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NCP OECD grievance mechanism

- underused or ineffective?

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as always
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Plan of presentation

1. Are the Guidelines the binding law?
2. What is the OECD National Contact Point?
3. Network of OECD NCPs;
4. NCPs case law;
5. Are the Guidelines used ,outside' the OECD NCPs network?;
6. Final thoughts.



Are the Guidelines the binding law?

The OECD Guidelines for Multinational Enterprises

- **recommendations** addressed by governments:
 - **to multinational enterprises**
 - **operating in or from adhering countries;**
- provide **voluntary principles and standards** for responsible business conduct consistent with applicable laws and internationally recognised standards;
- **may go beyond** what enterprises are **legally required** to comply with;
- are **distinct** from matters of **legal liability and enforcement**.



Are the Guidelines the binding law?

UN Guiding Principles on Business and Human Rights

- The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.
- Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.



Are the Guidelines the binding law?

Corporate Sustainability Reporting Directive (CSRD)

- To ensure consistency with international instruments such as the UN Guiding Principles on Business and Human Rights and **the OECD Due Diligence Guidance for Responsible Business Conduct**, the due diligence disclosure requirements should be specified in greater detail than is the case in Article 19a(1), point (b), and Article 29a(1), point (b) of Directive 2013/34/EU.
- Sustainability reporting standards should also take account of internationally recognised principles and frameworks on responsible business conduct, corporate social responsibility, and sustainable development, including the UN Sustainable Development Goals, the UN Guiding Principles on Business and Human Rights, **the OECD Guidelines for Multinational Enterprises**, the OECD Due Diligence Guidance for Responsible Business Conduct and related sectoral guidelines [...].



Are the Guidelines the binding law?

Corporate Sustainability Due Diligence Directive (CSDDD)

- The concept of human rights due diligence was specified and further developed in the **OECD Guidelines for Multinational Enterprises** which extended the application of due diligence to environmental and governance topics. **The OECD Guidance on Responsible Business Conduct** and sectoral guidance are internationally recognised frameworks setting out practical due diligence steps to help companies identify, prevent, mitigate and account for how they address actual and potential impacts in their operations, value chains and other business relationships.
- This Directive is consistent with the joint communication of the Commission on the EU Action Plan on Human Rights and Democracy 2020-2024. That action plan defines as a priority strengthening the Union's engagement to actively promote the global implementation of the UN Guiding Principles and other relevant international guidelines such as **the MNE Guidelines**, including by advancing relevant due diligence standards.



Are the Guidelines the binding law?

Corporate Sustainability Due Diligence Directive (CSDDD)

The due diligence process set out in this Directive should cover the six steps **defined by the Guidance for Responsible Business Conduct**, which include due diligence measures for companies to identify and address adverse human rights and environmental impacts. That process encompasses the following steps:

- (1) integrating due diligence into policies and management systems;
- (2) identifying and assessing adverse human rights and environmental impacts;
- (3) preventing, ceasing or minimising actual and potential adverse human rights and environmental impacts;
- (4) monitoring and assessing the effectiveness of measures;
- (5) communicating and
- (6) providing remediation.



EU green taxonomy

1. Aims of the regulation (among others): channel private investments into sustainable activities and address concerns about 'greenwashing'
2. environmental objectives (substantial contribution and lack of significant harm):
 - a. climate change mitigation;
 - b. climate change adaptation;
 - c. the sustainable use and protection of water and marine resources;
 - d. the transition to a circular economy;
 - e. pollution prevention and control;
 - f. the protection and restoration of biodiversity and ecosystems.
3. Percentage indicators (KPIs): 1. turnover; 2. CapEx; 3. OpEx



EU green taxonomy

Article 3 Criteria for environmentally sustainable economic activities

For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity:

- a) contributes substantially** to one or more of the environmental objectives;
- b) does not significantly harm** any of the environmental objectives;
- c) is carried out in compliance with the minimum safeguards**; and
- d) complies with technical screening criteria**, that have been established by the Commission.



