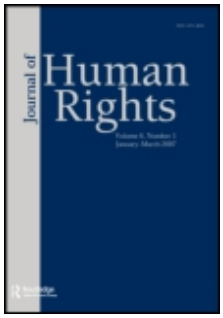

Sidelining corporate human rights violations: the failure of the OECD's regulatory consensus.

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Introduction

The purpose of this article is to subject the Organisation for Economic Cooperation and Development's (OECD) Guidelines on Multinational Enterprises (hereafter, 'the Guidelines') to critical scrutiny. The article uses empirical evidence to evaluate the effectiveness of the mechanism supporting the Guidelines. This mechanism is of significance to debates on the transnational regulation of corporations, since it is currently the most concrete regulatory process that exists to control socially harmful corporate activities at a global level. The Guidelines are implemented by signatory states to the OECD's Declaration on International Investment and Multinational Enterprises.[1] The Guidelines are now implemented by 48 signatory states, incorporating both OECD members and non-members (Bonucci and Kessedjian, 2018). Although the Guidelines are voluntary principles and are not legally binding on companies, signatory states agree to ensure the implementation and observation of the principles set out therein. As we will show, the Guidelines have also been a key reference point for the development of policy that deals with the human rights violations of business in the UN Human Rights Council.

The article begins by discussing the centrality of a principle of consensus that connects both the Guidelines and the epistemological assumptions underpinning the mechanism: the normative assumption that the process should be based upon a *consensus* of interests between the complainant and the company. It then presents a re-categorisation of the outcomes of OECD cases as a basis for analysing – both quantitatively and qualitatively – more precisely how those cases are resolved in practice. In doing so, the paper provides empirical evidence to support a critical evaluation of two key claims made by proponents of the process: first that the

Specific Instance Mechanism encourages mutually agreed – consensual – outcomes, and second that the process has been enhanced following its 2011 revision. The article concludes by discussing how the Guidelines' reliance on the theory and practice of consensus-building ultimately shapes their success, before noting how the findings set out herein can inform the development of a new treaty on business and human rights in the UN Human Rights Council.

The Idea of 'Consensus' in the OECD Guidelines

The OECD Guidelines are unique insofar as they are "the only corporate responsibility instrument formally adopted by states" (Černič, 2010, p. 70) that is truly global. The Guidelines were first adopted in 1976 and have since been amended five times, the latest amendment adopted in 2011 (Bonucci and Kessedjian, 2018). Under the Guidelines, member states are obliged to set up National Contact Points (NCPs) that have responsibility for addressing issues of implementation in specific instances. Although the NCPs have existed since 1984, the Specific Instance Mechanism itself was only introduced in the 2000 revision of the Guidelines. Most NCPs are located in government departments: the UK NCP, for example, is based in the Department for International Trade and Development. The work of NCPs are typically overseen by a mix of representatives of business, trade unions and non-governmental organisations (see, for example, UK NCP, n.d.).

The Guidelines cover the following areas: general policies (containing specific recommendations to corporations about compliance); disclosure of information; human rights standards; employment and industrial relations; environmental protection; combating bribery; consumer interests; science and technology;

competition; taxation; and bribery, solicitation and extortion. They set out standards of conduct that are based upon a selection of international instruments and standards, including: the UDHR; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the ILO Declaration on Fundamental Principles and Rights at Work; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the UN Convention against Corruption; the Rio Declaration on Environment and Development; the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters; and ISO standards, such as the Standard on Environmental Management Systems (OECD, 2011, pp. 32, 44, 49 and 50).

Jill Murray (2001) notes that the establishment of the Guidelines stemmed directly from the demands of developing countries during the 1960s and 1970s to limit the role of TNCs as conduits for the political aspirations of the most powerful governments. Developed nations also supported the Guidelines as a form of protection for their corporations from interference by host states. The 1976 Declaration on International Investment and Multinational Enterprises – to which the Guidelines belong – was adopted to give foreign corporations treatment "consistent with international law and no less favourable than that accorded in like situations to domestic enterprises" (OECD, 1976).

This context, in which we must understand the emergence of the Guidelines, also has features that are common to the political and economic development of OECD member states themselves in this period. This context is commonly referred to as the

'post-war consensus': the period of social compromise in many developed nations following World War II that saw a shift towards the establishment of social protections in the form of expanded regulatory mechanisms and a welfare safety-net. In political and historical analyses, this shorthand description of a myriad of highly complex and differentiated processes is typically over-simplified, and can be criticised for not paying attention to the grossly uneven development across different national contexts. Nonetheless, the idealised notion of a 'post-war consensus' has been a weather vane concept to the most influential policy makers and analysts.

This pluralist consensus is consistent with the dominant approach to regulation in OECD countries at a national level. This dominant mode of regulation supports a 'consensus' or 'co-operative' model of regulation, in which a series of fundamental, pluralist commitments are shared (Tombs and Whyte, 2010). This model is based upon the idea that power in modern social orders is dispersed rather than concentrated, that a variety of interests can be mobilized to influence the formal political agenda, and that social change, through mobilization of those interests, is possible (Tombs and Whyte, 2013). Consensus or co-operative models of regulation on the one hand, and neo-liberal political economy on the one hand, are each reducible to the view that a mutually beneficial co-incidence of interests amongst apparently antagonistic parties can be reached via relatively little or no state intervention. Thus, whether consciously or not, both consensual/co-operative models of regulation, and neo-liberal approaches to regulation, provide a closely coherent theoretical justification for currently dominant strategies of regulation. In national regulatory systems, this typically means that if government withdraws from regulatory enforcement – making it less likely that workplaces will be inspected, less

likely that inspections will result in enforcement, less likely the enforcement is of the more rather than less punitive type – then regulatory improvements are left in the realm of self-regulation: autonomous decisions by corporations themselves. Or, as Tombs (2016) puts it, regulation without enforcement.

