global Forum on Responsible Business Conduct (RBC) held at the OECD in Paris. It was my first international conference that focused on the OECD Guidelines for Multinational Enterprises (Guidelines) and that's where I met Roel Nieuwenkamp the first time.

In preparation of the conference, I read the programme and related documentation and took note of the following. The participants that were listed in the programme represented the main stakeholders from governments, business (Business and Industry Advisory Committee to the OECD (BIAC)), Trade Unions (Trade Union Advisory Committee to the OECD (TUAC)), and non-governmental organisations (NGOs) (OECD Watch, a global network of civil society organisations).

I was impressed by the presence of the four key stakeholders but was also curious to know whether other stakeholders were part of the OECD's process on RBC. I subsequently consulted the website of the OECD on RBC and found out that under the heading "other important partners" also listed the UN Working Group on Business and Human Rights; UN Global Compact; the International Labour Organisation; the International Coordinating Committee on National Human Rights Institutions; the Global Reporting Initiative; the International Organisation for Standardization; and the UN Economic and Social Commission of Asia and the Pacific (ESCAP).<sup>1</sup>

The representation looked very inclusive and participatory except, I, however, did not discern an adequate number of academic speakers who were not at the same time also members of any of the stakeholders listed above. After all, the same webpage mentioned above states: *The true intent and purpose of the Guidelines can only be realised through collaborative and multi-stakeholder action. Adhering governments engage with stakeholders in different ways in the implementation of the Guidelines. On a national level, many of these interactions are channelled through NCPs. On an international level, business, trade unions, civil and other partners regularly interact with the OECD.* (emphasis added by author)

In view of the importance of the Guidelines and its many impressive years of existence, I realised that "independent and neutral" academic stakeholders - I thought they might be subsumed under "other partners" – were actually missing. Academic partners could add useful analytical perspectives, broaden the discussions and provide suggestions for further development of the Guidelines that would not be co-opted by the positional interests of the various other official stakeholders. More importantly, academic partners could be the important transmitters in getting the words out to the future generations of business people and members at large of societies who might be affected by the Guidelines.

Some of the academic speakers listed then and in subsequent Global Forum programmes are either members of National Contact Points (NCPS), consultants to governments in charge of NCPs, or work for BIAC, TUAC or OECD Watch. Hence, I concluded that adding academic participants which are not affiliated with any of the main stakeholder groups could be useful for the OECD RBC dialogue process.

## **EMERGING ACADEMIC NETWORK**

Seeking to get feedback on my idea, I approached Roel Nieuwenkamp during the 2013 Global Forum and subsequently discussed my idea during bilateral meetings that same year while I was in Paris teaching at Sciences Po in their Master of Public Affairs Programme.

I quickly sensed commonality of views between myself and Roel and an interest to turn the idea into practice. While acting as chair of the OECD Working Party on RBC, Roel also continued to teach as part-time Professor of Public Administration at the University of Amsterdam. Having held important jobs in government, in business and in academe, Roel agreed that giving space for academic reflections and discussion could be beneficial for the implementation and further development of the Guidelines.

Roel was interested in several potential avenues of academic activities related to the OECD Guidelines such as mapping corporate social responsibility (CSR) on a global level and comparing CSR with the Guidelines. We also talked about comparisons between the other related instruments like the UN Guiding Principles on Human Rights (UNGPs), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the UN Global Compact and its 10 Principles.

Our discussions continued during the 2014 Global Forum and resulted in us providing related information about our idea to create an academic circle on an informal basis. We went through re-naming the group from Academic Circle, to Academic Friends and on to Academic Network. As a first step, we established a list of academics who expressed interest in joining our network. We started with 37 and are now at 57 members of the network. Members also include John Ruggie, Karl Sauvant, Lisa Sachs and other academics located in different parts of the world.

## **NETWORK TAKING SHAPE**

In 2015, we moved towards organising phone conferences with the membership of one-hour duration. Barbara Bijelic, Legal Expert in the RBC of the Investment Division, Directorate for Financial and Enterprise Affairs at the OECD worked with Roel and helped us set up the phone conferences for keeping the membership à jour and provided us with very useful suggestions as to how we could proceed with our network.

The phone conferences were organised according to the following structure. Roel would give an update on the latest developments concerning the Guidelines including narration of latest case examples and news from various NCPs. Participants were subsequently informed of plans that we wanted to suggest to them, for instance, organising informal meetings during the Global Forum in Paris or during the annual meeting of the UN Business and Human Rights meeting in Geneva. And at the end of the phone conference, I would open the floor for questions and comments coming from the membership of the academic network.

In 2016, we put out a call for abstracts for papers in the lead up to the 40-year anniversary of the Guidelines suggesting that accepted papers may be discussed or presented at the 2016 OECD Global Forum on RBC. Potential ideas for papers are copied below. Participants were also encouraged to propose additional research topics.

