The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?

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I. INTRODUCTION

The Organization for Economic Co-operation and Development (OECD) adopted the *OECD Guidelines for Multinational Enterprises* in 1976. Since then, the Guidelines have been revised twice in 2000 and 2011 to "reflect changes in the landscape for international investment and multinational enterprises".[1] Although they are non-binding, the OECD Guidelines recommend core principles and standards for responsible conduct of business.[2] The Guidelines are intended to ensure that multinational corporations (MNCs)[3] conduct their operations in compliance with government policies as well as to "strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises".[4] The concepts and principles of the Guidelines "are addressed to all the entities within the multinational enterprise" including parent companies and their local subsidiaries.[5]

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[1] OECD, *OECD Guidelines for Multinational Enterprises*, 2011 Edition, at 3, online http://www.oecd.org/dataoecd/43/29/48004323.pdf [OECD Guidelines].
[2] *Id.* at 3.
[3] The OECD Guidelines define multinational enterprises as "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways". See *OECD Guidelines for Multinational Enterprises, id.* at Chapter I: Concepts and Principles, paragraph 4.
[4] *Id.* at 13.
[5] *Id.* at Chapter I: Concepts and Principles, paragraph 4.

The OECD Guidelines contain general and specific principles on sustainable development covering economic, social and environmental sustainability issues.[6] In general terms the Guidelines enjoin MNCs to: contribute to economic, environmental and social progress with a view to achieving sustainable development, support and uphold good corporate governance principles in conducting their business, develop and apply effective self-regulatory practices and management systems capable of fostering a relationship of confidence and mutual trust between MNCs and host communities, carry out risk-based due diligence to prevent or mitigate the adverse impacts of their activities, encourage business partners such as suppliers and sub-contractors to conduct their business in a responsible manner by applying principles compatible with the OECD Guidelines, and to engage with relevant stakeholders prior to the planning and execution of projects that may significantly impact local communities.[7]

This article assesses the degree to which the OECD Guidelines aids the sustainable development of natural resources. By sustainable development I mean the conscious integration of social and environmental concerns with economic development. Sustainable development is a broad concept encompassing both social and economic dimensions, but my analysis here is confined to the provisions of the Guidelines on human rights, employment and industrial relations and environmental protection. I have deliberately chosen these three thematic areas because these are the issues that usually confront MNCs engaged in the exploration and exploitation of natural resources. The article begins by analyzing pertinent provisions of the OECD Guidelines on sustainable development, followed by a discussion of the implementation structures and procedures of the Guidelines. Thereafter, it assesses the extent to which the Guidelines have impacted sustainable exploitation and extraction of natural resources focusing in particular on the jurisprudence of the National Contact Points (NCPs). Amongst other things,

[6] These include principles dealing with disclosure of timely and accurate information on the activities of MNCs, human rights protection, employment and industrial relations, environmental stewardship, combating bribery and extortion, consumer interests, science and technology, competition and taxation.
[7] *OECD Guidelines for Multinational Enterprises, supra* note 1 at 19-20.

the article argues that, although the OECD Guidelines are not designed to apply exclusively to the natural resource sector, the Guidelines are often the most viable benchmarks against which the sustainable mining and exploitation of natural resources is judged. The Guidelines are particularly significant for the exploitation of natural resources in conflict zones because, quite often, conflict zones lack both functional governments and effective regulatory standards. In essence, the OECD Guidelines often fill the regulatory void in conflict and weak governance zones. Next, the article identifies certain inherent features of the OECD Guidelines that impede their capacity to promote sustainable development, including the non-binding nature of the Guidelines and the lack of sanctions for violation of the Guidelines. Finally, the article articulates strategies for enhancing the effectiveness of the Guidelines including the vesting of specific adjudicatory powers on the NCPs.

II. CONCEPTS AND PRINCIPLES OF THE OECD GUIDELINES RELATING TO SUSTAINABLE DEVELOPMENT

The OECD Guidelines urge MNCs to respect human rights, "protect the environment, public health and safety", and to "conduct their activities in a manner contributing to the wider goal of sustainable development".[8] With regard to human rights, the OECD Guidelines provide that MNCs should:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.[9]

[8] *Id.* at 31 & 42.
[9] *Id.* at 31.

The OECD Guidelines recognize that the responsibility of MNCs to respect human rights is independent of the host state's ability or willingness to protect the human rights of its citizens.[10] Thus, the host state's failure or inability to protect human rights or the fact that the host State may act in violation of its human rights commitments "does not diminish the expectation that enterprises respect human rights."[11]

The human rights principles established in the OECD Guidelines draw upon the United Nations Framework for Business and Human Rights' concepts of Protect, Respect and Remedy.[12] The Guidelines urge that, irrespective of the country or the specific context of MNCs' operations, MNCs should refer at a minimum to internationally recognized human rights as expressed in international instruments such as the Universal Declaration of Human Rights.[13] In appropriate cases, MNCs may need to consider and apply additional standards to ensure that they comply with the OECD Guidelines. For example, MNCs may need to take special measures to respect the human rights of specific groups such as indigenous peoples, national or ethnic minorities, women, children and migrant workers.[14] MNCs that operate in conflict zones, as some mining MNCs do, are urged by the Guidelines to "respect the standards of international humanitarian law" so as to "avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments."[15] Finally, where MNCs identify through their human rights due diligence process that their business operations have caused or contributed to adverse human rights impacts, MNCs should ensure remediation of the adverse impacts, either in co-operation with the host State or by utilizing its "operational-level grievance mechanism".[16]

[10] *Id.* at 31-32 paragraph 37.
[11] *Id.* at 32 paragraph 38.
[12] *Id.* at 31 paragraph 36.
[13] *Id.* at 32 paragraph 39.
[14] *Id.* at 32 paragraph 40.
[15] *Id.* at 32 paragraph 40.
[16] *Id.* at 34 paragraph 46.

The provisions of the OECD Guidelines on employment and industrial relations mirror the core principles and rights enshrined in the ILO Declaration on Fundamental Principles and Rights at Work, including the rights to freedom of association and to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced and compulsory labour, and non-discrimination in employment and occupation.[17] For example, the Guidelines recommend that MNCs should respect the collective rights and individual rights of their workers within the framework of both applicable law and regulations in host countries and applicable international labour standards.[18] Furthermore, the OECD Guidelines require MNCs to "observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country"; provide the best possible wages, benefits and conditions of work and ensure that wages and benefits are "at least adequate to satisfy the basic needs of the workers and their families".[19] The Guidelines also require MNCs to take adequate measures to ensure occupational health and safety not only by complying with prevailing regulatory standards in host countries but also by observing prevailing industry norms.[20] Thus, even where existing regulations in host countries do not so require, MNCs are expected to raise the level of their performance on occupational health and safety by implementing higher standards than those required by the host countries.[21]

With regard to environmental protection, the OECD Guidelines exalt MNCs to observe best environmental practices within the framework of laws, regulations and administrative practices in their host countries and in consideration of relevant international norms and principles.[22] More specifically, MNCs are to:

[17] *Id.* Chapter V, Commentary 51.
[18] *Id.* Chapter V.
[19] *Id.* at 36 paragraph 4.
[20] *Id.* at 36 paragraph 4.
[21] *Id.* Chapter V, Commentary 57.
[22] *Id.* Chapter VI.

> Establish and maintain a system of environment management appropriate to the enterprise, including:
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> a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
> b) Establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilization, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and
> c) Regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.[23]

MNCs are equally urged to disclose to the public and their workers information on the potential environmental, health and safety impacts of their activities. Such information should not only be timely but also it should be adequate, measurable and verifiable.[24] In essence, the OECD Guidelines implore MNCs to make honest and transparent reports on the environmental impacts of their activities as well as measures aimed at controlling or ameliorating such environmental impacts. Moreover, MNCs are to engage in adequate and timely communication and consultation with host communities who are directly affected by their activities;[25] avoid or mitigate the foreseeable environmental, health and safety-related impacts of their activities; observe the precautionary principle by acting proactively to avoid serious or irreversible environmental damage resulting from their activities; maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their activities; continually improve their corporate environmental performance at the level of both the MNCs and of their supply chains; provide adequate education and training to workers in environmental health and safety; and contribute to the development of environmentally meaningful and economically efficient public policy that will enhance environmental awareness and protection.[26]

Although the OECD Guidelines contain elaborate provisions on environmental protection, and while the Guidelines draw upon international instruments such as the Rio Declaration on Environment and

[23] *Id.* Chapter VI, Principle 1.
[24] *Id.* Chapter VI paragraph 2(a).
[25] *Id.* Chapter VI paragraph 2(b).
[26] *Id.* Chapter VI paragraphs 3-8.

Development, in certain respects these provisions fall short of the ideal. For example, while the Guidelines urge MNCs to communicate and consult with host communities on the environmental impacts of their activities, the Guidelines are silent on the process and outcome of such consultation. The Guidelines do not specifically urge MNCs to give due consideration to the objections of local host communities to projects undertaken by MNCs, although the need for such consideration can be fairly implied from the Guidelines. Moreover, the Guidelines do not require MNCs to seek prior approval or consent of host communities for projects that are acknowledged to pose significant environmental risks. This is a significant omission, especially in the context of the exploitation of natural resources. Natural resource extraction projects are notorious for their adverse environmental impacts on host communities. Hence the World Bank panel of experts has recommended that, companies in the resource extraction industries should obtain a "social licence" from host communities in the form of a "free prior and informed consent throughout each phase of a project cycle".[27] The OECD Guidelines' failure to elaborate on the process for consultation with host communities is equally troubling because quite often, host communities in developing countries are coerced by dictatorial host governments.[28] Hence these communities often remain silent even in the face of apparent environmental hazards for fear of reprisals from the government.

Sustainable Exploitation of Minerals in Conflict-Affected and High Risk Areas

The sustainable development creed of the OECD Guidelines is complemented by two distinct instruments, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones

[27] EXTRACTIVE INDUSTRIES REVIEW, STRIKING A BETTER BALANCE: THE WORLD BANK GROUP END EXTRACTIVE INDUSTRIES – THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW, vol. 1 (December 2003) at 21, online http://irispubluc.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/$File/volume1english.pdf

[28] For example, consultations with local communities on the Chad-Cameroon Petroleum Development Pipeline Project were conducted in the presence of state security forces. This led to suspicions that the consent of the communities was coerced. See World Bank Inspection Panel, *Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No 3373-CD); and Management of the Petroleum Economy (Credit No 3316-Cd)* at xiv-xv, para. 26, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChadInvestigationReporFinal.pdf

(Risk Awareness Tool)[29] and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (the Due Diligence Guidance).[30] The Risk Awareness Tool is designed to help companies invest responsibly in countries where governments are unable or unwilling to perform the usual responsibilities of a government. Adopted by the OECD Council on 8 June 2006 as a follow-up to the OECD Guidelines, the Risk Awareness Tool provides a series of questions that companies should consider in determining whether to make actual or prospective investments in weak governance zones. For example, companies should ask whether they have business policies and practices that could allow them to obey applicable laws in the host country and to observe relevant international instruments including the OECD Guidelines.[31] Companies must also consider whether the host government has full control over its territory and if not, assess the human rights situation in areas outside of the government's control.[32]

The Risk Awareness Tool does not place any responsibilities or obligation on companies but instead provides certain benchmarks against which companies should assess their investments in weak governance zones. In this sense the Risk Awareness Tool could potentially encourage responsible investments in developing countries where governments are often weak and unable to discharge conventional governance duties. However, the Risk Awareness Tool appears to assume that companies are conscientious. We know that most companies act on the basis of cost-benefit analysis. Thus, companies may invest in weak governance zones even if the questions raised by the Risk Awareness Tool are answered in the negative, provided that the benefits of such investment outweigh the risks. This explains why mining MNCs continue to invest in Africa's conflict zones.

[29] Online http://www.oecd.org/dataoecd/26/21/36885821.pdf.
[30] Online http://www.oecd.org/dataoecd/62/30/46740847.pdf.
[31] *The Due Diligence Guidance*, *id*. at 15.
[32] *Id*. at 16.