The framework of this pluralist socio-economic consensus is etched into the principles that inform the work of the OECD. The first principle establishes the core aim of the Guidelines as ensuring "mutual confidence between enterprises and the societies in which they operate …" It is an interesting choice of terms. Mutual confidence rather than dispute resolution. The commentary accompanying the Guidelines emphasises the *voluntary* nature of the obligations placed on corporations, whilst at the same time emphasising the binding responsibility placed on signatory states. The Guidelines defer this 'binding' commitment to national laws and practices. The founding concepts and principles thus assert that:

> Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law (OECD, 2011, p. 17).

In other words, where domestic law is lacking or too weak to ensure compliance with the standards laid out in the Guidelines, the default position is self-regulation; or in

the words of the Guidelines, corporations should "seek ways to honour such principles" themselves. In order to ensure compliance, the Guidelines establish a process of remedy: if principles are not honoured by corporations, then complainants are able to seek review by the appropriate NCP.

The role of the NCP is not envisaged as a watchdog, or a judicial mechanism that will make judgements about courses of action that any corporation might follow, even if there are obvious breaches of the Guidelines. Rather, the Guidelines note: "[t]he NCP will offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner."

The regulatory approach followed by the NCP mechanism thus emphasises techniques of persuasion, bargaining and compromise between stakeholder groups as the most successful strategy. The process is therefore best described as a 'compliance' or 'consensus' approach which encourages self-regulation, whereby corporations are responsible for monitoring and enforcing their own legal compliance as part of minimalist regulatory framework (Pearce and Tombs, 1990). 'Self-regulation' – a model of regulation where corporations are trusted to monitor and observe their own legal compliance – in fact constitutes the dominant approach to the 'regulation' of harmful business activities in OECD countries (Tombs and Whyte, 2015).

The OECD Guidelines reflect this general approach insofar as they place significant emphasis upon mutual-cooperation between parties and self-regulation. A directly

comparable approach to consensus building can be found underpinning the work an influential policy maker who is important to our analysis in this paper. John Ruggie, the former UN Special Representative to the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Entities, applies a conceptual framework of 'embedded liberalism' that he devised over 30 years ago as a political scientist that foregrounds the idea of the post-war consensus. This conceptual framework argues that there now exists a broad agreement across nations on the basis of how the global economy should be run: there is general agreement that we should encourage open trade across nations, based on principles of capital accumulation, and at the same time, there is a general agreement about the counter-veiling need for a prescribed minima of state intervention, social protection and regulation. This conceptual approach formed the bedrock of Ruggie's work for the UN, and in particular, his 'Guiding Principles' rely upon a pluralist consensus approach that assumes that states, international bodies like the UN and private corporations have a common interest in promoting the same approach to development (for a full discussion of this policy process see Khoury and Whyte, 2017).

As part of this consensus approach, Ruggie has consistently promoted the potential for the Guidelines to set standards (Ruggie, 2013; Ruggie and Nelson, 2015; also, Mares, 2010). Ruggie's Guiding Principles had been enthusiastically adopted by the OECD in the 2010 revision of the Guidelines. Indeed, the latest version of the Guidelines notes that it "draws upon the [UN] Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation" (OECD, 2011, p. 31).

In the sense that it claimed the support of the key parties involved in the debate – corporations, governments and NGOs – the Ruggie agenda adopts a consensus approach to regulation *par excellence* (Parker and Howe, 2012). However, since its adoption by the UN Human Rights Council, the Ruggie consensus has begun to unravel (Bittle and Snider, 2013; Khoury and Whyte, 2017). The precariousness of Ruggie's consensus building was fully revealed in September 2013 when Ecuador, supported by a further eighty-four member states, explicitly rejected Ruggie's voluntarist approach to introduce a binding legal instrument "to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises". This motion was supported by more than 530 civil society organisations and in June 2014 was supported by a majority of the UN Human Rights Council.

In what follows, we explore the concrete realities of the consensus approach adopted by the Guidelines. It is an approach that is somewhat strengthened in 2011, and for this reason we expose the implementation of the Guidelines in the post-2011 period under particular scrutiny. We do so by presenting a detailed and original analysis of the outcome of cases that seek resolution through the Specific Instance Mechanism. It is to this analysis that the next section of the paper turns.

Complaints heard by NCPs, 2002-2016

Some human rights NGOs have been trying to encourage wider use or propose reforms to enhance the use of the Guidelines, for several years now (see Ruggie and Nelson, 2015).[2] Almost all complaints made through this process relating to human rights violations tend to be made by NGOs and by trade unions concerned with labour

rights. The OECD confirms that NGOs have historically been the leading group using the NCPs, followed by trade unions (OECD, 2016). Indeed, only a small minority of cases are taken by other parties.

The data reveals that in the period between August 2002 and July 2012 trade unions had a higher rate of submission to the NCP process than NGOs (NGOs filed 130 cases; trade unions filed 150 cases). However, since the 2011 reform, there has been a reversal of this trend and NGOs have submitted a much higher number of complaints compared with trade unions (NGOs have lodged 106 complaints, whereas trade unions have submitted only 32 complaints). Of those complaints, the data reveals a wide gap between the success rates between the two groups. Trade unions have had considerably more success in getting their cases accepted by NCPs, with only 5 cases (or approximately 15%) rejected outright. Whereas NGOs had 50 cases rejected outright (just under 50%). Despite this relatively high rejection rate, since the latest reform, it NGOs seem to be more optimistic about the potential of the NCPs. We return to this point in the conclusion to this paper. For the time being, we direct our analysis to the broad sample of cases initiated by both trade unions and NGOs.

The analysis that follows is based upon a total of 403 cases that were sent to NCPs for resolution. Those cases were recorded by the Trade Union Advisory Committee to the OECD (TUAC) and the NGO OECDWatch from the start of introduction of the Specific Instance Mechanism in August 2002 to August 2016. This data includes a large majority of cases initiated under this procedure; and by far the largest single category of cases dealt with through the NCPs complaints procedure relate to human rights abuses (OECDWatch, 2014). This data is therefore relatively robust as an

indication of the overall activity of the Specific Instance Mechanism: the two datasets constitute a relatively comprehensive and respected source of data on human rights cases (for a more in-depth discussion of those sources see Ruggie and Nelson, 2015).

