

Guide for National Contact Points on issuing Recommendations and Determinations when handling Specific Instances



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1. Introduction

All governments adhering to the OECD Declaration on International Investment and Multinational Enterprises are required to establish a National Contact Point (NCP). NCPs are mandated to further the effectiveness of the OECD Guidelines for Multinational Enterprises ('the Guidelines') by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. The Guidelines do not provide a formal definition of 'specific instances', however the term is used to describe situations of alleged non-observance of the Guidelines brought to NCPs.¹ Between 2000 and 2018 over 400 specific instances have been submitted to NCPs. Over this period, most NCPs have developed rules of procedure and continue to refine their processes of handling specific instances to address challenges and improve outcomes.

The specific instance procedure is intended to provide a consensual, non-adversarial, forward-looking 'forum for discussion' for issues that arise relating to implementation of the Guidelines.²

When handling specific instances, NCPs regularly issue recommendations, and some have opted to make determinations setting out whether a company has observed the Guidelines. At the meeting of the NCP Network in December 2017, NCPs requested an overview of such practices so as to identify trends, challenges and good practices with respect to this issue. Previous versions of this paper were presented at the June and December 2018 meetings of the Network of NCPs. This version takes into account the comments received from NCPs and stakeholder input from BIAC, TUAC and OECD Watch. It also includes updates to specific instances as at December 2018.

¹ OECD (2016) Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>

² OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, Section I paragraph C

2. Guidelines provisions

Possible outcomes of specific instance procedures

According to the Procedural Guidance to the Guidelines ('the Procedural Guidance'),³ specific instance processes may conclude in a number of ways,⁴ each triggering a different kind of action by the NCP, namely:

1. The NCP concludes that the specific instance does not merit further examination. In this situation the NCP should issue a *statement* describing, at a minimum, the issues raised and the reasons for the NCP's decision;
2. The NCP concludes that the specific instance merits further examination, offers 'good offices' to help the parties resolve the issue⁵ and:
 - a. The parties reach agreement as a result of the NCP's intervention. In this situation the NCP should issue a *report* describing, at a minimum, the issues raised, the procedures initiated by the NCP in assisting the parties, and when the agreement was reached;
 - b. The parties do not reach agreement. In this situation the NCP should issue a *statement* describing, at a minimum, the issues raised, the reasons why the NCP decided that the issues merit further consideration, and the procedures initiated by the NCP in assisting the parties.

The statements and reports described above are to be made public by the NCP, though the amount of detail contained in these documents may vary if there is a need to protect the confidentiality of sensitive business and other information.⁶ For the purposes of this paper the collective term 'statements' will be used to refer to both statements and reports.

Procedural Guidance on recommendations

NCPs may issue recommendations as part of their public statements, though the Procedural Guidance does not provide a definition of recommendations. For the purposes of this paper, the following working definition is proposed:

Recommendations are suggested actions the parties are encouraged to take in order to resolve the issues; and in particular, suggested actions that the enterprise in question is encouraged to take in order to observe the Guidelines.

³ The Implementation Procedures of the OECD Guidelines for Multinational Enterprises are made up of: (i) the Decision of the Council on the Guidelines for Multinational Enterprises, as amended in 2011, (ii) the Procedural Guidance and (iii) the Commentary on the Implementation Procedures. The Procedural Guidance sets out the role of NCPs and the role of the Investment Committee with regards NCPs.

⁴ Procedural Guidance, para. C.3.

⁵ Procedural Guidance, para. C.2.

⁶ Procedural Guidance, para. C4; Commentary to Procedural Guidance, paras. 31-34.

The Procedural Guidance notes that NCPs *will* make recommendations *as appropriate* on the implementation of the Guidelines in those situations when the parties do not reach agreement (see Box 1 below). This is a strong call to include a recommendation in such circumstances, while allowing the NCP flexibility regarding what language or format to use.⁷ In all other circumstances, the inclusion of recommendations in the statement or report is at the discretion of the NCP.

Box 1. Procedural Guidance of the Guidelines (Commentary, para 35)

‘If the parties involved fail to reach agreement on the issues raised or if the NCP finds that one or more of the parties to the specific instance is unwilling to engage or to participate in good faith, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for. The statement should identify the parties concerned, the issues involved, the date on which the issues were raised with the NCP, any recommendations by the NCP, and any observations the NCP deems appropriate to include on the reasons why the proceedings did not produce an agreement.’

Determinations

Determinations are not explicitly described or called for in the Procedural Guidance, rather the issuance of determinations is a practice carried out by some NCPs, and as such they are optional.