The second instrument, the Due Diligence Guidance, is a multi-stakeholder initiative involving the OECD, the United Nations, governments of the eleven countries constituting the Great Lakes region of Africa, business community and civil society representatives. The Due Diligence Guidance is aimed at helping MNCs and other companies to avoid contributing to resource-fuelled conflicts.[33] In particular, the Due Diligence Guidance seeks to "promote accountability and transparency in the supply chain of minerals from conflict-affected and high-risk areas."[34] It recommends that companies operating in conflict zones should undertake a risk-based due diligence assessment of their activities and relationships against a myriad of standards including standards provided under national and international law and private sector voluntary initiatives.[35] The Due Diligence Guidance articulates a five-step framework for risk-based due diligence in the supply chain of minerals from conflict zones, including the establishing of a strong company management systems for the supply chain; the identification and assessment of risks of adverse impacts associated with the supply chain; the designing and implementation of a strategy to respond to identified risks; the undertaking of an independent third-party audit of supply chain due diligence at identified points in the supply chain; and finally, public reporting on the company's supply chain due diligence policies including measures taken to implement such policies.[36]

The Due Diligence Guidance is unique in the sense that it is addressed to all companies involved in the mineral supply chain including companies that trade in products derived from mineral resources originating from conflict zones. A due diligence assessment, if conducted reasonably and in good faith, could aid MNCs in identifying, preventing or mitigating the adverse impacts of their activities in conflict zones.[37] For example, on the basis of its due diligence assessment, a company may temporarily suspend trade in minerals from conflict zones while it takes steps to mitigate the risks associated with such

[33] *Id*. at 8.
[34] *Id*. at 12.
[35] *Id*. at 13.
[36] *Id*. at 17-19.
[37] *Id*. at 14.

minerals.[38] A company may also disengage with a supplier if the supplier fails to implement risk-mitigating measures or where it deems mitigation not feasible or the risks unacceptable.[39] However, the ability of the Due Diligence Guidance to effect change in corporate behavior appears to be compromised not only by its voluntariness but also by the fact that it lacks an implementation mechanism. Thus, as one OECD official observed recently, the Due Diligence Guidance "cannot be used as a basis for bringing a specific instance under the [OECD] Guidelines".[40] Moreover, the Due Diligence Guidance effectively claws back its due diligence mechanism by providing that the nature and extent of due diligence undertaken by a company must be appropriate for the particular circumstances of the company. Under the Due Diligence Guidance, "the nature and extent of due diligence that is appropriate will depend on the individual circumstances and be effected by factors such as the size of the enterprise, the location of the activities, the situation in a particular country, the sector and the nature of the products or services involved."[41] While this relativist position is understandable given the need to avoid a one-size-fits-all approach, it could negatively affect the potency and effectiveness of the Due Diligence Guidance because it allows companies to undertake less rigorous due diligence because they are smaller in size than other companies. This is the more so because the responsibility for determining the size and circumstances of a company, and thus the nature and extent of due diligence appropriate for its circumstances, rests with the company rather than an independent expert.

III. IMPLEMENTATION STRUCTURES AND PROCEDURES OF THE OECD GUIDELINES

The National Contact Points (NCPs) and the Investment Committee are responsible for effective implementation of the OECD Guidelines. Each member-country of the OECD is obliged to establish a NCP whose function is to undertake promotional activities and handle enquiries relating to the OECD

[38] *Id*. at 14.
[39] *Id*. at 14.
[40] Lahra Liberti, *OECD 50th Anniversary: the Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendation on Due Diligence Guidance for Conflict-Free Mineral Supply Chains*, 13 BUSINESS LAW INTERNATIONAL 35, 36 (2012).
[41] *The Due Diligence Guidance, supra* note 30 at 15.

Guidelines.[42] NCPs also play a conciliatory role by offering a forum for discussing and dealing with the issues raised in specific instances "in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines."[43]

OECD adhering countries have flexibility in organizing and constituting their NCPs provided that the NCPs are "composed and organized such that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government."[44] NCPs need not be identical in all OECD-adhering countries. Rather, NCPs may assume different organizational forms and countries may seek the active support of social partners such as the business community, worker organizations and non-governmental organizations.[45] For example, NCPs "can consist of senior representatives from one or more Ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts."[46] A country may choose to adopt a multi-stakeholder approach by allowing representatives of the business community, worker organizations and non-governmental organizations on their NCP.[47]

In addition to its broad promotional function, the Investment Committee assists the NCPs in discharging their duties by clarifying the OECD Guidelines in "specific instances".[48] In particular, the Investment Committee assists the NCPs to resolve any doubt about the interpretation of the provisions of the

[42] OECD, "Amendments of the Decision of the Council on the OECD Guidelines for Multinational Enterprises", reproduced in *OECD Guidelines for Multinational Enterprises, supra* note 1, Part II at 67-75 ["Amendments of the Decision of the Council"].
[43] OECD, "Implementation Procedures of the OECD Guidelines for Multinational Enterprises", reproduced in *OECD Guidelines for Multinational Enterprises, id.,* Part II pages 65-89 at 72 ["Implementation Procedures"].
[44] "Implementation Procedures"*, id.* at 71.
[45] *Id*. at 71.
[46] *Id*. at 71.
[47] *Id*. at 71.
[48] See "Amendments of the Decision of the Council"*, supra* note 42 at 69; "Implementation Procedures", *id*. at 74.

Guidelines in particular circumstances.[49] The Investment Committee's overarching duty is to oversee the effective functioning and implementation of the Guidelines.[50] In discharging its oversight role, the Investment Committee may consider a substantiated submission made to it by an adhering country, an advisory body or OECD Watch on whether a particular NCP is fulfilling its responsibilities with regard to its handling of specific instances; determine whether a NCP has accurately interpreted the Guidelines in specific instances; and make recommendations to improve the functioning of the NCPs.[51] However, although the Investment Committee has oversight functions, it is not a judicial or quasi-judicial body given that the OECD Guidelines are themselves voluntary.[52] The effect is that the Investment Committee cannot pass judgment on the behavior or conduct of MNCs.[53] Likewise, the findings of the NCPs cannot be appealed against or questioned by a referral to the Investment Committee.[54]

Implementation of the OECD Guidelines in Specific Instances

The "specific instance" procedures of the OECD Guidelines consist of three distinct stages: initial assessment of a specific instance and a decision whether it is worthy of further consideration; assistance to the parties in resolving the issues raised in the specific instance; and conclusion of the procedures.[55] When asked to resolve issues in a "specific instance", the NCP makes an initial assessment of whether the issues raised merit further examination and if so, the NCP offers its "good offices to help the parties involved to resolve the issues".[56] At this stage the NCP only needs to determine whether the issues raised in the specific instance are bona fide and relevant to the Guidelines. In doing so the NCP

[49] "Implementation Procedures", *id*. at 74.
[50] OECD, "Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises", reproduced in *OECD Guidelines for Multinational Enterprises, supra* note 1 at 77 para 4 ["Commentary on the Implementation Procedures"].
[51] "Implementation Procedures", *supra* note 43 at 74. See also "Commentary on the Implementation Procedures", *id.* at 88 para. 48.
[52] "Commentary on the Implementation Procedures", *id.* at 88 para. 44.
[53] "Amendments of the Decision of the Council"*, supra* note 42 at 69.
[54] "Commentary on the Implementation Procedures", *supra* note 50 at 88 para. 44.
[55] *Id.* at 86-87 para. 40.
[56] "Implementation Procedures", *supra* note 43 at 72.

considers certain factors, including the identity of the party concerned and its interest in the matter; whether the issue is material and substantiated; whether there is a link between the enterprise's activities and the issue raised in the specific instance; the relevance of applicable law and procedures including court rulings; how similar issues have been, or are being, treated in other domestic or international proceedings; and whether a consideration of the issues would contribute to the purposes and effectiveness of the Guidelines.[57] However, the mere fact that similar issues have been, or are being, treated in other domestic or international proceedings does not necessarily mean that the issues do not merit further consideration by the NCP. As a matter of fact, such prior or parallel domestic or international proceedings do not bar further consideration by the NCP. Rather, the NCP may undertake further consideration of the issues if it is satisfied that such endeavour "could make a positive contribution to the resolution of the issues and would not create serious prejudice for either of the parties involved in these other proceeding or cause a contempt of court situation".[58]

Where the NCP determines that issues raised in a specific instance deserve further consideration, it offers its good offices and attempts to assist the parties resolve the issues in a consultative and facilitative manner. At this stage, the NCP consults with the parties and, where necessary, seek advice from the business community, worker organizations, other non-governmental organizations and relevant experts.[59] It may also consult with NCPs in other countries and seek the guidance of the Investment Committee if it has any doubt about the proper interpretation of the Guidelines in particular circumstances.[60] In consultation with the parties the NCP may establish a reasonable timeframe within which the parties should discuss and resolve the issues.[61] In addition, the NCP may offer or facilitate access to consensual and non-adversarial means of dispute settlement including conciliation or

[57] "Commentary on the Implementation Procedures", *supra* note 50 at 82-83 para. 25.
[58] *Id.* at 83 para. 26.
[59] "Implementation Procedures", *supra* note 43 at 72.
[60] *Id*. at 72.
[61] "Commentary on the Implementation Procedures", *supra* note 50 at 86-87 para. 40.2.

mediation.[62] However, conciliation or mediation strategies are adopted by the NCP only if the parties to the specific instance agree to such strategies and only if they are committed to participate in conciliation or mediation in good faith.[63]

Specific instance procedures are conducted in a confidential manner. Thus, the NCP takes appropriate steps to protect sensitive business information as well as the interests of other parties and stakeholders involved in a specific instance.[64] Information provided in the course of specific instance procedures must remain confidential, unless the party providing the information agrees that the information should be disclosed or unless national law requires disclosure of such information.[65] In appropriate cases, the NCP may protect the identity of the parties involved in a specific instance where there are strong reasons to believe that disclosure of the parties' identity would be detrimental to one or more of the parties.[66] In fact, the NCP may refuse to disclose to a MNC the identity of a party to a specific instance involving the MNC if the NCP believes that such disclosure would be detrimental to the party.[67]

At the conclusion of the "specific instance" procedures the NCP is obliged to make the results of the procedures publicly available although it should take into account the need to protect sensitive business and other stakeholder information.[68] Public disclosure of results may, depending on the outcome of the procedures, take the form of a statement by the NCP that the issues raised do not merit further consideration and the reasons for the NCP's decision; or a report indicating that the parties have reached agreement on the issues raised; or a statement that the parties could not reach agreement on the issues including the reasons that the parties could not reach an agreement.[69] The NCP may make

[62] "Implementation Procedures", *supra* note 43 at 73.
[63] "Commentary on the Implementation Procedures", *supra* note 50 at 84 para. 29.
[64] "Implementation Procedures", *supra* note 43 at 73 para. 4.
[65] *Id*. at 73 para. 4.
[66] "Commentary on the Implementation Procedures", *supra* note 50 at 84 para. 30.
[67] *Id.* at 84 para. 30.
[68] "Implementation Procedures", *supra* note 43 at 73.
[69] *Id*. at 73.

recommendations to the parties and where appropriate, it may follow-up with the parties on the response to, and implementation of, the recommendations.[70] Finally, the NCP is obliged to notify the results of its specific instance procedures to the Investment Committee in a timely manner.[71]

There are substantive and procedural standards to be observed by the NCPs in dealing with the issues raised in specific instances. The NCPs must resolve issues in specific instances in a manner that is impartial, predictable, equitable and compatible with the OECD Guidelines.[72] NCPs should be predictable by providing clear information to the public on the role of the NCPs in resolving issues raised in specific instances, including the potential role of NCPs in monitoring the implementation of agreements reached between the parties.[73] As well, the NCPs should provide information on the timeframes for resolving issues raised in specific instances.[74] Equitable resolution of issues in specific instances requires the NCPs to ensure that the parties engage in the process on fair and equitable terms.[75] Thus, the NCPs must ensure that parties have reasonable access to sources of information relevant to the issues raised in specific instances.[76]

In addition, the NCPs discharge their responsibilities on the basis of a set of core criteria: visibility, accessibility, transparency and accountability.[77] The NCPs must be visible and easily accessible to the business community, labor, NGOs and the public at large. Thus, NCPs must respond to all legitimate requests for information and deal with specific issues raised by parties concerned in an efficient and timely manner.[78] In order to gain the confidence of the general public, NCPs are to discharge their duties in a transparent manner, taking into account the need to preserve the confidentiality of proceedings in

[70] "Commentary on the Implementation Procedures", *supra* note 50 at 85 para. 36.
[71] "Implementation Procedures", *supra* note 43 at 73.
[72] *Id*. at 72.
[73] "Commentary on the Implementation Procedures", *supra* note 50 at 81-82 para. 22.
[74] *Id.* at 81-82 para. 22.
[75] *Id*. at 81-82 para. 22.
[76] *Id*. at 81-82 para. 22.
[77] "Implementation Procedures", *supra* note 43 at 71.
[78] "Commentary on the Implementation Procedures", *supra* note 50 at 77 para 4.

specific instances.[79] Adhering countries are to ensure that persons appointed to serve on their NCPs are respected members of the public and that the leadership of the NCPs is such that the NCPs gain and retain the confidence of social partners and other stakeholders.[80] Governments of the OECD-adhering countries may also establish multi-stakeholder advisory or oversight bodies to assist the NCPs.[81] Finally, NCPs must be accountable for their actions by reporting annually on their activities and by holding regular meetings. Such meetings "provide an opportunity to share experiences and encourage 'best practices' with respect to the NCPs".[82]