EU green taxonomy

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- d) **complies with technical screening criteria**, that have been established by the Commission.



EU green taxonomy

Article 18 Minimum safeguards

- 1. The minimum safeguards** [...] shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with **the OECD Guidelines for Multinational Enterprises** and **the UN Guiding Principles on Business and Human Rights**, including the principles and rights set out in **the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights**.
2. When implementing the procedures referred to in paragraph 1 of this Article, undertakings shall adhere to the principle of 'do no significant harm' referred to in point (17) of Article 2 of Regulation (EU) 2019/2088. (SFDR)



EU green taxonomy

Article 18 Minimum safeguards described by the final report on Social Taxonomy:

This was deemed necessary when creating a taxonomy that focused on environmental sustainability in order to prevent a situation whereby certain activities are categorised as sustainable even though the entity which carries out these activities violates:

- (i) fundamental human rights;
- (ii) workers' rights; or
- (iii) principles of good governance like anti-bribery measurements or non-aggressive tax planning.



EU green taxonomy

	Human Rights
EU companies in scope of CSRD should be considered non-compliant if one of the two criteria apply	<ol style="list-style-type: none">1. The company has not established an adequate human rights due diligence process as outlined in the UNGPs and OECD Guidelines for MNEs.2. There are signals that the company did not adequately implement HRDD and/or did abuse HR. These are:<ol style="list-style-type: none">a) The company has finally been found in breach of labour law or human rights.b) The following two indicators signal that the company does not engage with stakeholders although this is an integral part of the UNGPs. <ul style="list-style-type: none">• An OECD National Contact Point has accepted a case, however the company refuses to engage with the party which has initiated it, or the company has been found non-compliant with the OECD guidelines by the NCP.• The Business and Human Rights Resource Centre (BHRRRC) has taken up an allegation against the company, and the company has not answered to it within 3 months, only if these letters are less than 2 years old.



SFDR PAI

- Violations of UN Global Compact Principles and Organizations for Economic Cooperation and Development (OECD) guidelines for multinational enterprises
- Lack of processes and compliance mechanisms to monitor compliance with UN Global Compact Principles and OECD Guidelines for Multinational Enterprises
- Unadjusted general pay gap
- Board gender diversity
- Exposure to controversial weapons (anti-personnel mines, cluster munitions, chemical weapons, and biological weapons)

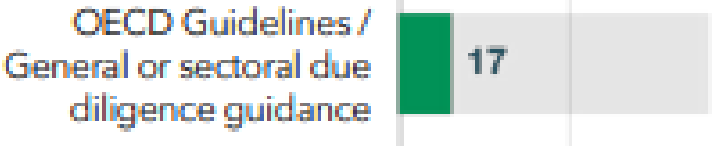


Use of the OECD Guidelines in NFRs

Non-financial statement specifies that it relies on:

All countries Italy Spain Poland Greece Romania

2019 NFRs – 1000 companies



2020 NFRs – 300 companies



NCPs network



What are OECD National Contact Points (NCPs)

1. National Contact Points for Responsible Business Conduct (NCPs for RBC) are agencies established by governments. Their mandate is twofold:
 - a) to promote the OECD Guidelines for Multinational Enterprises, and related due diligence guidance,
 - b) and **to handle cases** (referred to as “**specific instances**”) as a non-judicial grievance mechanism.
2. All 51 governments adhering to the OECD Guidelines which have the legal obligation to set up an NCP established one.
3. In 2020, NCPs celebrated 20 years as non-judicial grievance mechanisms.



What are OECD National Contact Points (NCPs)

1. Governments have the flexibility to organise their NCP in the form and structure they deem most appropriate.
2. There is no prescribed model, NCPs must operate in accordance with.
3. 'Core criteria',
 - a) visibility,
 - b) accessibility,
 - c) transparency and
 - d) accountability.
4. NCPs must handle cases in a way that is **impartial, predictable, equitable and compatible with the Guidelines.**



NCPs network

NCPs FOR RESPONSIBLE BUSINESS CONDUCT



National Contact Points (NCPs) are agencies established by governments. They promote the OECD Guidelines for Multinational Enterprises and related due diligence guidance, and handle cases - "specific instances" - as a non-judicial grievance mechanism. 50 governments have an NCP for RBC.