- What can we learn from the 40-year history of the development of the Guidelines for Multinational Enterprises since their introduction in 1976? What did they deliver and what should the next 40 years bring? What is the impact of the co-existence of the Guidelines for Multinational Enterprises, the Global Compact and the UNGPs? Do business, government or civil society groups “go shopping” when deciding on which framework to use? If so, what are the expected advantages/disadvantages of using either or the other for the different actors?
- What are the trends and impacts of RBC and the Guidelines in trade and investment agreements?
- What impacts have NCPs’ final statements brought for companies (for example commercial consequences to business (positive or negative), impacts to access to benefits and services (for example through export credits, investment promotion), reputational consequences?)
- What submission criteria and standard of proof should NCPs require given that the objective of the mechanism is to promote dialogue and implementation of the Guidelines? How is this reflected in practice and how does it compare to other systems?
- How can NCPs be strengthened with regard to their role of providing access to remedy for human rights and environmental damages?
- How are the core criteria of NCPs (visibility, accessibility, transparency and accountability) reflected in their handling of specific instances?
- What has driven or dissuaded companies from engaging in the specific instance procedure of the NCPs?

- How do governments themselves perform against the expectations of the Guidelines (for example in terms of environmental, social and governance (ESG) reporting, procurement, due diligence for RBC)?
- What role should the Guidelines and the NCP mechanism play in the following contexts and how have they been applied in practice with regard to:
  - modern slavery/ human trafficking in supply chains
  - conflict minerals other than tin, tantalum, tungsten and gold (for example precious stones, coal, jade, et cetera.)
  - labour conditions and human rights abuses related to mega sports events
  - human rights and labour standards in the fisheries industry
  - internet freedom/ privacy related issues
  - climate change related RBC risks
  - encouraging enabling sectors such as the financial sector to 'enable' RBC in other sectors
- Where do the current gaps lie with regard to the Guidelines?

Some of the abstracts were well written and the authors were encouraged to write papers that could be presented during the 40-year anniversary conference scheduled to be held in December 2016 in Paris and some of the presenters accepted the call for written papers to be included in a book jointly edited by Nicola Bonucci (OECD), Catherine Kessedjian (ILA-International Law Association) and Laurence Ravillon (SFDI- Société française pour le droit international). This book will be presented during the coming Global Forum in June 2018.

## CURRENT PROJECT OUTLOOK

It was difficult for Roel to participate in the creation of the academic circle since he held at the same time the chair of the Working Group on RBC and needed to keep a distance between the new informal academic group and his position at the OECD. Nevertheless, we were able to organise conference calls and met during the Global Forum in Paris and I was also able to organise a side-event during the annual conference in Geneva on Business and Human Rights in November 2015.

It was nevertheless clear that we needed to find a university which would be interested, willing and able to host the secretariat for the Academic Network. We could not continue counting on the OECD Secretariat to support us which would have meant putting undue work pressure on the OECD Secretariat. In any case, a distance needed to be established between the Academic Network and the OECD itself for integrity sake.

Roel and I searched for candidate universities in the USA and in Europe and got initial indications of interest. But at the final end, committed offers to take on the responsibility to provide resources and competent leadership came from two Dutch Universities namely Nyenrode Business Universiteit and Erasmus University Rotterdam. Colleagues representing both Dutch universities finally concluded that Erasmus University Rotterdam under the guidance of Martijn Scheltema, Professor of Law, will establish the secretariat of the Academic Network around the Global Forum in June 2018 which will also coincide with the stepping down of Roel as Chair of the Working Party on RBC.

## IN CLOSING

I am happy that a solution could be found that will ensure the continuity of the Academic Network and also provide the opportunity to make our network more formal and more performing on a regular basis. The new start will also help us all to provide a continuity to what Roel and myself were able to initiate and to go beyond what has been achieved so far.

I cherished the opportunity to collaborate with Roel. He was an inspiration and a very reliable colleague always ready to respond wherever in the world his professional assignments took him. Throughout the period 2014-2017, I could also count on Roel to provide inputs to conferences that I either organised or co-organised which had a link to the OECD Guidelines such as the conference on Business Diplomacy at Windesheim, Netherlands in 2014,<sup>2</sup> the biannual conference on negotiations in Paris in (2016)<sup>3</sup> and in the Colloquium on Living Wage at the University of Geneva, 2017.<sup>4</sup>

We both agree that more work needs to be done in regard to the development of sector-specific standards, ensuring complementarity with the other guiding principle documents, strengthening the functioning of the NCPs, improving dissemination of the Guidelines in the wider public and deepening the link to the United Nations Sustainable Development Goals.

I wish Roel continued success in his diplomatic career and thank him for all the great contributions that he was able to make while being Chair of the Working Party on RBC and thank him for letting us know that he will remain available in the future for eventual advise and support to our Academic Network.

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OECD **GUIDELINES** FOR MULTINATIONAL ENTERPRISES

As Roel Nieuwenkamp steps down from his role as the first Chair of the OECD Working Party on Responsible Business Conduct, this Liber Amicorum pays tribute to his many years of work on the OECD Guidelines for Multinational Enterprises. It compiles testimonies from academics close to him who are also engaged in efforts to promote responsible business conduct.

[https://mneguidelines.oecd.org/  
OECD-Guidelines-for-MNEs-A-Glass-Half-Full.htm](https://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.htm)



Kingdom of the Netherlands