The OECD categorises three very broad outcomes from cases lodged with a NCP. Those possible outcomes are classified in the Specific Instance Mechanism and recorded by NCPs as follows:

- **'In progress'** includes all specific instances that fall in the categories:

  -under initial assessment

  -assistance to parties

  - transferred

- **'Concluded'** includes all specific instances that fall in the categories:

  -specific instances closed after initial assessment

  - specific instances closed after assistance to parties

- **'Not accepted'** indicates that a specific instance has not been accepted for assessment.

These categories are very general categories and encompass a breadth of outcomes that blurs the significance of the case outcomes. The OECDWatch database offers more nuance, recording outcomes from cases lodged with a NCP using the following categories:

- 'Concluded': the case has been accepted by the NCP and there has been some negotiation between parties.

- 'Closed': cases can be closed by the NCP if there is no likelihood of agreement, or if, after initial investigation, it decides there is no case to answer.
- 'Rejected': the NCP has decided there is no evidence of a breach and therefore no case to answer.
- 'Blocked': cases in which there has been a delay in proceedings, normally as a result of a lack of cooperation or inability to respond to NCP requests.
- 'Withdrawn': cases in which the complainant has withdrawn the complaint.

However, a reading through of the summaries of cases in the initial stages of writing this article persuaded us to reframe both the OECD and OECDWatch categories. We did this because it became clear from our initial reading of the case summaries that were available to us that an interpretation of the data using those categories can create distortions in the interpretation of the data. Our first observation in this respect is that there are some types of case outcomes that are significant in terms of numbers but not counted separately in the existing categories. Those included the cases that have been suspended and cases where no decision has been reached. There were also a number of cases that we could not appraise in our analysis since there was not enough information logged by the NCP to meaningfully assess or understand the outcome. We therefore created a new category: '*Pending, Suspended or No Information*.'

Second, we found that often some of the *Rejected* and *Closed* case categories shared some characteristic similarities, and often it appeared as if the same cases might have been placed in either of those categories. This is because in both of those types of case, the NCP plays an active role in either preventing those cases from being heard

in the first place, or in closing them after the point that they have been initiated. We therefore collapsed those categories into a single '*Rejected and Closed'* category.

Third, we delineated a category of *Concluded and Withdrawn* cases. These are cases in which the complaint has been accepted and the case has reached its end-point without being either rejected or closed by the NCP.

Fourth, we retained the OECDWatch category of '*Blocked'* cases in which there was a delay in the process, normally as a result of a lack of cooperation or inability to respond to NCP requests, since from our reading of the cases we surmised that this category accurately captured this outcome.

Our four categories thus sought to set out a schematic way of reading the progress of cases through the Specific Instance Mechanism process in a way that allowed us to understand the material consequences of the outcomes more clearly. We analysed 403 cases that fell within the period August 2002 to August 2016, by applying our categories.[3] From this initial analysis, we can observe that in the fourteen-year period analysed, there were 139 *Rejected or Closed* cases (35%), 191 *Concluded or Withdrawn* cases (47%), 15 *Blocked* cases (4%), and 58 cases in which decisions had been *Suspended,* were *Pending* or where *No Information* (14%) had been provided to allow us to know anything about the details of the case.

Positive Outcomes?

Given that by far the largest category is the *Concluded or Withdrawn* category, first impressions seem to indicate that almost half of all cases have a positive outcome (in

the sense that they have apparently reached the end-point of the complaint process and therefore have been resolved in some way). Indeed, it is this category of cases that appear to have been resolved in some way that we are most interested in, since this is the category that can tell us both the good news stories about how complaints were most successfully concluded, and the bad news stories about how they were not. In order to explore the detail of the ways in which those cases were concluded we therefore analysed the data in more detail to probe what happened in those 191 cases included in the *Concluded or Withdrawn* category.

As we proceeded, we found a further twelve cases in the *Concluded or Withdrawn* category in which there was simply not enough information provided to precisely assess the outcome. After filtering those cases out, we were left with a total of 179 cases. In order to analyse the outcome of those 179 *Concluded or Withdrawn* cases in more detail, we delineated a further five types of cases within this category:

- Cases that yielded a *mutually agreed outcome* (n=49) or 27%;
- *Unresolved* cases, or cases in which one or more parties had not reached agreement about the outcome (n=102) or 57%;
- Cases that remained only *partially resolved* and therefore remained partially unresolved (n=10) or 6%;
- Cases that were *resolved via a separate process* that did not require the intervention of the NCP (n=13) or 7%;
- Cases in which *external factors* in the dispute between the parties changed the material outcome (e.g. corporate takeovers, corporations going in to bankruptcy or corporations ceasing operations in that country) (n=5) or 3%.

This analysis shows that forty-nine cases within the *Concluded or Withdrawn* category yielded a 'positive' outcome that was mutually agreed by all parties. This amounts to approximately three to four cases on average per year (or about one in eight of our total number of 403 cases).

The majority of those *Concluded or Withdrawn* cases were not mutually agreed by all parties. Because of the sheer scale of cases that 'failed' to reach mutually agreed outcomes, those cases warrant further analysis. It is to the analysis of the 112 'unresolved' or 'partially resolved' cases that the paper now turns. In the section that follows, we identify four separate types of 'system blockages' that prevented those cases reaching a successful outcome.