NCPs for RBC are the only internationally recognised non-judicial grievance mechanism for RBC.

NCPs can handle cases involving companies operating 'in & from' their territory.



Since 2011 the 3 most prevalent themes were:

- Human rights (58%)
- General policies of the Guidelines (51%)
- Employment & industrial relations (39%)



Since 2011 the primary submitters of cases to NCPs have been:

- NGOs (40%)
- Trade Unions (26%)
- Individuals (25%)



Since 2011, 42% of concluded cases by NCPs resulted in agreement and 31% of all concluded cases have resulted in a company policy change.



50 Guidelines adherent countries account for over 70% of global FDI, which highlights the global reach of NCPs.

Since 2000 NCPs have handled over 500 cases in over 100 countries and territories.



Notifier

Who may notify NCPs of an alleged breach of the Guidelines?

“Party concerned”

- organizations;
- individuals;
- does not have to be at the same time affected by operations of the enterprise;
- needs to prove its connection to the case



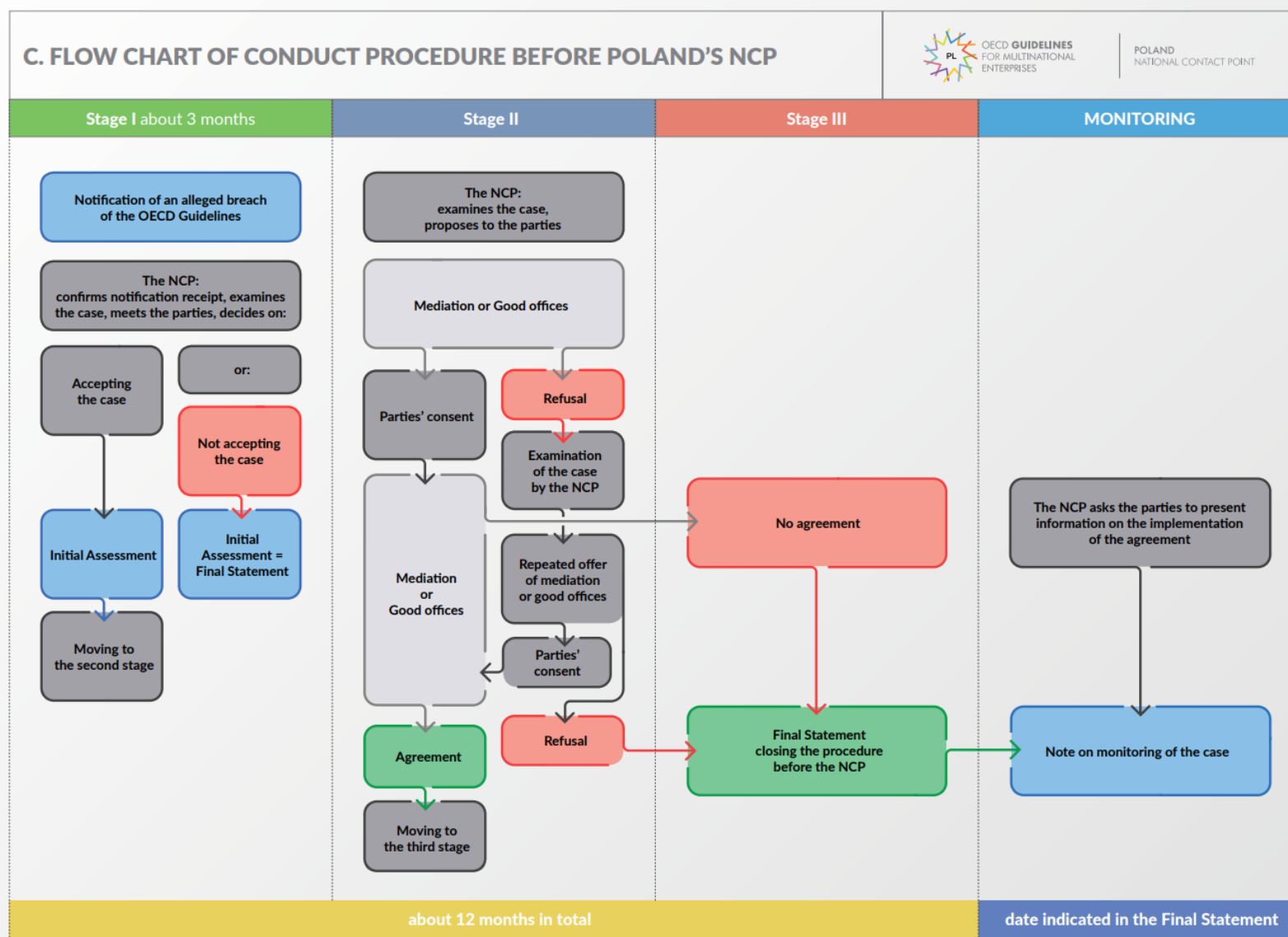
Polish OECD NCP procedure

The procedure before the NCP covers three stages total duration of which should not exceed 12 months.

1. Stage I: From receiving the notification to the preparation of an Initial Assessment (about 3 months from the receipt of the notification).
2. Stage II: From accepting the case for consideration by the NCP and preparation of the Initial Assessment. Includes helping the parties resolve the dispute.
3. Stage III: Includes preparation and publication of the Final Statement (not later than 12 months after receiving the notification), which ends the procedure before the NCP.
4. Recommendations for parties and agreement.
5. Monitoring.