A unique feature of the NCPs is the extraterritorial jurisdiction of NCPs. The OECD Guidelines are designed to apply universally to the business conduct of MNCs "wherever they operate".[83] Thus, the Guidelines can be implemented in both OECD adhering-countries and in non-OECD countries. That being the case, NCPs have jurisdiction over specific instances raising issues that arose in a non-adhering country. Thus, the NCP of the home country of the MNC involved in a specific instance has jurisdiction to consider the issues raised in the specific instance even if the issues arose in a foreign country that is not a member of the OECD.[84] In such cases, the home NCP usually takes steps to understand the issues, pursues enquiries and engages in fact finding activities by contacting the management of the MNC in the home country and by contacting embassies and government officials in the non-adhering country.[85]

IV. SIGNIFICANCE OF THE OECD GUIDELINES FOR THE SUSTAINABLE DEVELOPMENT OF NATURAL RESOURCES

This section of the article undertakes an assessment of the Guidelines with a view to determining whether they aid the sustainable development of natural resources. It is worth noting on the outset that

[79] *Id*. at 79 para. 9.
[80] *Id*. at 80 para. 10.
[81] *Id*. at 80 para. 11.
[82] *Id*. at 79 para. 9.
[83] *Id*. at 86 para. 39.
[84] *Id*. at 86 para. 39.
[85] *Id*. at 86 para. 39.

it is impossible to determine with mathematical precision the impacts of the Guidelines on sustainable development of natural resources. This is because, in the extractive industries, the OECD Guidelines are not applied in isolation but are often applied and implemented alongside comparable international initiatives on sustainable development including the World Bank Group's social standards, the United Nation's Global Compact, and the Equator Principles. Given the multitude of sustainable development initiatives applicable to the extractive industries it would be wrong to attribute any positive changes in the behavior of MNCs to any one particular regulatory initiative.[86]

That being said, the Guidelines could aid the quest for sustainable exploitation of natural resources because they have emerged as the most credible international benchmarks for measuring the conduct of MNCs. The credibility of the Guidelines stems not only from the fact that they were devised by an intergovernmental body, the OECD, but also because they apply extra-territorially to the business conduct of MNCs in foreign non-OECD countries. In fact, unlike regulatory initiatives such as the World Bank standards which apply only to MNCs that are recipients of World Bank loans and investment guarantees, the OECD Guidelines apply to all MNCs based in the OECD-adhering countries. This is particularly significant for the exploitation of natural resources in developing countries because most of the companies engaged in resource exploitation in these countries are subsidiaries of OECD-based MNCs.

Besides, the OECD Guidelines are utilized widely by international organizations, governments and NGOs. For example, the United Nations relied on the Guidelines as basis for determining the complicity of MNCs in human rights violations in the Democratic Republic of the Congo (DRC).[87] More specifically, the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of

[86] See D. Spar & J. Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 CHICAGO J. INT'L L. 171, 176 (2002).
[87] See *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, online http://www.un.dk/doc/S20021146.pdf

Wealth of the Democratic Republic of the Congo found that eighty-five companies breached the OECD Guidelines by financing and partnering with rebel groups that are renowned for their penchant for gross human rights violations.[88] In return, the companies were allowed 'privileged access' to natural resources by rebel groups.[89] As a result, the UN Panel of Experts recommended that the United Nations Security Council should "consider imposing certain restrictions on" the companies for their involvement "in the criminal and illicit exploitation" of natural resources in the DRC.[90] The recommended sanctions include travel bans on certain individuals identified by the Panel; freezing of assets, barring of the companies from accessing banking and financial institutions and barring the companies from establishing partnerships or other commercial relations with international financial institutions.[91] In addition, the UN Panel of Experts urged the United Nations to establish a monitoring body to verify and update "its list of business enterprises in violation of the OECD Guidelines and transmitting evidence of those violations to the OECD National Contact Points in the home Governments of the enterprises".[92]

The UN's reliance on the OECD Guidelines is significant for another reason. It elevates the global status of the Guidelines and imposes at least a moral obligation on OECD-adhering and non-adhering countries to ensure that their MNCs conduct their business in a responsible manner. Thus, countries that fail to ensure that their MNCs comply with the OECD Guidelines could be held to be complicit in the violations committed by the MNCs. In the words of the UN Panel of Experts,

> Countries which are signatories to those [OECD] Guidelines and other countries are morally obliged to ensure that their business enterprises adhere to and act on the Guidelines. … Home Governments have

[88] *Id*. at Annex III. According to the UN Panel of Experts, "By contributing to the revenues of the elite networks, directly or indirectly, those companies and individuals contribute to the ongoing conflict and to human rights abuses. More specifically, those business enterprises are in violation of the OECD Guidelines for Multinational Enterprises." See *id*. at 32 para. 175.
[89] *Id*. at 16 para. 79.
[90] *Id*. at 32 para. 175.
[91] *Id*. at 32 para. 176.
[92] *Id*. at 32 para. 178.

> the obligation to ensure that enterprises in their jurisdiction do not abuse principles of conduct that they have adopted as a matter of law. They are complicit when they do not take remedial measures.[93]

By relying on the OECD Guidelines as the basis for urging international monitoring of the activities of MNCs in the extractive industries, the UN Panel of Experts not only elevated the status of the Guidelines on the international arena but it also enhanced the international legitimacy of the Guidelines.[94]

Furthermore, the OECD Guidelines contain provisions on a broad range of sustainable development issues that often arise in the course of natural resource extraction. These issues include human rights, employment and industrial relations, environmental protection, and issues arising from supply chains. More specifically, the Guidelines represent the first concerted attempt by an inter-governmental body to articulate and recommend specific human rights standards for the conduct of business on a global scale.[95] The specific human rights standards set out in the OECD Guidelines are complemented by the Due Diligence Guidance which, as noted previously, urges MNCs to take pro-active measures to prevent or minimize adverse human rights impacts. Although both of these regulatory instruments are non-binding, a good faith implementation of the instruments by MNCs could ameliorate some of the adverse impacts of resource extraction.

Moreover, because the OECD Guidelines are designed to continually evolve in line with prevailing circumstances, the Guidelines may be better able to identify and disseminate best practices in the sustainable development of natural resources. The identification and dissemination of best practices could occur through the collaborative efforts of the NCPs, the Investment Committee, MNCs and

[93] *Id*. at 32 paras. 177-8.
[94] See Elisa Morgera, *An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review*, 18 GEO. INT'L ENVTL. L. REV. 751, 776 (2006).
[95] See Ashley L. Santner, *A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future*, 43 GEO. WASH. INT'L L. REV. 375, 375-6 (2011).

NGOs.[96] For example, in the course of negotiating the resolution of issues raised in a specific instance, the NCPs and the parties involved in the specific instance may mutually identify best practices in sustainable development as well as how best the MNC could avoid infractions of the Guidelines in the future. As well, NCPs are required to be self-referential by engaging in joint peer learning activities and peer reviews through meetings at the OECD or through direct co-operation between the NCPs.[97] The self-referential character of the NCPs could aid identification of best practices particularly where it involves thematic peer reviews and evaluations.[98] Peer review activities could also identify deficiencies and knowledge gaps within a particular NCP, as well as offer possible strategies for remedying such deficiencies and gaps. In fact, the OECD now organizes peer learning sessions for the NCPs. For example, a peer learning session was held during the 2011 annual meeting of the NCPs, focusing primarily on typical challenges encountered by NCPs in handling specific instances.[99] These challenges include issues relating to fact-finding, transparency and impartiality, field visits, and use of external experts.[100]

The inherent cooperative nature of the implementation procedures of the OECD Guidelines aids the sustainable development of natural resources in another sense. It breeds public confidence in the Guidelines. By allowing non-OECD organizations to participate in its implementation process, the Guidelines could appeal to a broader public, thus building public trust and confidence in the Guidelines.

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[96] Gefion Schuler, *Effective Governance Through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises*, 9 GERMAN LAW JOURNAL 1754 (2008) (arguing that the OECD Guidelines promote sustainable development through mediation, cooperation and broad-based consultation). It should also be said that the OECD Guidelines enhance collective problem-solving by promoting institutional cooperation between the various arms of the OECD, as well as cooperation between the OECD and non-OECD institutions such as the United Nations, the World Bank, MNCs and NGOs. Cooperation between NCPs of the OECD-adhering countries has increased in recent years. Such cooperation usually involves the coordination of activities regarding specific instances and the exchange of information and experiences on the functioning of the NCPs. See OECD, ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011: A NEW AGENDA FOR THE FUTURE, 38 (2011) [ANNUAL REPORT ON THE OECD GUIDELINES].

[97] "Commentary on the Implementation Procedures", *supra* note 50 at 81 para. 19.
[98] See *id.* at 81 para. 19.
[99] OECD, REPORT BY THE CHAIR OF THE 2011 MEETING OF THE NATIONAL CONTACT POINTS, 22, online http://www.oecd.org/dataoecd/31/56/49247209.pdf [REPORT BY THE CHAIR].
[100] *Id*. at 22.

Of particular significance is the direct involvement of NGOs in the implementation of the OECD Guidelines. For example, the Guidelines allow labour unions and NGOs to submit specific instances to the NCPs. This is significant because, quite often, local communities in developing countries where mining and oil and gas exploration often lead to allegations of violations of the OECD Guidelines do not possess the knowledge, finances and sometimes the courage to file specific instances against MNCs. It is hardly surprising then that the vast majority of specific instances filed against MNCs in the resource extraction industries were filed by NGOs on behalf of local communities in developing countries.[101]

Good faith participation in the Guidelines' implementation procedures not only could enhance the social reputation of MNCs, but it could also "generate considerable reputational effects on actors outside of the OECD".[102] For example, because the sustainable development principles and standards prescribed by the OECD Guidelines are, for the most part, higher than the prevailing standards in many developing countries, effective implementation of the Guidelines in developing countries could lead to the ratcheting up of domestic standards in these countries. In other words, the OECD Guidelines could influence non-OECD countries to adopt similar or comparable standards.[103]

The OECD Guidelines are particularly significant for the sustainable development of natural resources in conflict zones such as the Great Lakes region of Africa. Armed conflicts in developing countries are sometimes fuelled by the desire to gain access to natural resources. In other cases, financial proceeds from natural resource exploitation often help to sustain and prolong armed conflicts between

[101] In fact, most of the specific instances submitted to the NCPs as of 2012 were submitted by NGOs. See ANNUAL REPORT ON THE OECD GUIDELINES, *supra* note 96 at 38; REPORT BY THE CHAIR, *supra* note 99 at 21.
[102] Schuler, *supra* note 96 at 1755.
[103] For example, the African Union has recommended that companies doing business in Africa should strive to comply with the OECD Guidelines, even though member countries of the African Union are not members of the OECD. See *NEPAD-OECD Africa Investment Initiative*, online http://www.oecd.org/industry/internationalinvestment/investmentfor development/nepad-oecd/

governments and rebel groups, as was the case in Angola, DRC, Liberia, and Sierra Leone.[104] Although the OECD Guidelines are not legally binding, they assume an elevated legal status in conflict zones because they are often the sole viable benchmarks against which the conduct of business in conflict zones is judged. Conflict zones often lack functional governments and even where governments exist, they are unable to protect the rights of their citizens, provide basic public services and ensure effective management of public institutions.[105] Thus, countries in conflict zones often lack effective legal and regulatory regimes for the conduct of business. The OECD Guidelines fill the void and they readily become a substitute for national laws in conflict zones.[106] A case in point is the DRC whose government was, for much of the last three decades, unable to exercise any form of administrative control over the mineral-bearing regions of the country. Rather, most of the mineral-bearing regions of the DRC were captured and controlled by rebel groups whose primary concern was the illegal exploitation of DRC's mineral resources. The weakness of DRC's central government meant that laws and regulations governing the exploitation of mineral resources in that country were hardly applied in the mineral bearing regions controlled by rebel groups, effectively rendering these regions lawless. As indicated in the NCP case law discussed below, the void in regulatory enforcement in the DRC appears to have been filled by the OECD Guidelines because some mining companies that operated in the lawless regions of DRC were found to have acted in violation of the Guidelines.

The significance of the OECD Guidelines in conflict zones is enhanced under the 2011 version of the Guidelines which contain references to specific international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Labour Organization's Declaration

[104] See EVARISTUS OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS IN DOMESTIC AND INTERNATIONAL REGIMES: AN AFRICAN CASE STUDY, 18-22 (2009).
[105] *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, at 42, online http://www.oecd.org/dataoecd/26/21/36885821.pdf.
[106] Christian Schliemann, *Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises – a Public International Law Perspective*, 13 GERMAN L.J. 51, 59 (2012).

on Fundamental Principles and Rights at Work and the Rio Declaration on Environment and Development.[107] The incorporation of these international instruments into the OECD Guidelines could enable NCPs to hold MNCs accountable for violation of the instruments, particularly in conflict zones where human rights are very often violated by MNCs in their quest for access to natural resources.