System Blockages[4]

1 A lack of cooperation

Of the cases that are included in our *Unresolved* category noted above, a significant number (just under half) remained unresolved because of a lack of co-operation in the process shown by the corporation. The intransigence of corporations and a brazen lack of cooperation was visible across a range of different cases (e.g. *Sherpa et al. v First Quantum Minerals; and Glencore International AG*; *MiningWatch Canada et al. v Barrick Gold Corporation*; *Amnesty International and FoE v Shell*; *ECCHR, Sherpa & UGF v ICT Cotton*; *Sherpa et al v Financière du Champ de Mars*; *Bolloré; and SOCFINAL*; *ForUM and FoE Norway v Cermag ASA*; *Survival International v Vendanta Resources plc*; *Global Witness v Afrimex*; *Nepenthes v Dalhoff, Larsen & Hornemann (DLH)*; *GermanWatch v Bayer*; *CCC v Adidas*). In a further set of cases, the companies either simply refused any involvement with the process (e.g. *CIPCE v*

Skanska; *CGTP et al. v Grupo Altas Cumbres*; *Thai and Filipino labour unions v Triumph International*; *FREDEMI coalition v Goldcorp*; and *CEDHA v Xstrata Copper*), obstructed the process, (e.g. *Fenceline Community and FoE NL v Royal Dutch Shell*); and/or refused mediation by the NCP (e.g. *Cornerhouse v Rolls Royce; BAE Systems; and Airbus*).

In *Norwegian Support Committee for Western Sahara v Sjøvik*, the parties agreed upon recommendations to the Norwegian government and to the steps the company would take to comply with the requirements set out in the OECD Guidelines. However, *Sjøvik* later refused to disclose what and how it has respected and/or implemented the Guidelines' due diligence provisions that it had agreed to; the complainant therefore has no way of knowing whether the company is honouring the agreement signed by both parties.

In a small, but significant number of cases, developments in other legal proceedings relating to the same case preclude an NCP decision. In some cases, this has led to corporations unilaterally withdrawing from the case. In the cases *CLEC & ERI v Florida Crystals Corporation*; *American Sugar Refining Incorporated; Sugar Cane Growers Cooperative of Florida; Fanjul Corporation* the companies initially agreed to mediation, but later withdrew from the process when parallel civil proceedings were initiated by the victims, although parallel proceedings are not in themselves enough not to establish mediation.

2 A lack of political will

Several cases demonstrate that NCPs are often reluctant to force an outcome that

imposes punitive conditions on the corporations that are the subject of complaints. Some observers have noted that often corporations are given preferential treatment in the process. Černič (2010, p. 82) has noted, for example, that "[i]n many OECD countries major concerns have been expressed about the way NCPs arrive at the statement agreed by the company, the complainant and the NCP by first contacting the company not the complainant". For him, this is perhaps unsurprising given that NCPs are annexed to governments that do a great deal of diplomatic work on behalf of their corporations operating abroad:

> … since most of the NCPs are located within business or industry departments of governments, it appears that they are more inclined to support business activities. For example, the UK NCP until recently discussed the initial assessment of a complaint with the companies first and only later with the complainant. There is no simultaneous discussion and companies have been given higher degree of access to the NCP (Černič, 2008, p. 94).

This observation is entirely consistent with the regulatory consensus approach adopted by the OECD and its member states (as set out earlier in this paper). This might go some way to explaining a lack of political will on the part of NCPs to intervene in ways that challenge corporations. Thus, some officially '*Withdrawn'* cases were blocked from going forward by the NCP (e.g. *RAID v Ridgepoint; Tremalt; and Alex Stewart (Assayers) Ltd.*). In other cases, the NCP was considered by the complainant as incapable of contributing to a meaningful resolution to the dispute (e.g. *Amnesty International and Friends of the Earth v Shell*), or the NCP simply ignored grievances by the complainants concerning the process (e.g. *CCC & ICN v G-Star*). These cases were thus '*Withdrawn'* following extreme dissatisfaction with the NCP process on the part of complainants. Ultimately none were resolved,

apart from the latter through an external process involving the Dutch Minister of Economic Affairs. The Dutch NCP responsible for the case *CCC & ICN v G-Star* declared it was made redundant when the Dutch Minister took over the mediation process, and ultimately ignored the complainants' reservations about the NCP's withdrawal from the process.

Some NCPs demonstrated a lack of commitment to their own process, simply closing cases unilaterally after limited attempts at mediation, stating no consensual agreement was possible (e.g. *Global Sports Technology (Beteiligungsgesellschaft) v Austrian Trade Unions*); without having met with the unions or making a public statement (e.g. *Nestlé v Korean Confederation of Trade Unions (KCTU), International Union of Food Workers, and the International Federation of Chemical, Energy, Mine and General Workers' Union (ICEM)*); based on the company's affirmation of its intention to abide by a court order to reinstate the dismissed workers although it had in fact already convened early retirement and severance schemes with many of them (e.g. *Honda v International Metalworkers' Federation (IMF)*); or claimed that they simply could not offer any useful intervention (e.g. *Eiffage Energie v Fédération Nationale des Salariés de la Construction et du Bois de la CGT, la Fédération Nationale Construction Bois de la CFDT and CFE CGC BTP*). In the case *Novartis v Austrian Union of Salaried Private Sector Employees*, the NCP released a watered-down version of its final statement that glorified the company for its corporate social responsibility efforts, including a social plan for dismissed employees. The NCP failed to acknowledge the role the trade union had played in obtaining the social plan (namely through a parallel legal complaints procedure which had forced Novartis to negotiate the plan).

In other cases, the NCPs simply excluded complainants from negotiations (as in *CBE v National Grid Transco* and *RAID v Avient*) or proved incapable of dealing with complaints (e.g. *CEDHA v Xstrata Copper*). In such cases, the NCPs seem to go to great lengths to avoid engaging with the complaints in any serious manner. In another set of cases (*Pobal Chill Chomain Community et al. v Marathon Oil; Statoil; and Shell*), the NCP denied the admissibility of the case, ostensibly because the companies claimed they already had a 'legal' contract with the government that they had complied with, even though the complaint formally disputed the compliance of those contracts with the OECD Guidelines.

In the case *Reprieve v British Telecommunications*, the complainants made the assertion that there is a clear bias in favour of companies. The NGO complained that throughout the process the company's assertions were taken at face value without any substantiating evidence, and that a greater onus was placed on the NGO to substantiate the complaint. NGO Amnesty International concluded that the UK NCP was both woefully under-resourced and clearly exhibiting bias towards corporations in the cases it analysed. OECD Watch, has also criticised NCPs for their uneven expectations of standards of compliance with the Guidelines and have noted the recent expectation of an "unreasonably high burden of proof" (OECDWatch, 2014, p. 18).