Polish OECD NCP procedure



Consequences of violating OECD guidelines

NCP

- Is not a party of a specific instance and does not act on behalf of the one of parties;
- Delivers good offices (mediation and conciliation);

Consequences of violation

- 1. To date, primarily image consequences;**
- 2. Once taxonomy and other ESG regulations come into effect – potential real financial impact.**

Specific instances conducted by the Polish NCP

1. Until 2017, mainly labor rights cases
2. OLX - environment, consumer rights, general principles, indirectly human rights
3. PZU - environment, disclosure of information, general principles, human rights, consumer rights
4. Lotos – environment, human rights, disclosure of information
5. Valeo - environment, general principles, human rights



Potential areas of violations in Poland

Environment

- »Energy sector

Employment and Industrial Relations

- »Employees' rights

Consumer interests

- »Offering services and products the use of which is prohibited by law or unethical

Human rights

- »Supply chain



NCPs specific instances

SCOPE: Between 2000 and 2019, NCPs have handled more than 500 cases relating to company operations in over 100 countries and territories

THEMES: The majority of cases since 2011 deal with human rights (57%), followed by general policies, which include expectations related to due diligence (53%), followed by employment and worker issues (40%) and environment (21%).

SECTOR: 29% of cases since 2000 relate to issues arising from multinational enterprises operating in the manufacturing sector.



NCPs specific instances

SUBMITTERS: Trade unions and non-governmental organisations (NGOs) each account for 40% and 38%, respectively, of the cases submitted to NCPs since 2000.