Perhaps, more than any other feature of the OECD Guidelines, the implementation procedures of the OECD Guidelines and in particular, the interpretation and application of the Guidelines in specific instances by the NCPs, have contributed to the advancement of sustainable development of natural resources. As discussed below, in epoch-making decisions some NCPs have held companies in the natural resource sector responsible for human rights and environmental violations under the OECD Guidelines. NCPs have also held that, given the responsibility of MNCs to observe due diligence under the Guidelines, MNCs are responsible for the conduct of their supply chain. This is particularly significant because, in the extractive industries, suppliers of minerals are sometimes complicit in human rights violations. Taken together these decisions may serve to awaken the conscience of business entities to the need to abide by the Guidelines and to conduct their business in a responsible manner. Besides, the implementation procedures of the Guidelines can be deployed proactively to prevent unsustainable business practices on the part of MNCs engaged in the exploitation of natural resources. A specific instance complaint could lead to a review or redesign of natural resource projects to ensure that they comply with the standards established under the Guidelines.[108] For example, a specific instance complaint against MNCs involved in Cerrejon Coal project in Colombia prompted the MNCs to undertake an independent review of the project. In the end, the MNCs not only agreed to engage and consult with

[107] See *OECD Guidelines for Multinational Enterprises, supra* note 1 at 31-46.
[108] See Heather Bowman, *If I had a Hammer: The OECD Guidelines for Multinational Enterprises as Another Tool to Protect Indigenous Rights to Land*, 15 PACIFIC RIM LAW & POLICY JOURNAL 703, 709-719 (2006).

local host communities but they also agreed to pay compensation to the communities adversely affected by the project.[109]

Moreover, the Guidelines' implementation procedures are capable of generating social pressure against MNCs engaged in the unsustainable exploitation of natural resources. Such social pressure could take the form of adverse publicity against MNCs resulting from allegations of irresponsible behavior in a specific instance complaint. In some cases, social pressure could lead to changes in corporate behavior.[110] A change in corporate behavior could take the form of MNCs acceding to the prayers and demands made in a specific instance prior to or after the handling of a specific instance. Such a scenario played out in *Corner House et al v. BTC Corporation* where, during the pendency of the specific instance, BTC Corporation acceded to some of the prayers in the specific instance by adopting a Human Rights Undertaking that prevented BTC Corporation from relying on the legal exceptions embedded in its investment contracts with the host countries.[111] BTC Corporation apparently capitulated because of the intense level of outcry against the company,[112] coupled with the attendant bad publicity that the specific instance generated in the media. Furthermore, as is apparent in the NCP case law discussed below, specific instance complaints can also lead to negotiations between the parties and in some cases, such negotiations have led to the amicable settlement of issues between parties.

[109] See *Statement by the Australian National Contact Point: BHP-Billiton – Cerrejon Coal Specific Instance*, online http://www.oecd.org/dataoecd/4/35/43175359.pdf [*Bleechmore v. BHP-Billiton*].
[110] See Morgera, *supra* note 94 769.
[111] *Revised Final Statement by the UK NCP on the Complaint from Corner House et al against BTC Corporation*, 22 February 2011, online http://www.oecd.org/dataoecd/8/2/47331134.pdf [*Corner House v. BTC Corporation*].
[112] See Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses*, 1(2) JOURNAL OF WORLD ENERGY LAW & BUSINESS 158, 174 (2008) (arguing that BTC Corporation adopted the Human Rights Undertaking as a result of civil society mobilization against the company).

Case Law of the National Contact Points Relating to Natural Resources

The NCPs have received 262 requests to consider specific instances since the OECD Guidelines were reviewed and updated in 2000.[113] Of the 262 requests for consideration of specific instances, 178 specific instances were actively taken up and considered by the NCPs.[114] Specific instances traverse a number of industrial sectors[115] and they often raise issues relating to employment and human relations, human rights and environmental protection.[116] However, given the focus of this article the NCP Case Law analyzed in this section is confined to specific instances in the natural resources industry.

One of the most significant specific instances handled by a NCP is the *Rights and Accountability in Development (RAID) v. DAS Air*.[117] This specific instance, which was filed by RAID, alleged that DAS Air, a U.K. based company, acted in breach of the OECD Guidelines by failing to exercise due diligence when transporting minerals sourced from conflict zone in the DRC.[118] RAID also alleged that, in contravention of the United Nations embargo on transportation of conflict minerals from the DRC, DAS Air transported minerals from the DRC at a time when the DRC airspace was closed to civilian airlines due to the armed conflict in that country. RAID's allegation were based partly on the report of the UN Panel of Experts and partly on the findings of a Judicial Commission established by the Ugandan government to investigate the allegations made in the report issued by the UN Panel of Experts. In fact, the bulk of the evidence submitted to the UK NCP by RAID to substantiate the allegations in the specific instance was obtained from the Ugandan judicial commission. The evidence includes a flight log which indicated that, at the

[113] ANNUAL REPORT ON THE OECD GUIDELINES, *supra* note 96 at 38.
[114] *Id*. at 38.
[115] These industrial sectors include textiles, food services, automotive, forestry, starch/derivatives, energy, and telecommunications. See ANNUAL REPORT ON THE OECD GUIDELINES, *id*. at 38; REPORT BY THE CHAIR, *supra* note 99 at 21.
[116] ANNUAL REPORT ON THE OECD GUIDELINES, *id*. at 38.
[117] *Statement by the United Kingdom National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises: DAS Air* (17 July 2008), online http://www.oecd.org/dataoecd/11/31/44479531.pdf [*RAID v. DAS Air*]
[118] *RAID v. DAS Air*, *id*.

relevant times (when the airspace was closed to civilian flights), DAS Air conducted a number of flights between the DRC, Uganda and Rwanda.[119]

Proceeding on the premise that "heightened care is required by companies when investing and trading in weak governance zones", the UK NCP held that "DAS Air transported minerals from Kigali, which had a reasonable probability of having been sourced from the conflict zone in the DRC, on behalf of its customers."[120] It found that because DAS Air "had a significant market share of flights transporting minerals from Kigali" and because DAS Air "had a good regional knowledge as it was a prominent carrier in Africa", it "should have had a clear understanding of the potential for the minerals to have been sourced from" the conflict zone in the DRC.[121] Consequently, by failing to ensure that the minerals it transported on behalf of its clients were not sourced from conflict zones, DAS Air violated its responsibility under the OECD Guidelines to observe due diligence in relation to its supply chain as well as its responsibility to respect the human rights of those affected by its activities.[122] Regrettably, the UK NCP was unable to make specific recommendations to DAS Air because, prior to its final statement, DAS Air had ceased doing business as a going concern, its business and assets having been sold by its administrator.

Nonetheless, the decision in *RAID v. DAS Air* is significant because, for the first time in the jurisprudence of the NCPs, a company was found to have violated its human rights responsibilities under the OECD Guidelines. In this regard, *RAID v. DAS Air* is a bold and courageous decision that bodes well for sustainable development of natural resources. While many NCPs have, so far, not been as courageous as the UK NCP, the decision in *RAID v. DAS Air* could spur other NCPs to take a similar position in the future. This is particularly so given the peer learning mechanism embedded in the OECD Guidelines.

[119] *Id*. at 4-9 paras 21-46.
[120] *Id*. at 8 para. 43.
[121] *Id*. at 9 para. 44.
[122] *Id*. at 9-10 paras. 44-50.

Another significant case is *Global Witness v. Afrimex* wherein Global Witness alleged that Afrimex violated the OECD Guidelines by paying mineral taxes to rebel forces in the DRC, thus contributing to, and prolonging, the armed conflict in that country.[123] It alleged further that Afrimex failed to practice sufficient due diligence on its supply chain by failing to exert influence on its suppliers to desist from paying money to rebel groups in return for access to minerals. Global Witness also alleged that, in violation of the OECD Guidelines, Afrimex sourced minerals from mines that used child and forced labour, who work under unacceptable health and safety practices.[124] Global Witness' allegations were based on the report of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo which specifically identified Afrimex as one of the companies in violation of the OECD Guidelines.[125] While upholding most of the allegations, the U.K. NCP found that:

> Afrimex initiated the demand for minerals sourced from a conflict zone. Afrimex sourced these minerals from an associated company SOCOMI, and 2 independent comptoirs who paid taxes and mineral licences to RCD-Goma when they occupied the area. These payments contributed to the ongoing conflict.[126]

The UK NCP found that because Afrimex did not take steps to influence its associated companies that dealt in conflict minerals, and because these associated companies' payments of mineral taxes and levies to rebel forces contributed to the continuation of the conflict, Afrimex was in violation of its responsibility to respect the human rights of those affected by its activities as well as its responsibility to contribute to economic, social and environmental progress with a view to achieving sustainable development.[127] The NCP also concluded that Afrimex violated its due diligence responsibilities under the OECD Guidelines because it "did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not

[123] *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* (28 August 2008), online http://www.oecd.org/dataoecd/40/29/43750590.pdf [*Global Witness v. Afrimex*].
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1.
[127] *Id.* at 13 para. 59.

use child or forced labour or with better health and safety."[128] While Afrimex obtained assurances from its suppliers about the sources of the minerals, these assurances "were too weak to fulfil the requirements of the Guidelines."[129] Thus, Afrimex acted in violation of its responsibilities to contribute to the effective abolition of child labour and the elimination of all forms of forced or compulsory labour.[130]

Also noteworthy is *Bleechmore v. BHP-Billiton* which is a specific instance filed with the Australian NCP by Mr. Ralph Bleechmore, acting as agents for Colombian communities affected by the Cerrejon Coal project.[131] This specific instance alleged that BHP-Billiton, in partnership with other companies involved in the Cerrejon Coal project, acted in breach of its sustainable development responsibilities under the OECD Guidelines by depopulating local communities and by destroying the township of Tabaco through the forced expulsion of its population in order to make way for the project.[132] It also alleged that BHP-Billiton and its allied companies paid inadequate compensation for resettling the Tabaco community.[133] The specific instance sought several remedies including revision of the compensation paid to the Tabaco community, improvements to the living conditions of the former residents of Tabaco, and the implementation of all subsequent resettlement plans in a socially responsible manner.[134]

While the specific instance was pending, the MNCs involved in the Cerrejon Coal project instituted an independent social review of the project under the leadership of Professor John Harker.[135] Subsequently, the parties agreed to suspend the handling of the specific instance pending the outcome

[128] *Id.* at 13 para. 62.
[129] *Id.* at 13 para. 62.
[130] *Id.* at 13 para. 62.
[131] *Bleechmore v. BHP-Billiton*, *supra* note 109.
[132] *Id.* paras. 3 & 4.
[133] *Id*.
[134] *Id*. at para. 4.
[135] *Id*. at para. 11.

of the independent review.[136] The independent review panel found a number of irregularities in the execution of the project particularly as it relates to the relationship between the MNCs and local communities affected by the project. The review panel recommended that sponsors of the project should more actively consult and engage with local communities.[137] Following these recommendations, MNCs involved in the project reached an agreement with the Tabaco community to pay US$1.8 million as indemnities and an additional US$1.3 million for sustainable projects.[138]

Following these events, the Australian NCP resumed its handling of the specific instance with all parties agreeing that the recommendations of the independent review panel are an appropriate basis for handling the specific instance. After a series of meetings, the parties agreed that, in addition to the monetary compensation mentioned above, the resettlement of local communities should be overseen and monitored by an independent facilitator and that the Cerrejon Coal project should appoint a senior management officer to oversee its community engagement, community development activities and resettlement processes.[139] In fact, BHP-Billiton has since appointed its Group Manager for Community Relations as the social responsibility manager for the Cerrejon Coal project.[140]

A more convoluted specific instance involves BTC Corporation, owner and operator of the Baku-Tblisi-Ceyhan pipeline that crosses Azerbaijan, Georgia and Turkey.[141] The pipeline is a joint-venture project between several MNCs including BP Exploration (Caspian Sea) Ltd., Chevron, Statoil, Turkish Petroleum, Total and ConoccoPhillips. A group of NGOs alleged that BTC Corporation violated the OECD Guidelines by exerting undue influence on the regulatory framework governing the project, seeking and obtaining exceptions related to social, labour, tax and environmental laws, failing to construct and operate the

[136] *Id*. at para. 12.
[137] *Id*. at para. 13.
[138] *Id*. at para. 15.
[139] *Id*. at para. 17.
[140] *Id*. at para. 18.
[141] *Corner House v. BTC Corporation*, *supra* note 111.

pipeline in a manner that contributes to the goals of sustainable development, failing to consult with local communities affected by the pipeline project, and undermining the ability of the host governments to mitigate serious threats to the environment and human health and safety.[142] These complaints stem in part from the lopsidedness of the legal regimes governing the BTC pipeline project. Among other clauses, the project agreements signed by BTC and the three host governments contain investment stabilization clauses which set a limit on the project's regulatory obligations.[143]

In the revised Final Statement,[144] the UK NCP concluded that "the negotiations between the company and the host governments were conducted appropriately, that the company did not seek or accept exemptions not contemplated in the statutory or regulatory framework, and that [the] company did not undermine the ability of the host governments to mitigate serious threats".[145] This conclusion was apparently influenced by the fact that, both BTC Corporation and the host governments were represented by expert legal advisors in the course of negotiating the legal agreements governing the project.[146] However, on the issue of compensation, the UK NCP found that while BTC Corporation complied with the OECD Guidelines by making "pro-active efforts to establish due diligence procedures

[142] *Id*.