3 A lack of enforcement powers

The ineffectiveness of the NCPs highlights a major weakness of the system: that NCPs have no clear mechanism of enforcement and very often simply fail to obtain

mediation through 'goodwill' (and this became obvious in cases such as *RAID v Ridgepoint; Tremalt; and Alex Stewart (Assayers) Ltd*; *Parmalat v CUT-Brazil*). A key feature of the process that is always in the background of such cases is an awareness of all parties that the NCPs cannot oblige companies to engage in the complaints process, although they can recommend the withdrawal of some government services. Thus, even when the complaint may appear to have serious cause, ultimately, the NCPs are dependent upon the cooperation of the companies. The tolerance of a system of regulation without enforcement (Tombs, 2016) may be a factor in the weakening of political will outlined in the previous section.

In the *Fenceline Community* case, for example, complainants noted an unreasonably high confidentiality requirement during the procedure, but also specifically highlighted the NCPs lack of authority vis-à-vis the company. The Guidelines' voluntary nature and the lack of an enforceable supervisory capacity for the NCPs was cited as a major problem in the Specific Instance Mechanism. Accordingly, whilst the NCPs often went ahead with their review despite the company's lack of cooperation in several of the cases – and some NCPs even found the companies in breach of the Guidelines or made recommendations in their final statements (e.g. *Lawyers for Palestinian Human Rights v G4S*; *RAID v ENRC*; *Privacy International et al. v Gamma International*) –NCPs could only make recommendations to the parties in those cases.

The exception to this dependency on corporate 'goodwill' can be seen in *Canada Tibet Committee v China Gold International Resources*. In this case, in response to the company's refusal to engage, the Canadian NCP imposed sanctions on the

company. The penalties included withdrawing Trade Commissioner Services and other Canadian advocacy support abroad. The NCP had the support of the Canadian government to act upon its decision. Despite the welcomed initiative by the Canadian NCP in this case, this kind of reaction from an NCP remains exceptional.

Even in cases where the NCPs have demanded action, the corporations involved have sometimes simply ignored those demands. This happened perhaps most clearly in the cases *Corner House et al. v BP, CRBM v ENI*, *ForUM and Friends of the Earth Norway v Cermaq ASA* and *Survival International v Vedanta Resources* where the corporation simply disregarded the NCP's requests. Lack of enforcement is thus a major weakness of the NCP process that has been recognised by others (see for example, Ruggie and Nelson, 2015) since governments do not generally provide any reinforcement or support for the NCPs when and if they find companies in breach of the Guidelines.

4 A lack of accountability

In a number of cases, unsatisfied complainants have taken their complaints further up the ladder of the Specific Instance Mechanism. Some countries have set up procedures for complaints against NCPs. However, only a minority of countries have established complaints processes; and where these systems exist there is no consistency in their structures. This inconsistency is characteristic of the NCPs since countries have substantial flexibility in determining the structure and make-up of their NCPs (Genovese, 2016). In some contexts, complainants can request NCP oversight through ombudspersons, for example in Belgium and Finland, or in other contexts via appointed boards, as is the case in the UK. Complaints are filed after the final

assessment is made by the NCP in cases where the applicant(s) consider(s) the NCP not to have acted in accordance with its procedure, including for concerns of bias, negligence, etc. Ombudspeople are usually part of government and deal with complaints from several government sectors, as is the case in Belgium and Finland where complaints are made to Belgian Federal Ombudsman[5] or the Finnish Parliamentary Ombudsman[6]. However, the UK has set up a Steering Board specifically for its NCP. In the UK, either party of the NCP's mediation can ask for a review by the Steering Board if it feels the case has not been treated fairly or been given due consideration.

In *Proyecto Gato v Tractebel*, several NGOs sent a letter to the OECD requesting clarification on the interpretation of the Guidelines, arguing that the Belgian NCP had failed to treat the complaint in accordance with OECD rules. The NGO took their complaint further, and subsequently filed with the Belgian Ombudsperson against the NCP. Proyecto Gato's complaint was upheld, although it is rare that complaints are upheld by national states. And, in several cases brought by NGOs, the NCPs blatantly refused transparent, non-confidential dialogue consistent with the Procedural Guidance of the MNE Guidelines (e.g. *CCFD et al. v Michelin*; *DECOIN et al. v Ascendant Copper Corporation*); and in *DECOIN et al. v Ascendant Copper Corporation*, where the complainants 'withdrew' because of the unilateral decision of the NCP to a closed-door mediation; the company later used the withdrawal to claim that the case had been resolved.

In *IAC & WDM v GCM Resources plc,* the complainants were so outraged by the NCP that they filed a complaint with the UK's OECD Steering Board. In this case, the

NCP exhibited a bias in favour of the company when it refused to consider potential human rights impacts and focused instead upon less controversial issues such as the alleged failure by the company to follow its own self-regulatory standards. The NCP's bias was hard to deny given that seven UN Special Rapporteurs had issued a joint UN press-release, calling for an immediate halt to the company's proposed project because it was a threat to fundamental human rights, including the rights to food, water, adequate housing, freedom from extreme poverty and the rights of indigenous people. Whilst the Steering Board found the NCP to have committed errors and recommended that the complaint be re-examined, the NCP ignored the Board. It insisted in its final statement that the company was only in breach of its obligations to develop trusted self-regulatory practices and management systems. In its follow-up statement a year later, however, the NCP noted that no significant development had been made by the company, and thus nor in the conditions that led to the complaint. The entire complaint in this case was a series of frustrations for the complainants that ultimately had no impact on the human rights obligations of the company involved.

In its in-depth analysis of the UK NCP, Amnesty International found a lack of predictability or consistency in applying the Guidelines that often comes down to a discretionary misinterpretation (Amnesty International, 2016). Moreover, it argued, there is little accountability of NCPs when this does happen. Amnesty found that inappropriately high evidential thresholds were being expected of complainants, often making "arbitrary judgements at the initial assessment stage without proper examination" (Ibid., p. 6). At the same time, "the expectations of the NCP towards companies to provide evidence of responsible business practice are not as stringent" (Ibid., p. 60).