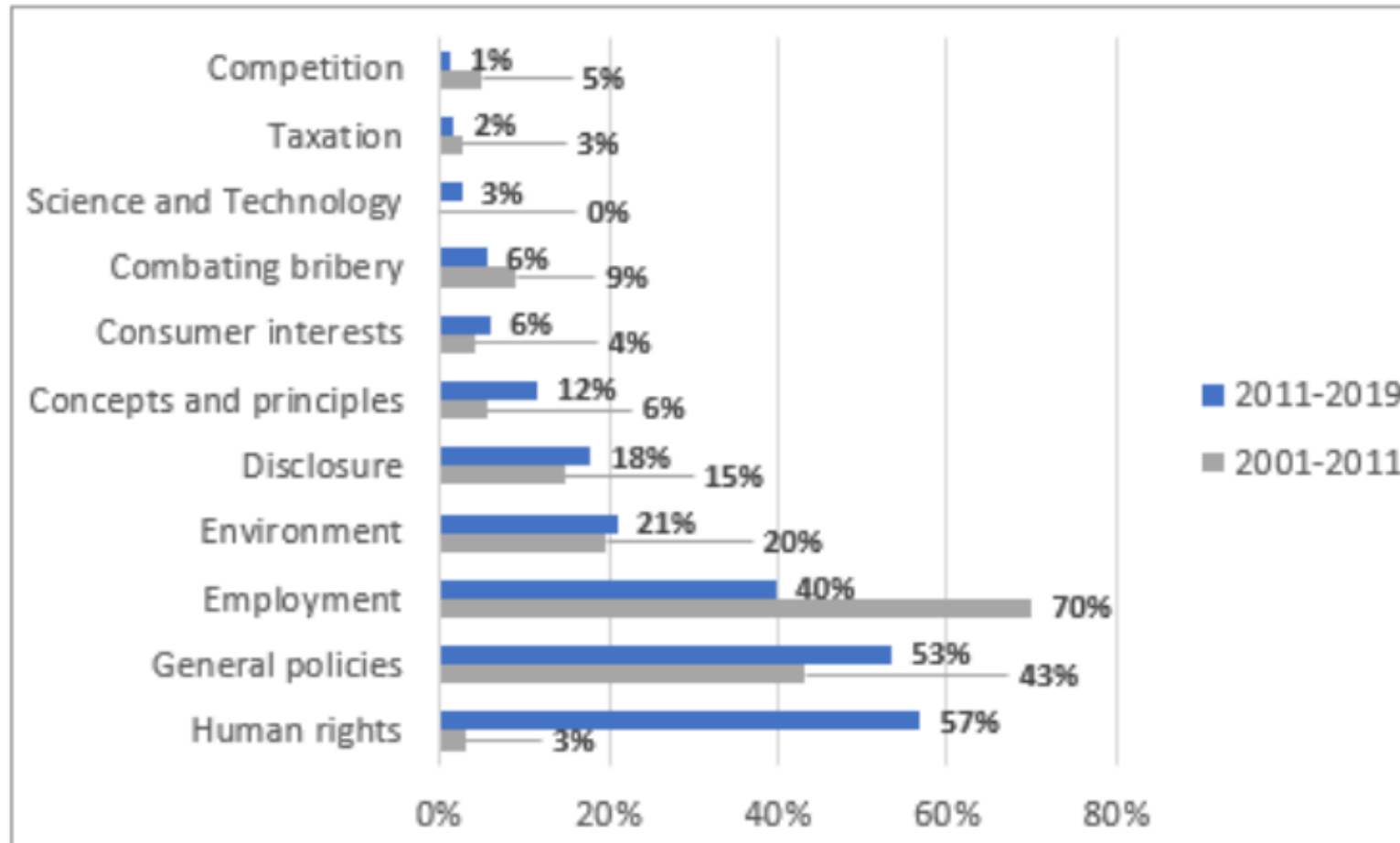
OUTCOMES: Between 2011 and 2019, over a third of all cases which were accepted for further examination by NCPs (36%) resulted in some form of agreement between the parties; approximately 33% resulted in an internal policy change by the company in question



NCPs specific instances

Chapters of the OECD Guidelines referenced in cases (before and after 2011)

and Forestry &



Chosen cases

ENI S.p.A., ENI International BV, and CWA and ACA

Following mediation organised by the NCP of Italy in July 2019, ENI S.p.A, a major Italian oil and gas multinational enterprise, and a group of NGOs in Nigeria, signed a Terms of Settlement. In the agreement, the parties concluded that the company would construct a drainage system that would remedy impacts caused by violent flooding. The violent flooding was allegedly linked to the company's construction and road infrastructure development, which supported its oil drilling operations in 1970