[143] On stabilization clauses, see Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries*, 10 ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW 1 (2010); Cotula, *supra* note 112.

[144] It should be noted that in its final statement released in 2007, the UK NCP found that the BTC pipeline project complied substantially with the OECD Guidelines. Dissatisfied with this outcome, the complainants requested the UK NCP Steering Board to conduct a procedural review of the specific instance, alleging that the process adopted by the UK NCP in handling this specific instance was unfair to the complainants. Upon review, the review committee of the Steering Board of the UK NCP concluded that the NCP acted unfairly by refusing to provide the complainants access to a report by BTC Corporation's largest shareholder, BP, which report the NCP had relied on in determining the outcome of the specific instance. The lack of access to the BP report, which addressed compensation and grievance concerns by local communities, meant that the complainants were denied an opportunity to comment on the report prior to the NCP's reliance on the report. The review committee recommended that the final statement be withdrawn and that the specific instance be re-opened. The UK NCP subsequently re-opened the specific instance and on 22 February 2011, it issued a revised Final Statement on the specific instance. See *Corner House v. BTC Corporation, supra* note 111.

[145] *Corner House v. BTC Corporation, supra* note 111 at para. 29.

[146] *Id.* para. 27.

over compensation, rural development and grievance process",[147] the company failed to investigate adequately complaints by villagers that they were intimidated and pressured by local security forces to accept inadequate compensation.[148] During a field visit conducted by the NCP, some villages in Turkey complained that they had been pressured to accept low compensation.[149] In addition, the villages told the NCP of being intimidated and warned against filing any grievances by local sub-contractors and security forces.[150] Ultimately, the UK NCP concluded that

> … the company's activities in one region were not in accordance with … the Guidelines regarding consultations with affected communities, in (a) failing to identify specific complaints of intimidation against affected communities by local security forces where the information was received outside of the formal grievance and monitoring channels, and (b), in not taking adequate steps to respond to such complaints, failing to adequately safeguard against the risk of local partners in this region undermining the overall consultation and grievance process.[151]

Significance of the Case Law

These specific instances are significant because they represent clear instances of NCPs asserting and exercising an adjudicatory or judgmental role. As mentioned previously, the decision in *RAID v Das Air* is an epoch making decision because, for the first time in the history of the NCPs, a company was found in violation of its human rights responsibilities under the OECD Guidelines. Moreover, the UK NCP found in a subsequent specific instance that Afrimex contributed to the conflict in the DRC by sourcing minerals from conflict zones in that country.[152] These bold decisions, should they become ingrained in the jurisprudence of the NCPs, not only reinforce the OECD Guidelines as an autonomous transnational

[147] *Id.* para. 42.
[148] *Id.* para. 52.
[149] *Id.* para. 50.
[150] *Id.* para. 50.
[151] *Id.* para. 63.
[152] *Global Witness v. Afrimex, supra* note 123.

regulatory system[153] but they could also potentially lead to the ratcheting up of sustainable development standards and principles across the globe and perhaps, the enactment of national legislation relating to the obligations of companies to observe sustainable practices in their operations.[154] In this way, the OECD Guidelines could crystallize into hard law.

These specific instances also demonstrate that the adjudication of specific instances by NCPs can produce positive changes in corporate behavior. The invocation of the NCP procedures through a specific instance could produce social pressures that may influence a change in corporate behavior. For example, BTC Corporation, in response to the social pressure generated by a specific instance filed against it, adopted a Human Rights Undertaking that preemptively addressed and resolved some of the allegations raised in the specific instance.[155] Similarly, the specific instance filed against BHP-Billiton prompted the company to conduct an independent review of the Cerrejon Coal project, culminating in the company engaging in pro-active consultation with local host communities.[156]

The jurisprudence of the NCPs also provide positive guidance to MNCs on the implementation of their due diligence responsibilities in the context of supply chain. For example, the UK NCP held in *Global Witness v. Afrimex* that MNCs must take pro-active steps to influence the responsible conduct of their supply chain.[157] MNCs must also share and explore options with their supply chain on how best to ensure compliance with the OECD Guidelines.[158] Furthermore, the UK NCP held that mere assurances by suppliers that they will act or are acting in compliance with the OECD Guidelines are not enough to

[153] See Larry Cata' Backer, *Rights and Accountability in Development v Das Air and Global Witness v. Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. INT'L L. 258, 273 (2009).
[154] See Santner, *supra* note 95 at 387.
[155] See *Corner House v. BTC Corporation, supra* note 111 at para. 27.
[156] See *Bleechmore v. BHP-Biliton*, *supra* note 109.

[157] *Global Witness v. Afrimex, supra* note 123.
[158] *Id*.

satisfy the due diligence requirements of the Guidelines.[159] Thus, if MNCs are to meet their due diligence responsibilities under the OECD Guidelines MNCs should ensure that they monitor the behavior of their suppliers.

In some cases, NCP case law has helped MNCs to identify and address weaknesses in their due diligence process, thus aiding MNCs in strengthening their sustainable development credentials. This is evident in *Corner House v. BTC Corporation* where the UK NCP found that BTC Corporation's due diligence process was ineffective because it made a distinction between complaints made through its internal grievance process and complaints raised through other channels.[160] Thus, while BTC investigated complaints filed through its internal grievance process it refused to investigate or address complaints made through other channels. As the UK NCP points out, "this distinction was a general weakness in the company's monitoring and grievance process that, in the particular region of north-east Turkey, led to a specific failure to identify complaints of intimidation against affected communities where the information was received outside of the formal grievance and monitoring channels."[161] But for this particular weakness in BTC Corporation's due diligence process, the company "could have identified a heightened risk of intimidation and led to additional efforts in compensatory checks and monitoring."[162]

In some instances, the NCPs have recommended substantive changes in corporate culture such as a recommendation that a company adopt a code of conduct. For example, in *Global Witness v. Afrimex,* the UK NCP urged Afrimex to formulate and adopt a corporate responsibility policy that not only takes into account the potential implications of its activities, but also the need to "take proactive steps to

[159] *Id*.
[160] *Corner House v. BTC Corporation, supra* note 111 at para. 60.
[161] *Id.* at para. 61.
[162] *Id.* at para. 54.

understand how their existing and proposed activities affect human rights in the DRC."[163] The NCP stated further that:

> To ensure this policy is effective, it needs to be integrated into Afrimex's way of working; to create this policy without a subsequent change in behaviour would merely create a worthless piece of paper. In Afrimex's case this means requiring its suppliers to do no harm: to take credible steps to ensure that military forces do not extract rents along the supply chain; to require a commitment that adequate steps are taken to ensure that minerals are not sourced from mines using forced and child labour, and are not from the most dangerous mines. Afrimex then needs to consider the necessary steps to monitor the effectiveness of this policy, which should be reviewed periodically.[164]

Implementation of NCP recommendations could lead to the amicable settlement of disputes but more importantly, these recommendations could lay a foundation for preventing future disputes between the parties. For example, the specific instance involving *BHP-Biliton* led to the sustainable resettlement of the Tabaco community including the payment of adequate compensation and the enhancement of consultation with the community. The specific instance equally ensured that "there is an established process for managing further issues" between the MNCs and the Tabaco community.[165] In this sense the outcome of this specific instance provides valuable lessons for other communities adversely affected by mining projects in Colombia.[166] The resolution of this specific instance is testimony that the NCP process can be an effective tool for sustainable development provided that the parties make good faith efforts to resolve issues. Taken together, these positive outcomes strengthen the case for the vesting of express adjudicatory roles on the NCPs, a case that will be amplified subsequently.

V. FACTORS INHIBITING THE OECD GUIDELINES

Although generally speaking the OECD Guidelines have been modestly successful in promoting the sustainable development of natural resources, there are inherent features within the Guidelines that hinder their effectiveness. A prime example of such features is the voluntary and non-binding nature of

[163] *Global Witness v. Afrimex, supra* note 123 at 13 para. 65.
[164] *Id*. at 13 para. 66.
[165] *Bleechmore v. BHP-Billiton, supra* note 109 at para. 27.
[166] *Id*. at para. 31.

the Guidelines. As mentioned previously, the OECD Guidelines are mere recommendations for responsible business conduct. Thus, MNCs are not legally obliged to comply with the Guidelines. A further inhibiting feature is the requirement of an investment nexus, a condition-precedent to the NCP's handling of a specific instance. The NCPs would only accept a "specific instance" if there is an "investment nexus" between the issues in the specific instance and the MNC that is the subject of the specific instance.[167] According to the Chairperson of the Annual Meeting of the NCPs, the OECD "Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus."[168]

The requirement of an "investment nexus" appears designed to ensure that MNCs are not unnecessarily saddled with allegations of violations of the Guidelines in cases where the MNCs have no direct stake in an investment project or in cases where the issues raised in a specific instance are not directly caused by the MNC. In order words, the requirement ensures that specific instances accepted by the NCPs are at least minimally connected with the activities of MNCs. The requirement could thus wield out or prevent frivolous complaints against MNCs. However, the requirement of an "investment nexus" is equally capable of preventing NCPs from accepting meritorious complaints against MNCs. In fact, NCPs have rejected several complaints raising human rights and environmental issues [in the natural resource sector] on the basis of lack of an investment nexus.[169] For example, a specific instance alleging that ANZ Banking Group violated the OECD Guidelines by providing financial guarantees for a logging company involved allegedly in human rights and environmental degradation in Papua New Guinea was rejected by the Australian NCP on grounds of lack of an investment nexus.[170] According to the Australian NCP, the

[167] See OECD, *2003 Annual Meeting of the National Contact Points: Report by the Chair*, at 12 online http://www.oecd.org/dataoecd/3/47/15941397.pdf
[168] *Id.* at 12.
[169] Sarah F. Vendules, *The Struggle for Legitimacy in Environmental Standards Systems: The OECD Guidelines for Multinational Enterprises*, 21 COLORADO J. INT'L ENVTL. L. & POL'Y 451, 470-1 (2010).
[170] *Statement by the Australian National Contact Point: ANZ Specific Instance*, online http://www.oecd.org/dataoecd/42/53/37615891.pdf

guarantee provided by the ANZ bank does not qualify as an investment in the logging company as intended by the OECD Guidelines.[171] Similarly, Finland's NCP rejected a request for specific instance against Finnvera Oyj because the financing and export guarantees provided by Finnvera Oyj for the Botnia S.A. paper mill project in Uruguay did not qualify as an investment in the paper mill project.[172]

The requirement of an investment nexus could also prevent NCPs from accepting specific instances dealing with supply chains, although a few NCPs have in the past accepted such specific instances despite the requirement of an investment nexus.[173] Although the implementation procedures of the OECD Guidelines clearly envisage that specific instances may contain issues arising "from the activity of a group of enterprises organized as consortium, joint venture or other similar form",[174] business arrangements such as the supply chain arrangement or sub-contracting arrangement do not lend themselves to easy classification with regard to an investment nexus. Thus, the requirement of an investment nexus could potentially limit and circumscribe the scope of specific instances under the OECD Guidelines. That being said, the requirement of an investment nexus has not been uniformly interpreted and applied by the NCPs. Several NCPs have adopted a liberal interpretation of the requirement of an investment nexus, while some NCPs appear to de-emphasize or downplay the significance of the requirement by accepting specific instance complaints without addressing the issue of an investment nexus.[175]

Although as noted previously the 2011 revisions to the OECD Guidelines incorporates international human rights instruments, the 2011 version of the Guidelines is nonetheless susceptible to the criticism that, like previous versions of the Guidelines, it contains provisions that claw-back or whittle down some

[171] *Statement by the Australian National Contact Point: ANZ Specific Instance, id.* at para. 9.
[172] See *Finland's NCP Statement on the Specific Instance Concerning the Orion Paper Mill Factory Project (Uruguay; Botnia SA) and Finnvera Oyj*, 12 October 2006, online http://www.oecd.org/dataoecd/28/27/39202146.pdf
[173] See Vendules, *supra* note 169 at 470-4.
[174] "Commentary on the Implementation Procedures", *supra* note 50 at 82 para. 24.
[175] Vendules, *supra* note 169 at 471.

of its more specific provisions. For example, MNCs are urged to "[c]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impact."[176] Similarly, MNCs are exalted to "establish and maintain a system of environmental management appropriate to the enterprise".[177] The phrases 'appropriate to their size' and 'appropriate to the enterprise' are nebulous and not susceptible to any precise definition. These phrases may have been adopted by the OECD in order to avoid the pitfalls inherent in any one-size-fits-all mechanism which often fail to cater to differences in circumstances and experiences. However, the phrases are problematic because they suggest that the human rights and environmental protection responsibilities of MNCs under the OECD Guidelines are relative to the size of the MNCs. However, given the various forms of the MNC,[178] it may be impracticable to determine the size of a particular MNC and thus, the extent of its human rights and environmental due diligence under the Guidelines. Besides, these provisions are loopholes that MNCs could utilize to avoid compliance with the OECD Guidelines. Because there is no adjudicatory mechanism under the Guidelines, MNCs are at liberty to determine for themselves what human rights or environmental management system is 'appropriate to the enterprise' in any given context. Thus, MNCs may deliberately lower their human rights and environmental stewardship under the OECD Guidelines on the basis of the size of the MNCs.