What the four aspects identified in this analysis have in common is that they point to serious weaknesses in the NCP Process that make it difficult to claim that the OECD Guidelines are by any mark an adequate instrument with which to address corporate violations of human rights. They indicate clearly, that the pursuit of a consensus has proven impossible to achieve. Moreover, the analysis of this data demonstrates that the lack of regulatory force has effectively neutered the process. The Specific Instance Mechanism relies on the participation of business in developing and enforcing its own regulation, together with a faith in consensus forms of policy-making that do not rest on the resolution of conflict between interests, but instead seek a consensus that is palpably incapable of offering any true remedy to the victims. The lack of cooperation by corporations, the lack of enforcement by the NCPs, the criticisms of the NCPs voiced by the complainants, testimonies of NCP biases in favour of business, and a notable ineffectiveness of NCPs mean that this instrument is not well placed to offer effective remedy. So far, the paper has analysed cases in the period August 2002-August 2016. Yet as we note in the opening sections of this paper, the Specific Instance Mechanism has been subject to some reform and adjustment in light of the Ruggie Guiding Principles. It is to the impact that those reforms have had on the Guidelines and their implementation that the next section of the paper turns.

The Impact of the 2011 Reforms

The 2000 review of the Guidelines gave a stronger role to the NCPs, and extended their role in resolving issues related to the non-observance of the Guidelines by corporations. It is this context that provides the motivation for our analysis of the

content of those cases and how the process generates particular outcomes in those cases.

In his 2008 "Protect, Respect and Remedy" Framework, John Ruggie explicitly recognised weaknesses in the Specific Instance Mechanism. However, he located the weakness not in the *process*, or in the power asymmetries that are not addressed by the process – as we have here – but in the fine detail of the Guidelines. In his report, Ruggie called for a revision of the Guidelines noting their lack of specificity but also suggesting that many voluntary corporate codes of conduct or CSR policies adopted by companies and business organisations had exceeded the Guidelines and made them outdated (Ruggie, 2006, §46). He later attributed his own work to increases in the complaints lodged to NCPs by NGOs and workers' organisations, following his 2008 Framework stating that "NGOs as well as workers' organizations drew on the Framework in lodging new complaints to OECD NCPs, which in part accounts for the increase in cases in the cycles 2010-2011" (Ruggie and Nelson, 2015, pp. 3-4).

A year after Ruggie's Framework was adopted by the UN, the OECD began discussing a revision of the Guidelines that included a response to Ruggie's recommendation that the NCPs be legitimate, accessible, predictable, equitable, rights-compatible and transparent. As Mares notes, Ruggie also explicitly encouraged the OECD to adopt a due diligence approach in its guidance for responsible trade in conflict minerals (Mares, 2012). As we note above, Ruggie's recommendations on the Guidelines were incorporated into its revision in 2011, coinciding with the end of his UN mandate and the presentation of the Guiding Principles. In his 2010 report to the UN, while noting some weaknesses, he concluded that the NCPs have "the potential

of providing effective remedy."

Our analysis scrutinised the post-2011 period is order to provide an indication of the impact of the Guiding Principles on the NCP Process. Using the same categories that we use in the analysis above, we analysed the outcomes of cases in the first ten years of the Specific Instance Mechanism and in the 4 years following (i.e. between August 2002 and July 2012 and between August 2012 and August 2016).

August 2002 - July 2012

Of 265 complaints that were filed in this period there were at total of 175 unresolved cases, eighteen cases that were resolved or partially resolved via a separate process not involving the NCP, six cases in which external factors in the dispute between the parties changed the material outcome (e.g. corporate takeovers, bankruptcy or cessation of operations in that country), ten cases remained only partially resolved, thirty-two cases that yielded a mutually agreed outcome and twenty-four cases which were either blocked or where there was not enough information to adequately assess the case.

August 2012 - August 2016

The same analysis of data we have for the period following the 2011 reform to the OECD Guidelines (between August 2012 and August 2016), reveals that of a total of 138 cases, eighty were unresolved, four cases were resolved or partially resolved via a separate process not involving the NCP, one case remained only partially resolved, fifteen cases yielded a mutually agreed outcome and thirty-eight cases that were either blocked, filed or pending.

As *Table 1* below shows, whilst there was a peak in cases 2013, the numbers before and after the reform have remained relatively stable. Moreover, we would also note that within the 2013 data, of those complaints lodged, a relatively large number – amounting to just under half of cases – were rejected outright by NCPs.

Table 1. Cases lodged with NCPs August 2002-August 2016[7]

<Insert Table 1 here>

Yet even if we did not take into account the peculiarities of cases included in the 2013 figure, the relatively high total for this year does not significantly interrupt the trend: that by 2015, the total number of cases had reverted to approximately the same number of cases taken in 2002. This trend also serves as a clear indication that Ruggie's assertion of the increase in claims is not warranted. Rather, there has been no significant change in the use of the Guidelines following the 2011 reforms.

A close reading of the '*Unresolved*' cases since the 2011 reforms reveals that a large number cases remain unresolved predominantly because the company refuses to engage in NCP mediation (those cases include: *Canada Tibet Committee v China Gold Int. Resources*; *Lawyers for Palestinian Human Rights v G4S*; *CLEC & ERI vs Florida Crystals Corporation; American Sugar Refining Inc.; Sugar Cane Growers Cooperative of Florida; and Fanjul Corporation*; *Lok Shakti Abhiyan et. al v Government Pension Fund – Global*; *Ripley Corp S.A. v UNI Global Union and UNI Americas*; *Tower Semiconductor Ltd v RENGOR*). Yet, as we indicated above, it is clear that in order to fully understand how particular outcomes in this process are

generated, we need to be able to understand how cases were successfully, as well as unsuccessfully, concluded.