Chosen cases

Crédit Suisse and Society for Threatened Peoples Switzerland (North Dakota Access Pipeline)

Following mediation organised by the Swiss NCP in September 2019, Credit Suisse and Society for Threatened Peoples (STP) reached an agreement related to Credit Suisse's business relationship with construction companies involved in the development of the Dakota Access Pipeline in the United States. According to the agreement, Credit Suisse will include the concept of Free Prior Informed Consent of indigenous peoples (FPIC), in its internal sector specific policies for Oil & Gas, Mining and Forestry & Agribusiness.



Chosen cases

Grupa OLX and Frank Bold Foundation

Following mediation organised by the Polish NCP April 2019, a letter of intent was signed by the Frank Bold Foundation, an NGO, and Grupa OLX, an internet service company, in which the parties agreed that company would delete advertisements allegedly violating environmental protection provisions from its web platform.



Chosen cases

Mining in Liberia

- »Combating bribery, bribe solicitation and extortion, General policies
- »misappropriation of public funds

Alleging that ArcelorMittal had breached the combatting bribery, and general policies provisions of the Guidelines in Liberia. As ArcelorMittal is based in Luxembourg, the specific instance was transferred to the Luxembourg NCP, while the Netherlands NCP plays a supporting role.

Among numerous allegations, FoE and SDI's concerns included:

- 1.ArcelorMittal's donation of 100 pick-up trucks to the Government of Liberia (GoL) in August 2008;
- 2.misappropriation and misuse of the County Social Development Fund (CSDF), managed by both ArcelorMittal and the GoL;
- 3.lack of communication with local communities about the impact of ArcelorMittal's operations; and
- 4.potential mining or exploration in the East Nimba Nature Reserve.

the CSDF be transformed into a Trust or Foundation as an independent body composed of representatives from the government, civil society organizations, and ArcelorMittal. In addition, a 'board for grievances' would be available to hear appeals concerning funded projects.



Chosen cases

F1 in Bahrain

- »General policies, Human rights
- »Human rights abuses

More specifically the NGO alleged that holding Grand Prix events in Bahrain in 2012, 2013 and 2014 has helped to present an international image of Bahrain which is at odds with the reality of ongoing human rights abuses. It also alleges that the events have given rise to new human rights abuses, because of the response of security forces to protests associated with the events.



Does it ring a bell



Chosen cases

Oil exploration in Congo

- »Environment, General policies, Human rights
- »National park

Oil exploration in an area of the Virunga National Park in the Democratic Republic of the Congo (DRC). More specifically, the NGO alleged that oil exploration was in conflict with international agreements – particularly regarding the Park's status as a World Heritage site – and DRC law and posed risks to the local environment and local communities dependent upon the surrounding ecosystem



Chosen cases

German garment industry in Bangladesh

- » Human rights, general principles
- » Supply chain, fire in a factory

German multinational Enterprise had breached the “General policies”, “Human Rights” as well as the “Employment and Industrial Relations” provisions of the Guidelines in Bangladesh



Chosen cases

rocuronium bromide in USA

- »Human rights, disclosure
- »Lethal injection

The manufacture of rocuronium bromide and links to lethal injection execution through sales of the generic medicine in the United States.



Chosen cases

bank in Netherlands

- »Consumer interests, Disclosure, Environment
- »Climate policy

Although ING reports about its own, direct, greenhouse gas emissions, it does not report publically about its indirect, product emissions through companies and projects it finances worldwide cause and has not yet announced to do so in the near future. Moreover, the bank has not yet set its own targets to reduce the emission of greenhouse gasses resulting from its financial products.



Chosen cases

Environmental NGOs in Cameroon

- »General policies, Human rights, Environment
- »NGOs recognized as MNEs
- »The Baka people

WWF has not observed the Guidelines in particular by failing to conduct due diligence and by not making its support for the demarcation of the protected areas conditional upon the free, prior and informed consent of the Baka people of southeast Cameroon.