[176] *OECD Guidelines for Multinational Enterprises, supra* note 1 at 31, Principle 5.
[177] *Id.* at 42, Principle 1.
[178] MNCs come in different shapes and sizes. Some MNCs are hierarchically integrated in the sense that control of the MNCs and their subsidiaries is in the hands of the parent company, while other MNCs operate in the form of disparate and loose entities in different countries. See PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES & THE LAW, 45-79 (2nd Ed., 2007). Within a hierarchically integrated MNC, management of the MNC may be organized "along divisional lines of control based on managerial functions, products, and areas of operation."[178] MUCHLINSKI, *id*. at 77. In fact, the OECD Guidelines appreciate the different shapes and forms of MNCs when they state that although one or more entities within a particular MNC "may be able to exercise a significant influence over the activities of others", the degree of autonomy of the entities comprising the MNC "may vary widely from one multinational enterprise to another." See *OECD Guidelines for Multinational Enterprises, supra* note 1 at 17 para. 4. Moreover, some MNCs' investments in foreign countries are undertaken on the basis of joint ventures such that the joint venture partners establish an independent company in the host country to implement and oversee the investments of the partners.

The environmental provisions of the OECD Guidelines are also effectively diluted by means of vague language. For example, the Guidelines recommend that MNCs should make "adequate and timely communication and consultation" with communities affected by their operations.[179] However, the Guidelines do not specify what qualifies as adequate and timely communication and consultation. The question then is, is the adequacy or timeliness of communication determined from the prism of local circumstances and standards or is the determination to be based on international standards? Given the fact that MNCs often prefer weak regulatory standards, MNCs may prefer that "adequate and timely communication and consultation" is determined from the perspective of local practices in the host countries.[180] However, a reliance on local circumstances would be counter-productive to the overarching goal of the OECD Guidelines to promote sustainable conduct of business given that, for the most part, standards in developing countries are low and sometimes non-existent.[181]

That being said, it is worth noting that the 2011 version of OECD Guidelines has cured some of the defects that were inherent in earlier versions of the Guidelines. For example, earlier versions of the Guidelines advocated relativism in complying with the principles enshrined in the Guidelines. These earlier versions urged compliance with the Guidelines within the framework of the laws, practices and standards applicable in the host countries. As I argued in an earlier piece, the relativist position of the erstwhile versions of the Guidelines effectively promoted non-compliance because "applicable laws, practices, and standards in host developing countries are often lower than those in OECD Countries".[182] Unlike the previous versions, however, the 2011 version of the OECD Guidelines urge MNCs to comply

[179] *OECD Guidelines for Multinational Enterprises, supra* note 1 at 42.
[180] See *Final Statement of the Dutch NCP on the Complaint (dated 15 May 2006) on the Violations of Pilipinas Shell Petroleum Corporation (PSPC), Pursuant to the OECD Guidelines for Multinational Enterprises* (14 July 2009) at 10, online http://www.oecd.org/dataoecd/2/12/43663730.pdf ["*Final Statement on Pilipinas Shell"]*.
[181] The Netherlands NCP has suggested that "the standard for communication with stakeholders should be derived from the practices and legal systems common to the home OECD countries". See *Final Statement on Pilipinas Shell, id*. at 10.
[182] OSHIONEBO, *supra* note 104 at 139.

with its provisions within the framework of relevant and applicable domestic and international law and regulations.[183]

Effective implementation of the OECD Guidelines is also hindered by institutional limitations of the Guidelines particularly with regard to the nature and composition of the NCPs. The NCPs are composed primarily of government officials, although OECD member countries are at liberty to appoint independent members to their NCPs. Besides, in many OECD countries "NCPs are mainly located in government departments concerned with foreign investment".[184] For example, the United States' NCP is located in the U.S. Bureau of Economic and Business Affairs,[185] while Canada's NCP consists of an inter-departmental committee chaired by the Department of Foreign Affairs and International Trade.[186] Similarly, Australia's NCP consists of a senior executive of the Foreign Investment and Trade Policy Division of the Treasury.[187] In fact, 28 of the 42 adhering-countries of the OECD have NCPs that consist solely of government departments; while 13 countries have NCPs consisting of multiple stakeholders.[188] Interestingly, only one country, the Netherlands, has a truly independent NCP in the sense that it consists solely of independent experts.[189] Of the 13 NCPs consisting of multiple stakeholders, 2 are bipartite (comprising of representatives of governments and business), 9 are tripartite (comprising of representatives of governments, business and trade unions) and 1 is quandripartite (involving representatives of governments, business, trade unions and NGOs).[190]

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[183] *OECD Guidelines for Multinational Enterprises, supra* note 1 at 31 & 35.
[184] Schuler, *supra* note 96 at 1756.
[185] See U.S. Department of State, *U.S. National Contact Point*, online http://www.state.gov/e/eb/oecd/usncp/us/index.htm
[186] See *Canada's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (MNEs)*, online http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R&view=d
[187] Australian Government, *The Australian National Contact Point*, online http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm
[188] REPORT BY THE CHAIR, *supra* note 99 at 6.
[189] *Id*. at 6.
[190] *Id*. at 6.

The composition and physical location of NCPs raise questions as to the independence and impartiality of the NCPs. If NCPs are integral parts of government departments responsible for promoting foreign investment, and if government officials constitute the bulk of membership of the NCPs, why then should ordinary citizens be expected to accept that the NCPs and their members will be impartial and fair-minded in discharging their responsibilities? Put bluntly, the nature and composition of the NCPs could raise a perception of bias in the minds of the public because, as one observer notes, "it is the same people who are responsible for a successful foreign investment policy who are expected to judge the behavior of their investing enterprise."[191] The OECD Watch has observed similarly that NCPs housed at government departments "without any oversight body do not have the perceived credibility and impartiality that is now required from NCPs."[192]

The optics of bias become the more apparent in specific instances involving MNCs based in the advanced OECD countries and local communities in developing countries. Because most developing countries are not members of the OECD, specific instances alleging violations committed by OECD-based MNCs in the course of their operations in developing countries are filed with the NCPs of the home countries of the MNCs. Local communities whose rights are allegedly infringed in violation of the OECD Guidelines would be hard pressed to accept the impartiality of the NCPs where complaints against MNCs are judged by government officials and government institutions from the home countries of the MNCs.

The perception of bias is a real threat to the OECD Guidelines given that, in recent years, most of the specific instances filed with NCPs are specific instances in non-adhering countries.[193] A good example of such misgivings can be found in the specific instance filed against Botnia S.A./Metsa-Botnia Oy, a Finnish MNC. The Center for Human Rights and Environment, an NGO based in Argentina, alleged that Botnia

[191] Schuler, *supra* note 96 at 1756.
[192] *OECD Watch Statement on the Update of the OECD Guidelines for Multinational Enterprises*, reproduced in ANNUAL REPORT ON THE OECD GUIDELINES, *supra* note 96 at 171 ["*OECD Watch Statement"*].
[193] ANNUAL REPORT ON THE OECD GUIDELINES, *supra* note 96 at 38 (reporting that "[i]n accordance with the trends of previous years, 65 percent of new specific instances raised for which location information is available were raised in non-adhering countries.") See also REPORT BY THE CHAIR, *supra* note 99 at 20.

SA-Metsa-Botnia Oy's pulp mill project in Uruguay violates the environmental protection principles of the OECD Guidelines. Finland's NCP, which as noted previously is that country's Ministry of Trade and Industry, found that although the "pulp mill has various implications for the local community", the "project complies with stringent international criteria set for environmental impact assessment" while making use of "the best possible technology available."[194] Thus, it found that the pulp mill project complied with the OECD Guidelines. Unsatisfied with this outcome, the Center for Human Rights and Environment filed a petition with the Ombudsman of the Parliament of Finland alleging that, the Finnish NCP committed procedural errors in handling the specific instance.[195] More significantly, it alleged bias on the part of the Finnish NCP due to the fact that the Finnish government is a key stakeholder in the pulp mill project. At least, four state-owned companies were stakeholders in the project. For example, the Finish State bank, Finnvera, provided financial support for the project, while other State-owned corporations such as the Metso Corporation and the Nordic Investment Bank are also stakeholders in the project.[196] Although there is no hard evidence that the Finnish NCP was biased in favour of Botnia SA-Metsa, the mere fact that the Finnish NCP is the Ministry of Trade and Industry raises a strong perception of partiality. This perception is reinforced by the undisputed involvement of Finland's State-owned companies in the project.

Another factor inhibiting the effectiveness of the OECD Guidelines is the lack of an appellate structure for reviewing the decisions and conclusions reached by the NCPs. As noted previously, although the Investment Committee performs oversight role over the NCPs, the oversight powers of the Investment Committee are, at best, "very weak" because the Investment Committee lacks power to overrule the

[194] *Metsa-Botnia Has Complied with the OECD Guidelines in Uruguay*, Press Release by the Finnish National Contact Point, 22 December 2006, online http://www.oecd.org/dataoecd/17/42/38053102.pdf
[195] *Pulp Mill Conflict-Finnish Parliamentary Ombudsman Receives Complaint in Botnia Investment Conflict*, 31 January, 2007, online http://www.oecdwatch.org/cases/Case_86/348/at_download/file
[196] *Id*.

NCPs.[197] In fact, the Investment Committee cannot sit on appeal on the findings or decisions reached by the NCPs. Neither can the outcome of the NCPs' implementation process be questioned by referral to the Investment Committee.[198] This is a fundamental weakness in the implementation procedures of the OECD Guidelines because the lack of an appellate structure prevents meaningful checks and balances on the activities of the NCPs. While the Investment Committee has power to consider a substantiated submission that a particular NCP is not effectively discharging its responsibilities under the Guidelines,[199] this falls short of the requisite appellate oversight that would have enhanced the degree to which the NCPs are accountable for their actions or inaction. That being said, some countries have attempted to provide some oversight for their NCPs. For example, the United Kingdom has established a Steering Board to oversee the activities of the UK NCP.[200] However, the oversight provided by the Steering Board is limited because, while the board has power to review the Final Statements issued by the NCP for the purpose of identifying procedural errors in the NCP decision-making process and ensuring that such errors are corrected where possible, the Steering Board lacks the power to set aside the NCP's decision even if there are procedural errors in the process leading to the decision. Neither can it replace the NCP's decision with its own decision.[201]

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[197] Schuler, *supra* note 96 at 1772-3.

[198] "Commentary on the Implementation Procedures", *supra* note 50 at 88 para. 44.

[199] *Id*. at 88 para. 47.

[200] REVIEW PROCEDURE FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO THE UK NATIONAL CONTACT POINT, 10 December 2008 (updated on 14 January 2011) online http://www.bis.gov.uk/assets/biscore/business-sectors/docs/r/11-654-review-procedure-uk-national-contact-point.pdf.

[201] *Id*. at para. 7.1. However, where there are procedural errors in the process leading to the NCP's decision the Steering Board can remit the decision to the NCP with instructions on how to rectify the procedural error, or acknowledge the errors in the NCP's handling of the specific instance and make recommendations on how to avoid such errors in the future. See *Id*. at para. 7.1. In the BTC Pipeline specific instance, for example, the Steering Board chose the former option and asked the NCP to re-open the specific instance, having found that the NCP's failure to provide the complainants access to a report submitted to the NCP by BTC Corporation's largest shareholder amounted to a procedural error that unfairly affected the NCP's decision. See *Corner House v. BTC Corporation*, *supra* note 111.