WWF v SOCO has become the poster-child of the 2011 reform of the Guidelines and has been praised as an example of successful NCP mediation for human rights cases (van't Foort and Wilde-Ramsing, 2015). The complaint was brought by the environmental NGO World Wildlife Fund in 2013, based on the activities of the UK drilling company SOCO in Virunga national park, a UNESCO world heritage site in the Democratic Republic of the Congo. The UK NCP accepted the majority of the complaint and hired an external mediator. The mediation resulted in an agreement with what has been considered a ground-breaking joint-statement in which SOCO agreed to cease its operations, committed to never again jeopardise the value of another UNESCO world heritage site and to conduct environmental impact assessments and human rights due diligence in line with international standards. However, whilst SOCO did cease its operations, it did not relinquish its operating permits leaving the company with a significant margin of manoeuver. The NGO Global Witness has criticised SOCO and the NCP resolution based upon a series of statements made by SOCO's senior executives that give serious reason to doubt its human rights commitment. SOCO's Deputy Chief Executive, Roger Cagle, has publicly stated in *The Times* newspaper that the agreement "forces DRC and UNESCO to come to some kind of accommodation" (cited in Global Witness, 2014); this suggests that they must find an arrangement that is beneficial for the company. Moreover, according to Global Witness, SOCO has also sought to reassure investors and make clear to the Congolese authorities that the joint-statement with the WWF did not signal a withdrawal from Virunga (Ibid.). Global Witnesses' trepidations are

supported by the company's subsequent actions. For example, one of the caveats of the agreement was that the company was allowed to complete a seismic survey inside Virunga Park to gather data on the park's oil potential. SOCO did not relinquish its operating permits either, and so the park could still fall into a grey zone if it is declassified as a World Heritage Site or its boundaries are shifted. What this means in practice is that whilst SOCO backed off from any immediate oil exploration, it has not renounced its claim to eventual drilling and production in Virunga. More likely is that the corporation will try to use the results of its seismic survey – which confirmed that Virunga is sitting on a lot of oil – to lever the Congolese government's decision.

Considered one of the major achievements of the 2011 Guidelines, the inclusion of the principle of due diligence adjusted the emphasis of earlier versions on the 'investment nexus', which was abolished by the 2011 reform to the process (broadly defined as "MNEs' practical ability to influence the conduct of their business partners is based on the extent to which they have an investment-like relationship" by Sisco et al., 2010, p. 16). Sisco et. al.'s critique of the 'investment nexus' concept was that it was "… too flexible and open to interpretation to be applied as a framework for responsible supply chain management" (Ibid). In theory, due diligence introduced a responsibility for corporations to carry out risk-based due diligence to identify, prevent and mitigate adverse impacts based on their investment relationships; thus suggesting, as Ruggie and Nelson (2015, p. 17) do, that corporations "… should avoid causing or contributing to adverse impacts on the social, environmental and other interests related to the Guidelines, not only through their own activities but also through their business relationships". However, the system blockages we have identified and discussed above indicate a rather different state of affairs. Namely, that

despite the 2011 reforms, the principle of due diligence has not encouraged either a rise in the application of the procedure, or a focussing on minds in the boardroom.

Thus, upon scrutiny of the outcomes of the cases, the deficiency in the OECD Specific Instance Mechanism appears to be one that allows for corporations to make commitments to the Guidelines' due diligence provisions without the NCPs verifying whether the company followed through with those commitments (including identifying, preventing, mitigating and accounting for actual and potential human rights effects of business). Perhaps this is not surprising given that, as we indicate in the previous section of this paper, the lack of effective enforcement mechanisms creates major blockages in the system. After all, what the Guidelines call for is that companies carry out due diligence according to their *own* assessment of the human rights situations in the specific contexts and of their eventual contribution to adverse human rights impacts. The measure of that contribution, and of the impact, is thus left to the company itself.[8]

It would appear in light of the empirical evidence presented in this section, that Ruggie and Nelson's (2015, p. 16) belief that "… the Guidelines' due diligence provisions provide companies with *high level guidance* on what they need to do to address the risk of contributing to human rights harm" may have been a little premature to say the least. In practice, the 2011 revision has not yielded the kinds of results that can be said to be making a real difference in human rights terms. If anything, there has been very little change both in the very small number of cases initiated using this process and in their outcomes meaning that companies are as likely and as able as ever to disregard or disengage with the process or its recommendations.

Conclusion

Our analysis in this paper points to four major weaknesses with the OECD Guidelines that are rooted in its essentially 'consensus' approach. First, companies continue to refuse to engage with the NCPs. Second is that NCPs display a lack of political will to intervene in ways that challenge corporations. Third, even if there was a clearer political will, because compliance with the Guidelines is effectively voluntary, there is no way for NCPs to oblige or coerce companies to participate in the process. Finally, given the lack of accountability for decisions made by NCPs, there is no adequate redress for complainants. All of this points to a fundamental asymmetry of power in which complaints remain structurally weak when they seek to invoke the Specific Instance Mechanism.

Moreover, what the analysis of these cases suggests is that rather than providing a mechanism that encourages consensual decision-making, NCPs have a different role: they have sought to 'manage' complaints. Indeed, the evidence indicates very clearly that the NCP process – one that relies upon the goodwill cooperation of business – has proven to be largely ineffective. In addition to these shortcomings, deeper consideration of the 'success' cases of the 'human rights' reform of the OECD Guidelines indicates that the reforms are not actually delivering the claimed outcomes, particularly with regards to the due diligence standard.

To recap, we found that *around one in eight cases was resolved to the mutual satisfaction of both parties*. On average this adds up to *between three and four cases every year* that are resolved with mutual agreement, anywhere in the world. We are

therefore dealing with a few cases that can, in global terms, barely be described as token. Indeed, recent research by OECD Watch (2018) albeit based on a much smaller sample of 18 NGO-led cases, found almost three quarters of cases "no remedy-related outcome whatsoever was achieved for the victims of corporate misconduct" (Ibid., p. 2). This report drew a number of conclusions that we also draw: namely that "[t]he NCP system is currently an unpredictable patchwork of methods and structures" that often lacks adequate resourcing or political will (Ibid., p. 15).