For the purposes of this paper, the following working definition of determinations is proposed:

Determinations are statements by NCPs setting out their views on whether the company observed the Guidelines.

Structure of the paper

This scoping paper seeks to address the following questions:

- What trends can be observed with regard to the inclusion of recommendations and determinations (section 3), namely:
 - What is the current rate of inclusion of recommendations and determinations in specific instance statements across NCPs?
 - What factors may influence the inclusion of recommendations and determinations in specific instance statements?
 - What language is used in the formulation of recommendations and determinations by NCPs?
- What particular challenges and opportunities are associated with the inclusion of recommendations and determinations in specific instance statements? (section 4)

⁷

Commentary, para. 35.

- What are the various stakeholder perspectives on recommendations and determinations? (section 5)

3. Mapping

In order to determine the scope of the use of recommendations and determinations by NCPs, this mapping exercise firstly provides an overview of:

- whether an NCP's rules of procedures (RoP) include the possibility to issue recommendations and/or determinations;
- which NCPs have actually issued recommendations and/or determinations in cases filed in or after 2011, and how often;
- which cases include a recommendation and/or determination.

Secondly, the mapping examines whether the issuance of recommendations and/or determinations is correlated with the following factors:

- the chapter(s) of the guidelines covered;
- the stage reached in the procedure and whether or not agreement between the parties has been reached;
- the complexity of the issues.

Finally, the mapping explores the language used in the formulation of recommendations and determinations.

This mapping is based on data from the OECD Specific Instances database and from annual reports submitted to the Investment Committee by NCPs. The cases covered were all filed in or after 2011 and closed (concluded or not accepted) by 2018, constituting a sample of 211 closed specific instances.⁸

Which NCPs issue recommendations and/or determinations?

Forty NCPs out of 48 have published rules of procedures. Table 1 shows that, of these 40, 33 include a reference to the making of recommendations (83%). Thirty of the 48 NCPs have closed at least one case in the period considered. The table shows that 24 out of these 30 NCPs have made recommendations in at least one case (80%). In three cases, NCPs have issued recommendations although their rules of procedure do not provide for recommendations.

⁸ Dates mentioned in case references are the dates of submission as recorded in the OECD Case Database. There were four cases concluded in 2018 for which the final statement is pending. As such they have been excluded from the sample.

Table 1. NCP rules of procedure and practice on recommendations

	BoP mention recommendations	NCP issued recommendation(s) since 2011			
Argentina	✓	✓	Kazakhstan	X	No cases
Australia	✓	✓	Korea	✓	✓
Austria	✓	✓	Latvia	✓	X
Belgium	X	✓	Lithuania	✓	No cases
Brazil	✓	✓	Luxembourg	✓	✓
Canada	✓	✓	Mexico	✓	✓
Chile	✓	✓	Morocco	✓	X
Colombia	✓	✓	Netherlands	✓	✓
Costa Rica	✓	No cases	New Zealand	X	X
Czech Republic	✓	No cases	Norway	✓	✓
Denmark	✓	✓	Peru	✓	X
Finland	✓	✓	Poland	✓	X
France	✓	✓	Slovak Republic	✓	No cases
Germany	✓	✓	Spain	X	✓
Greece	X	No cases	Sweden	✓	✓
Hungary	✓	No cases	Switzerland	✓	✓
Ireland	✓	No cases	Turkey	X	X
Israel	✓	No cases	Ukraine	✓	No cases
Italy	✓	✓	United Kingdom	✓	✓
Japan	X	✓	United States	✓	✓
			Total	31	24

Note: This table only lists NCPs with published rules of procedures and/or those that have closed a specific instance since 2011.

Table 2 shows that, among all NCPs, the rules of procedure of 9 NCPs (19%) provide for the issuance of determinations. Among the 40 NCPs which have rules of procedure in place, the ratio is 23%. The table shows that 13 out of a total of 48 NCPs issued a determination since 2011 (27%). Among the 30 NCPs that closed a case in the period considered, the ratio is 43%. Nine NCPs have issued determinations even though their rules of procedure do not explicitly provide for this possibility. It is important to note that at times language in statements on whether the company observed the Guidelines or not is not explicit or categorical and as such whether a statement contains a determination can be a matter of interpretation.