In addition, interpretation and implementation of the OECD Guidelines lack uniformity and consistency. For example, I have previously noted the differing approaches on the issue of an investment nexus. While some NCPs rely on lack of an investment nexus as basis for rejecting specific instances, other NCPs have given a liberal interpretation to the requirement and have accepted specific instances even where MNCs are only connected marginally with the projects giving rise to the issues in the specific instances. Yet, other NCPs have simply ignored the requirement all together. Moreover, although the OECD Guidelines stress transparency as a cardinal requirement for effective implementation, transparency standards do not appear to be universally observed by the NCPs. Rather, the extent to which the NCPs are transparent varies from country to country. Some NCPs are more open in terms of preparing and publishing a final statement on their handling of specific instances, while other NCPs appear reluctant to prepare and publish their final statements.[202] For example, "the U.S. NCP neither releases specifics concerning cases it has addressed, nor publishes its annual report to the [Investment Committee]".[203] In fact, while the U.S. NCP has received 32 specific instances since the year 2000,[204] it has issued a statement or report on only one of these specific instances.[205]

A more worrisome observation is that the NCPs have differing approaches and views on the role of the NCPs in handling specific instances.[206] NCPs differ on whether, in handling specific instances, the NCPs should make a determination in their final statement as to whether the OECD Guidelines have been breached by MNCs. Some NCPs see their role as limited to the facilitation of conciliation or mediation while other NCPs adopt both facilitative and adjudicatory roles. The U.S. NCP is a prime example of NCPs in the former category. The U.S. NCP is of the view that it is inappropriate for NCPs to adjudicate

[202] See Christopher N. Franciose, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 BOSTON COLLEGE INT'L & COMP. L. REV. 223, 233 (2007).
[203] *Id*., 233.
[204] See REPORT BY THE CHAIR, *supra* note 99 at 20.
[205] See OECD, *Statements by National Contact Points for the OECD Guidelines for Multinational Enterprises*, online http://www.oecd.org/documents/59/0,3746,en_2649_34889_2489211_1_1_1_1,00.html
[206] See Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises*, 2011 JOURNAL OF DISPUTE RESOLUTION 351 (2011).

disputes and make determinations on breach of the Guidelines in their final statements given that the specific instance procedure is based on the "good offices" of the NCPs.[207] In fact, it is a long-standing practice by the U.S. NCP not to adjudge U.S. businesses as guilty of breach of the OECD Guidelines. According to an observer, "the U.S. NCP has made it clear that it has no intention of ever acknowledging that a particular MNE has breached the Guidelines, regardless of the egregiousness of the behavior."[208] Australian and Canadian NCPs have taken a position similar to that of the U.S. NCP. According to the Australian NCP, the OECD Guidelines "do not allow for any arbitral or judgmental role by the [NCP]."[209] Similarly, in handling a specific instance, the Canadian NCP states that its purpose "was not to conduct an investigation into the operation of Ascendant [corporation] with a view to determining a violation, or not, of the OECD Guidelines as such investigations are not a part of the NCP's mandate."[210] Other NCPs, such as those of Germany and the United Kingdom, have adopted the view that final statements issued by NCPs should state whether or not the Guidelines have been complied with because "it would not be logical to make recommendations to a company on how to bring its practices into line with the Guidelines without first indicating if the company has departed from those Guidelines."[211] The U.K. NCP's complaints procedures provide that, upon a review of all necessary information gathered in a specific instance, the NCP should "make a decision as to whether the Guidelines have been breached."[212] It has also stated that where, in the course of a specific instance, its efforts at mediation

[207] REPORT BY THE CHAIR, *supra* note 99 at 24.
[208] Franciose, *supra* note 202 at 233.
[209] *Statement by the Australian NCP on the Complaint by the Construction, Forestry, Mining, Energy Union – Mining and Energy Division (CFMEU) Trade Union against Xstrata Coal Pty Ltd (XSTRATA),* 8 June 2011, online http://www.oecd.org/dataoecd/5/37/48754688.pdf ["*Australian NCP Statement on Xstrata*"].
[210] *Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises Statement Concerning Ascendant Copper Corporation in Ecuador*, online http://www.oecd.org/dataoecd/20/24/37205653.pdf
[211] REPORT BY THE CHAIR, *supra* note 99 at 24.
[212] UK NATIONAL CONTACT POINT PROCEDURES FOR DEALING WITH COMPLAINTS BROUGH UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 28 April 2008 (Amended on 16 September 2009, 25 January 2011, and 19 July 2011), at para. 4.5.7, online http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf [UK NATIONAL CONTACT POINT PROCEDURES]. See also *The UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, October 2009, online http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/09-1352-uk-national-contact-point-for-oecd-

fail, "the NCP will determine whether the Guidelines have been met".[213] In fact, as noted in the NCP case law discussed in this article, the U.K. NCP is renowned for making definite pronouncements on violations of the Guidelines. Regrettably, the utility of such pronouncements is undermined by the obvious lack of mechanisms for enforcing NCP decisions.

The inconsistencies apparent in the NCPs' handling of specific instances arise primarily as a result of glaring jurisdictional loopholes in the OECD Guidelines. Although the Guidelines empower the NCPs to issue a final statement on specific instances, the contents of such statements are not prescribed or mandated by the Guidelines. Moreover, the Guidelines do not specifically oblige the NCPs to state whether or not the Guidelines have been breached by MNCs. Neither do the Guidelines require "NCPs to make a statement on the validity of a complaint and observance of the Guidelines when mediation has failed."[214] Rather, the OECD Guidelines appear to confine the role of the NCPs to that of conciliators and mediators by providing that NCPs shall offer their good offices to help the parties involved in a specific instance to resolve the issues.[215]

The dialogic and conciliatory approach adopted by the OECD Guidelines could be counter-productive given that, quite often, the parties to a specific instance have unequal capacity to negotiate and resolve the issues. MNCs are more likely to have the financial and human capacity to engage in lengthy and expensive negotiations than labour unions, NGOs and local communities that are often parties to specific instances. Local communities in developing countries may not be able to participate in negotiations that are held in the home countries of MNCs. They would require financial resources and

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guidelines-multinational-enterprises.pdf (stating that "if the UK NCP has examined the complaint, it will prepare and publish a Final Statement which clearly sets out whether or not the Guidelines have been breached").

[213] *Global Witness v. Afrimex, supra* note 123 at 2 para. 5. See also *Statement by the United Kingdom National Contact Point for OECD Guidelines for Multinational Enterprises (NCP): Anglo American*, at para. 19, online http://www.oecd.org/dataoecd/39/49/43750200.pdf ("It is usual practice for the NCP to make determinations of compliance and to issue recommendations in respect of a specific instance on those matters which remain unresolved.")

[214] *OECD Watch Statement, supra* note 192 at 168.

[215] "Implementation Procedures", *supra* note 43 at 72.

visas to attend negotiation sessions in foreign countries, save to the limited extent that such sessions are held electronically via the internet. Even if they have the financial resources, they may not have the human expertise necessary to undertake such negotiations. While local communities are often represented by NGOs, NGOs do not possess a limitless amount of human and financial resources to be able to represent all needy communities. Moreover, access to information is essential for effective negotiations with MNCs. It is usually difficult for local communities to obtain corporate information that could substantiate or prove the allegations in specific instances because corporations are not obliged to disclose such information. While the implementation procedures of the OECD Guidelines encourage MNCs to disclose information to the parties in specific instances, such disclosure depends on the good faith of MNCs. MNCs may refuse to disclose corporate information to complainants, as was the case in the specific instance filed against Pilipinas Shell, a subsidiary of the Royal Duct Shell.[216] Willful refusal to disclose information inhibits the ability of NCPs to resolve disputes and to find "possible mutually acceptable solutions."[217]

Finally, and perhaps more significantly, effectiveness of the OECD Guidelines is undermined by the obvious lack of legal sanctions for violating the Guidelines. The Guidelines are not instruments of sanction.[218] In fact, the Guidelines are not designed "to hold any company to account."[219] Thus, even where an NCP has found a violation of the Guidelines it cannot impose sanctions on MNCs for such violation. The lack of sanctions is an incentive for non-compliance with the Guidelines. Moreover, there is little incentive for MNCs to voluntarily submit themselves to the jurisdiction of the NCPs given that there are no sanctions for refusing to participate in the implementation process. In effect, a refusal by

[216] *Final Statement on Pilipinas Shell, supra* note 180 at 14-15.
[217] *Id.* at 14.
[218] *Statement by the UK NCP on Avient*, 8 September 2004, online http://www.oecd.org/dataoecd/5/20/38034511.pdf
[219] *Id*.

MNCs to participate in the mediation process bears no consequences for the MNCs.[220] For example, Innospec Inc. refused to participate in the mediation of a specific instance filed with the U.S. NCP without suffering any consequences even though the U.S. NCP determined that the issues raised in the specific instance merited further consideration by way of mediation.[221] Similarly, Xstrata Coal Pty Ltd., an Australian MNC and, Ivanhoe Mines Ltd., a Canadian MNC, refused to participate in specific instance procedures without attracting sanctions.[222] Xstrata did not participate in the procedure because it "did not see any value in engaging in a mediation process" with the complainant through the Australian NCP.[223] A party's refusal to participate in the mediation process defeats the overarching function of the NCP which is to facilitate the resolution of issues raised in specific instances through dialogue and mediation. In *RAID v. Oryx*, for example, the UK NCP was "unable to form any further conclusion over the application of the Guidelines" because Oryx declined to enter into direct dialogue with RAID and because "the two parties were not able to join in a more constructive dialogue".[224]

VI. ENHANCING THE OECD GUIDELINES

In the previous section I identified several factors that hinder the effectiveness of the OECD Guidelines including the voluntary and non-binding nature of the Guidelines, the requirement of an investment nexus, the vagueness of the language of the Guidelines, lack of an explicit adjudicatory role for the NCPs, lack of independence for the NCPs, the inconsistencies in interpretation and application of the Guidelines in specific instances, and the lack of sanctions for violations of the Guidelines. In this section

[220] *OECD Watch Statement, supra* note 192 at 168.
[221] See *Statement by the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, February 1, 2012, online http://www.state.gov/e/eb/oecd/usncp/links/rls/183059.htm
[222] See *Australian NCP Statement on Xstrata, supra* note 209; *Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises Statement Concerning Ivanhoe Mines Ltd in Burma*, online http://www.oecd.org/dataoecd/20/24/37205653.pdf
[223] *Australian NCP Statement on Xstrata, id.*
[224] See *NCP Statement on Oryx Natural Resources*, June 2005, online http://www.oecd.org/dataoecd/5/17/38033885.pdf.

of the article, I articulate and advance a few strategies for enhancing the effectiveness of the Guidelines from both within and without the OECD.

The implementation of the OECD Guidelines can be enhanced by discarding the requirement of an investment nexus and adopting in its stead a more realistic benchmark which I will refer to simply as the "leverage or influence nexus" approach. NCPs should accept specific instance complaints against MNCs where the MNCs either control the activities that gave rise to the specific instance, or are in a position of influence relative to the business entity whose activities caused the issues raised in the specific instance. In fact, the 2011 version of the OECD Guidelines seems to incorporate the "influence nexus" approach, albeit in the context of risk management and due diligence by MNCs. It provides that:

> If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.[225]

Furthermore, the OECD Guidelines provide that the expectation that MNCs would "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship"[226] is to be met or satisfied by the MNC using "its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact."[227]

The 2011 version of the OECD Guidelines also appears to mitigate the supply chain issue by acknowledging expressly that MNCs have responsibility for their supply chains particularly in the context of due diligence efforts to mitigate adverse impacts of corporate activities. In the context of due diligence, the Guidelines apply to "those adverse impacts that are either caused or contributed to by the

[225] *OECD Guidelines for Multinational Enterprises, supra* note 1 at 24 para. 19.
[226] *Id*. at 20 Principle A.12.
[227] *Id.* at 24 para. 20.

enterprise, or are directly linked to their operations, products or services by a business relationship".[228] Under the Guidelines, a "business relationship includes relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services."[229] The Guidelines also provide that MNCs should seek ways to prevent or mitigate adverse human rights impacts arising directly from their business operations as well as adverse impacts arising from the "business operations, product or services by a business relationship, even if they do not contribute to those impacts."[230] Thus, MNCs are to ensure that business entities with which they enter into a business relationship not only observe the human rights provisions of the OECD Guidelines but also take steps to prevent or mitigate adverse human rights impacts. More broadly, the Guidelines urge MNCs to encourage business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines."[231]

In fact, the Legal Adviser for the General Secretariat of the OECD has admitted that the 2011 version of the Guidelines "extend beyond a company's own actions to those of its suppliers and others along the business relationship, forming a link of responsibility".[232] Thus, in a supply chain situation, "if an NCP determines that there is a violation, complicity with that action can also be deemed a violation leading to liability."[233] Similarly, failure by MNCs to take steps to cease or prevent a previously identified risk of adverse impact in the context of its supply chain is deemed a violation of the Guidelines.[234] Although MNCs bear due diligence responsibility for the adverse impacts of their suppliers' activities,[235] such responsibility appears to be effectively clawed back because, the OECD Guidelines require MNCs to have

[228] *Id.* at 23 para. 14.
[229] *Id*. at 23 para. 14.
[230] *Id.* at 31, Principle 3.
[231] *Id.* at 20, Principles A.12 & A.13.
[232] Santner, *supra* note 95 at 384.
[233] *Id.* at 384.
[234] *Id.* at 384, footnote 50.
[235] See *OECD Guidelines for Multinational Enterprises, supra* note 1 at 23 para. 14.

contributed to the adverse impacts in order to be liable.[236] According to the Guidelines, for the purpose of its recommendations on due diligence, the phrase "contributing to an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions."[237]

Moreover, the 2011 version of the OECD Guidelines does not appear to address the culpability of financial institutions that provide financing for projects that violate the Guidelines. Conceivably, the requirement of an investment nexus could, despite the 2011 revisions to the Guidelines, prevent some NCPs from accepting specific instances alleging that financial institutions violated the Guidelines by providing loans and financial guarantees for projects executed in violation of the Guidelines. The adoption of the 'influence nexus', as suggested previously, could resolve this problem. The "influence nexus" approach is broad enough to allow NCPs to accept complaints against MNCs that provide financing and funding for business entities that cause adverse impacts. Thus, under the "influence nexus" approach, a bank that provides funding for a mining company may be the subject of a specific instance if the activities of the mining company violate the OECD Guidelines.