In the period since the Guidelines' 2011 reform, its success as measured in mutually agreed outcomes has remained unchanged. And as *Table 1* above shows, rather than significant increases in cases, we see that there has in fact been a recent decline in the number of cases lodged with NCPs; and in 2014, the annual total of cases was the lowest since 2002. And this is where this 'consensual' principle begins to look flawed. Corporations know they do not have to cooperate, and, as we have shown, in a very large proportion of cases, corporations simply refuse to engage, safe in the knowledge that there are few consequences for ignoring the demands of NCPs.

Our findings provide a cautionary tale for the UN Human Rights Council's 2014 *Resolution for an international legally binding instrument on the human rights responsibilities of corporations* (A/HRC/26/ L.22/Rev.1). The empirical evidence set out in this paper forewarns the UNHRC that any mechanism negotiated to address corporate violations of human rights cannot be based on weak enforcement, not least since corporations without the credible threat of meaningful enforcement are powerful enough to either ignore or undermine processes such as the Guidelines.

The Guidelines therefore have a more difficult task than is generally acknowledged in official commentaries, or in those of its most prominent champions. The Guidelines are seeking to intervene in a process that can never resemble a pluralistic process because of the gross imbalances of power between parties. As we have seen, some organisations are better placed to offer a more serious challenge to corporate power and which might fare better in such cases. Trade unions, who often represent workers in direct confrontation with their employers are much more used to dealing with disputes through *dissensus* rather than *consensus*. Because of their ability to take industrial action, trade unions are generally – though not always – better placed to confront corporations with a more direct threat of disruption to regimes of extraction, production and the distribution of goods. Human rights NGOs generally have different constituencies (they tend to be funded by dispersed groups of individual subscribers), they have different relationships to the people they struggle on behalf of, and may often be based in locations that are removed from those communities; and they operate differently, largely via different modes of public campaigning rather than industrial relations struggles.

The difference in the social power base of those organisations and their different *modus operandi* may lead us to anticipate that they will use the process under different conditions and for different reasons. There is evidence in the data, that different types of organisations have different rates of success; for example, it appears that trade unions are generally more successful than NGOs in settling their cases without NCPs. And where trade unions do engage with the NCP Process, they are more successful in negotiating 'mutually agreed' outcomes. In our data, there were a total of nineteen mutually agreed outcomes in cases submitted by NGOs, whilst trade

unions negotiated twenty-seven, or around thirty percent more. Without entering into a broader analysis of the role NGOs have played in furthering the neo-liberal agenda by undermining the role of the state (see for example Bandarage, 2011; Matanga, 2010; Richards, 1977; Veltmeyer, 2005) we would argue that the key issue here is that the *fora* in which resolution is sought, by NGOs especially, through the OECD procedure remain distant from the struggles taking place on the ground. These resolutions tend to produce a few 'successes' that, as our analysis of the sample of cases here shows, is so insignificant as to make this a process more symbolic than real.

For these reasons, it is important that those the ongoing UN process develops a mechanism that allows opposing interests to be recognised rather than stifled; that recognises conflicts over the pursuit of corporate strategies as legitimate, rather than seeking to manage such conflicts through the creation of a fake consensus.

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https://www.oecdwatch.org/cases/Case_209;
https://www.oecdwatch.org/cases/Case_208?searchterm=sherpa+glencore
Sherpa et al. v Financière du Champ de Mars, Bolloré and SOCFINAL (7 December 2010)
https://www.oecdwatch.org/cases/Case_201; https://www.oecdwatch.org/cases/Case_200;
https://www.oecdwatch.org/cases/Case_202
Survival International v Vedanta Resources PLC (19 December 2008)
https://www.oecdwatch.org/cases/Case_165?searchterm=vedanta+r
Thai and Filipino labour unions v Triumph International (3 December 2009)
https://www.oecdwatch.org/cases/Case_171
Tower Semiconductor Ltd. V RENGOR (18 August 2014)
http://www.tuacoecdmneguidelines.org/CaseDescription.asp?id=178
WWF v SOCO (7 October 2013) https://www.oecdwatch.org/cases/Case_307

Endnotes:

[1] See http://www.oecd.org/corporate/mne/; for more on the development of the Guidelines see Černič (2010).

[2] Those include: EarthRights (see its call for reform at: www.earthrights.org/campaigns/reforming-oecd-guidelines-multinational-investment); and Amnesty UK (see its call for reform at: www.amnesty.org.uk/sites/default/files/uk_ncp_review_exec_summary.pdf).

[3] Our analysis does not distinguish between cases prior to and after the 2011 reforms to the process because, as we discuss later tin the paper, our analysis shows that fundamental problems with the Specific Instance Mechanism remain that have not been addressed by the revision. These 'system blockages' as we have called them following OECDWatch's analysis, existed prior to the revision and remain intact.

[4] All case citations can be found at Appendix 1.

[5] In the Belgian system "The [federal] ombudsperson can examine the action and decisions of the administrative authorities from complaints lodged or at the request of the House of Representatives. They strive to find concrete solutions to problems and to reconcile the points of view of the citizen and the administration. Based on their investigations, the ombudspeople report to the House of Representatives, make and submit recommendations" (http://www.federaalombudsman.be/content/faqs).

[6] According to its website, the Finnish Parliamentary Ombudsman "exercises oversight to ensure that public authorities and officials observe the law and fulfil their duties. The scope of oversight includes also other parties performing public functions. The aim is to ensure good administration and the observance of constitutional and human rights. The Ombudsman investigates complaints, launches its own investigations and carries out on-site inspections in official agencies and institutions" (http://www.oikeusasiamies.fi/Resource.phx/eoa/english/index.htx; see for example OECDWatch, 2007).

[7] Our analysis was delimited to cases from August 2002 to August 2016. For this reason, the number of cases for the years 2002 and 2016 do not take into account the total number of cases for these years but only cases from August to December 2002 and January to August 2016.

[8] See also the similar critiques of the voluntarist implementation of 'due diligence' provisions by Blome (2016) and Human Rights Watch (2017).