Chosen cases

Heineken in Congo

»Combating bribery, bribe solicitation and extortion, Concepts and principles, Employment and industrial relations, General policies

»Dismissal of 168 employees

Heineken, a Dutch multinational and its subsidiary Bralima operating in the Democratic Republic of Congo (DRC). The three individuals stated that Bralima had not observed the Guidelines in the dismissals of 168 former employees in the DRC between 1999 and 2003.



Chosen cases

Kinross Gold Corporation Group in Brasil

- »Environment, General policies, Human rights
- »No link proved but companies declared to help

the city of Paracatu's neighbouring associations alleging that Kinross Brasil Mineração, part of the Canadian multinational enterprise "Kinross Gold Corporation Group", did not observe the Guidelines.

More specifically, the submitters alleged that the use of explosives by Kinross damaged surrounding homes and that some of the infrastructure built by Kinross made access from the rural area of Machadinho to the city of Paracatu difficult. Although no link was established between the company's use of explosives and the damage to homes, Kinross stated its intent to repair the homes in three urban neighbourhoods through a partnership project with the City of Paracatu and the active participation of the community.



Chosen cases

Statkraft in Sweden

- »Environment, General policies, Human rights
- » the Sami reindeer herding collective

Statkraft AS, a Norwegian multinational enterprise, had not observed the general policies, human rights, and environment provisions of the Guidelines by planning to build a wind power plant on reindeer herding ground in Sweden.

The Sami reindeer herding collective acknowledge that Statkraft had consulted with the community during the planning stages of the wind power plant, but content that "meaningful engagement" had not taken place.



Valeo case

- In particular, the OECD NCP recommends that the Company implement appropriate due diligence procedures in relation to environmental issues, respect for human rights and conduct a detailed risks assessments in relation to environmental issues and respect for human rights in the Company's operations.
- The French Due Diligence law: Duty of Vigilance law (Loi de Vigilance)
 - establish, implement and publish its own vigilance plan



Netherlands

Climate case Shell

ECLI:NL:RBDHA:2021:5339

In its interpretation of the unwritten standard of care, the court follows the UN Guiding Principles. The UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights. The UNGP reflect current insights. They do not create any new right nor establish legally binding obligations. The UNGP are in line with the content of other, widely accepted soft law instruments, such as the UN Global Compact 'principles' and the OECD Guidelines for Multinational Enterprises (the OECD guidelines).



Netherlands

Climate case Shell

ECLI:NL:RBDHA:2021:5339

Since 201, the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGP. For this reason, the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care. Due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP.



Netherlands

Climate case Shell

ECLI:NL:RBDHA:2021:5339

It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other ‘internationally recognized human rights’, including the ECHR. For example, the OECD Guidelines for Multinational Enterprises (the OECD guidelines) state the following: [...]



Netherlands

Climate case Shell

ECLI:NL:RBDHA:2021:5339

The court orders RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO₂ emissions into the atmosphere (Scope 1, 2 and 3)

due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.



Risks

- Location of the NCP
- Lack of the NCP impartiality
- Lack of the NCP visibility, recognition and respect
- Lack of the NCP expert background
- Parties attitudes



When to choose the NCP's good offices

1. A chance for an agreement
2. Lack of hard regulations/binding law
3. A Significant MNE
4. A non-financially reporting MNE
5. Costs
6. Inadmissible litigation
7. A case involves impacts in value chain



Can NGOs campaign on the specific instance?

Oil exploration in Nigeria

1. Shell
2. Friends of the Earth International, Friends of the Earth Netherlands, and Amnesty International



NCP OECD grievance mechanism - underused or ineffective?

It depends...

The significance and legal recognition of the Guidelines is rising.

Mechanism cannot be effective without specific instances and engagement of:

1. notifiers;
2. MNEs;
3. NCPs.

Lack of effective enforcement procedure.

Voluntariness.





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