Independence of the NCPs could be enhanced by ensuring that membership of the NCPs is not limited to government officials as is currently the case in most OECD countries. Rather, independent experts such as retired judges and professors should be appointed to the NCP. A pool of NCP members comprising government officials and independent experts should be established by each OECD country. More significantly, parties to a dispute should be allowed to agree mutually on the particular members of the NCP to conciliate or adjudicate a dispute. Some OECD countries have attempted to address the perception of partiality by ensuring that their NCPs comprise of various stakeholders such as governments, business community, trade unions and NGOs. As mentioned previously, 13 OECD-

[236] *Id.* at 23 para. 14.
[237] *Id.* at 23 para. 14.

adhering countries have NCPs consisting of multiple stakeholders.[238] The UK NCP allows parties to a specific instance to mutually agree that mediation shall be conducted by an independent third party.[239] A more independent NCP is the Netherland's NCP which consists of four independent experts, although these independent experts are advised by four advisors from government ministries.[240] However, unlike the current regime in most countries that unwittingly promotes a perception of partiality on the part of NCPs, the inclusion of independent experts in NCP membership would engender confidence and trust in the NCP, ensure its impartiality and independence and create a strong precedential value for the decisions reached by the NCP.[241] In this way, the OECD Guidelines would grow and mature organically as a conduct-influencing instrument. Another way to promote the independence of the NCPs is to establish a multi-stakeholder oversight body to oversee and guide the activities of the NCPs.[242]

Perhaps more importantly, the OECD ought to vest specific adjudicatory and judgmental roles on the NCPs, a position championed by the German and U.K. NCPs. If the parties to a specific instance are unable or unwilling to reconcile their differences through mediation, the NCPs ought to be able to adjudicate and resolve the dispute. It is counter-productive for the NCPs to refrain from apportioning blame or to refuse to indicate in their final statements whether or not there has been a breach of the OECD Guidelines. A final statement that does not indicate whether or not the Guidelines are breached is devoid of meaning and thus, it could act as a disincentive to participate in the implementation process. MNCs and NGOs are rational actors that often act on the basis of cost-benefit analysis. Thus, MNCs and NGOs may not be willing to participate voluntarily in the NCP procedure knowing that the outcome of a specific instance would not involve a final statement that determines breach of the Guidelines. Happily,

[238] REPORT BY THE CHAIR, *supra* note 99 at 6. These countries are Belgium, Denmark, Estonia, Finland, France, Latvia, Lithuania, Luxembourg, Morocco, Romania, Slovenia, Sweden and Norway. See REPORT BY THE CHAIR, *id*. at 6 & 28, footnotes 16-19.
[239] See UK NATIONAL CONTACT POINT PROCEDURES, *supra* note 212 at para. 4.1.5.
[240] REPORT BY THE CHAIR, *supra* note 99 at 6 & 28, footnote 20.
[241] In fact, the NCPs agree that the use of external experts in handling specific instances could increase the favourable perception of the impartiality of NCPs. See REPORT BY THE CHAIR, *id.* at 22.
[242] Liberti, *supra* note 40 at 47.

most NCPs appreciate that a willingness to indicate in the final statement whether or not the Guidelines were breached is a factor that weighs "in the cost/benefit analysis of the parties' decision to engage in the NCP procedure."[243]

The assumption of a judgmental role by the NCPs is important for another reason. A decision by the NCP that a MNC has breached the OECD Guidelines could act as a shaming device which could ultimately compel a change in corporate behavior.[244] Public disclosure by the NCP that a particular MNC acted in breach of the OECD Guidelines can lead to public shaming of the MNC particularly in the form of negative publicity in the press. The desire to avoid such negative publicity may spur the MNC to change its corporate behavior and comply with the Guidelines.[245]

Although the vesting of adjudicatory roles on the NCPs would be a commendable improvement to the OECD Guidelines, to be effective, such adjudicatory role must be complemented by clear enforcement provisions that would enable the NCPs or some other body to enforce the findings and decisions of the NCPs. Under the current regime, even where the final statements issued by NCPs make determinations of non-compliance with the Guidelines, such final statements are themselves of limited utility not only because the statements are non-binding but also because the NCPs lack the power to implement the recommendations in their final statements.[246] In fact, the Guidelines lack a formal process for enforcing or following-up on the NCPs' recommendations in their final statements.[247]

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[243] REPORT BY THE CHAIR, *supra* note 99 at 24.
[244] See MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM, 21-24 (2002).
[245] See Morgera, *supra* note 94 at 769 (arguing that the "risk that instances of 'bad' corporate behavior will be highlighted by the NCP [specific] instances processes may also act as an incentive for MNEs to comply with the Guidelines").
[246] See Bob Hepple, *A Race to the Top?: International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 354 (1999); Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 671 (1995); Bowman, *supra* note 108 at 730.
[247] The UK NCP has attempted to address this weakness by devising its own unique complaint procedure. Under this complaint procedure, the UK NCP is obliged to specify a date by which both parties to a specific instance are to update the NCP on the MNC's progress towards compliance with the NCP's recommendations in the Final

Furthermore, the OECD should provide a regime of sanctions for violating the OECD Guidelines. There should be real and substantial consequences for violating the Guidelines. However, sanctions need not be punitive. Sanctions could include withholding government loans, export credits and investment guarantees from MNCs adjudged by the NCP to be in violation of the Guidelines. Sanctions could also include barring non-compliant MNCs from bidding for government contracts or from participating in OECD activities. Governments can also suspend the disbursement of loans previously granted to the violating MNCs pending their compliance with the OECD Guidelines. Some might argue that such sanctions would impact adversely on the ability of MNCs to compete for international business. However, a similar regime of sanctions currently being implemented by the World Bank has not had a demonstrable adverse effect on the competitiveness of MNCs. The World Bank has, on some occasions, suspended the disbursement of loans granted to MNCs for non-compliance with its sustainable development policies.[248] In fact, some countries including Denmark, Finland, France, Germany, and the Netherlands already require MNCs to make certain declarations on compliance with the OECD Guidelines as a prerequisite for obtaining export credits and financial guarantees from the government.[249] While the efforts of these countries are commendable, it is doubtful whether such financial penalties can be implemented effectively on a state by state basis. States may not want to withhold export credits and guarantees from their MNCs for fear that it could adversely affect the competitiveness of the MNCs on the international stage. Thus, a better approach would be the adoption of the suggested financial penalties on an OECD-wide basis.

Statement. Upon receipt of this update the UK NCP will publish a further statement reflecting the parties' response. See *The UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, October 2009, online http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/09-1352-uk-national-contact-point-for-oecd-guidelines-multinational-enterprises.pdf

[248] See Evaristus Oshionebo, *World Bank and Sustainable Development of Natural Resources in Developing Countries*, 27(2) JOURNAL OF ENERGY & NATURAL RESOURCES LAW 193, 222 (2009).

[249] See Schliemann, *supra* note 106 at 57.

The OECD could also utilize social media to exert pressure on erring MNCs by creating a list of violators of the Guidelines and posting such list on its website. As argued previously, mere public disclosure of violation may be enough to effect a change in corporate behavior because such disclosure puts the MNC to public shame and ridicule. However, the implementation of the suggested 'list of violators' should be flexible such that upon being adjudged to have violated the Guidelines, the MNC is given a specific time frame within which to comply with the Guidelines. A MNC should appear on the list of violators only if it fails to comply with Guidelines within the stipulated time frame.

The OECD Guidelines can equally be enhanced outside of the confines of the OECD if certain provisions of the Guidelines are incorporated specifically in natural resource contracts. For example, provisions of the Guidelines can be incorporated in mining contracts between developing countries and MNCs.[250] This is hardly a novel idea given that the World Bank's social standards are often incorporated in contractual provisions between developing countries and resource extraction companies. For example, the Chad-Cameroon Pipeline Development Projects incorporates the World Bank standards.[251] To some extent the OECD advocates such incorporation by encouraging MNCs to incorporate its due diligence provisions into contracts with suppliers and sub-contractors.[252] The incorporation of the OECD Guidelines in contractual documents is significant because it elevates the legal status of the Guidelines to the level of "hard" private law. Breach of the incorporated provisions of the Guidelines would amount to breach of contract which attracts legal sanctions such as damages.

That being said, the incorporation of the OECD Guidelines in contractual documents has its drawback. In some parts of the common law world, third party beneficiaries under the contract may not have the legal standing to enforce the contract except they fall within the few recognized exceptions under the

[250] See Louise Vytopil, *Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices*, 8 UTRECHT LAW REVIEW 155, 166-168 (noting that some MNCs in the Netherlands usually incorporate corporate social responsibility clauses in their supply-chain contracts).
[251] See ….
[252] See *Due Diligence Guidance, supra* note 30 at 17.

doctrine of privity of contracts. The doctrine of privity of contracts holds that only parties to a contract can sue to enforce the contract.[253] Suppose, for example, that a contract between Ghana and XYZ Mining Inc. provides that "XYZ Mining Inc. shall, in keeping with its responsibility under the OECD Guidelines, 'respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'".[254] Suppose further that XYZ Mining Inc. is engaged in human rights violations in Ghana apparently in breach of the above stated contractual provision. Under this hypothetical scenario, Ghanaian citizens whose human rights have been violated by XYZ Mining Inc. may not be able to sue the company for breach of contract because they are not parties to the contract between Ghana and XYZ Mining Inc.

While it is desirable for developing countries to incorporate the Guidelines in contract documents with MNCs, such incorporation is unlikely at this moment given both the financial power and influence of MNCs and the fact that developing countries are currently engaged in intense competition for foreign investment. Developing countries may be dissuaded from incorporating the Guidelines in contract documents for fear that it could deter foreign investment. However, such fears are ill-conceived because natural resources are available in commercial quantity in a few countries, meaning there is little room for forum shopping in terms of investment in natural resource exploitation. Given the intensity of the competition for access to natural resources, it is unlikely that a country's insistence on incorporating the OECD Guidelines in contractual documents would dissuade MNCs from investing in the natural resource sector.

[253] See *Dunlop Pneumatic Tyre v. Selfridge*, [1915] Appeal Cases 847 (House of Lords). The doctrine has been abrogated in England and New Zealand. See JOHN D. McCAMUS, THE LAW OF CONTRACTS, 299 (2005).
[254] This example incorporates Principle 1 of Chapter IV (Human Rights) under the OECD Guidelines.

VII. CONCLUSION

The OECD Guidelines are intended to promote responsible conduct of business on a world-wide basis. Amongst other responsibilities, the Guidelines enjoin MNCs to respect and uphold human rights, workers rights and environmental sustainability within the framework of international instruments. While on paper the OECD Guidelines are well intentioned, the reality is that the Guidelines have thus far spurred only modest progress in the quest for sustainable development of natural resources. Potency of the Guidelines is hindered by a number of factors including the non-binding nature of the Guidelines, the requirement of an investment nexus, the vagueness of some of the provisions under the Guidelines, the lack of independence by the NCPs, the inconsistencies in interpretation and application of the Guidelines, the lack of a clear adjudicatory role for the NCPs, and the lack of sanctions for violation of the Guidelines.

These factors are no doubt substantial, but it would be wrong to classify the OECD Guidelines as mere window dressing simply on the basis of their inability thus far to effect profound positive changes in the behavior of MNCs. As noted in this article, the OECD Guidelines have potential to become real solutions if the structural and institutional foundations of the Guidelines are enhanced. For example, the problem of partiality which afflicts many NCPs could be ameliorated by ensuring that NCPs consist of independent experts, as opposed to the current regime under which most NCPs consist of government officials. The utility of the NCPs could equally be enhanced by vesting on the NCPs express power to adjudicate issues raised in specific instances. Perhaps more importantly, violators of the Guidelines ought to be penalized for their actions by way of sanctions. However, sanctions need be punitive but could include withholding government loans and guarantees from non-complying MNCs and barring violators from bidding for government contracts. These recommended changes would engender trust in the OECD Guidelines particularly amongst those constituencies (workers and host communities)

adversely affected by the activities of MNCs. These changes could also elevate the status of the OECD Guidelines as a conduct-influencing mechanism and perhaps transform the Guidelines into real solutions for sustainable development of natural resources.