Table 2. NCP rules of procedure and practice on determinations

	RoP mention determinations	NCP issued determination(s) since 2011
Argentina	X	X
Australia	X	✓
Austria	X	X
Belgium	X	X
Brazil	X	X
Canada	X	✓
Chile	✓	✓
Colombia	✓	X
Costa Rica	X	No cases
Czech Republic	X	No cases
Denmark	X	✓
Finland	✓	✓
France	X	✓
Germany	X	X
Greece	X	No cases
Hungary	X	No cases
Ireland	X	No cases
Israel	X	No cases
Italy	X	✓
Japan	X	X
Kazakhstan	X	No cases
Korea	X	✓
Latvia	X	X
Lithuania	✓	No cases
Luxembourg	✓	X
Mexico	X	X
Morocco	X	✓
Netherlands	X	✓
New Zealand	X	X
Norway	✓	✓
Peru	X	X
Poland	✓	X
Slovak Republic	X	No cases
Spain	X	X
Sweden	X	✓
Switzerland	X	X
Turkey	X	X
Ukraine	✓	No cases
United Kingdom	✓	✓
United States	X	X
Total	8	13

Note: This table only lists NCPs with published rules of procedures and/or those that have closed a specific instance since 2011.

Table 3 shows that 91 of the 211 closed cases (concluded or not accepted) include recommendations, that is, 43%.

Table 3. Cases which include at least one recommendation

	Name of case	Year closed	Lead NCP
1.	Lafarge Holcim Ltd and Ricardo Molina, an individual	2016	Argentina
2.	Central de Trabajadores de la Tecnología y la Comunicación (CEPETEL) - TELECOM Argentina S.A	2018	Argentina
3.	Barrick Gold Corporation and FOCO in Argentina	2018	Argentina
4.	Molinos Río de la Plata S.A – Maxiconsumo S.A	2018	Argentina
5.	Prof. Ben Saul, Sydney Centre for International Law against Serco Group plc	2017	Australia
6.	Inclusive Development International and Equitable Cambodia, and ANZ Banking Group	2018	Australia
7.	Andritz Hydro GmbH and Finance and Trade Watch Austria	2017	Austria
8.	Destruction of property near a mine in the Democratic Republic of Congo	2013	Belgium
9.	Environmental issues relating to the construction of a harbour	2014	Belgium
10.	Socfin Group/Socapalm and Sherpa concerning operations in Cameroon	2017	Belgium
11.	Etex, Building and Wood Workers' International (BWI) and Ceramic Workers' Union of the Republic of Argentina (FOCRA) - 29 February 2016	2017	Belgium
12.	Mass layoffs in the banking sector in Brazil	2013	Brazil
13.	C&A Moda Ltda and individual	2016	Brazil
14.	Gold mining in Mongolia	2012	Canada
15.	Mining in Papua New Guinea	2014	Canada
16.	Gold mining in China's Tibet Autonomous Region	2015	Canada
17.	Gold mining in Mali	2017	Canada
18.	Seabridge Gold and the Southeast Alaska Conservation Council	2017	Canada
19.	Banro Corporation and group of former employees	2018	Canada
20.	Electricity supplier in Chile	2015	Chile
21.	Food service in Chile	2015	Chile
22.	Retail sector in Peru	2015	Chile
23.	Hoteles Decamerón Colombia S.A.S. (Hodecol S.A.S) and the National Union of the Gastronomic, Hotel and Tourism Industry Workers of Colombia (SINTHOL)	2017	Colombia
24.	Drummond and the National Trade Union of Diseased and Disabled Workers of the Mining Sector (SINTRADEM), the General Federation of Labor, Cesar Office (CGT Cesar), and the General Confederation of Labor, Colombia (CGT Colombia)	2018	Colombia
25.	ExxonMobil de Colombia S.A. Vs. National Trade Union of ExxonMobil Colombia Workers (SINTRAEXXOM)	2018	Colombia
26.	Alleged human and labour rights in Denmark and Portugal	2014	Denmark
27.	PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers	2016	Denmark
28.	Danish Ministry of Defence in regard to the contracting and building of the inspection vessel Lauge Koch	2018	Denmark
29.	Complaint against a higher Danish educational institution's policy and respect to human rights	2018	Denmark
30.	Xayaburi Dam in Laos	2013	Finland
31.	Industrialisation of pasturage sites in India	2013	France
32.	Freedom of representation in France	2014	France
33.	Closure of a paper mill in France	2015	France
34.	Violation of employee rights in Cameroon	2015	France
35.	Alsetex, Etienne Lacroix Group and Americans for Democracy and Human Rights in Bahrain (ADHRB)	2016	France
36.	Somadex and former employees	2016	France
37.	Vinci and Vinci Airports and ITUC in Cambodia	2018	France
38.	Alleged human rights violations in Bangladesh	2014	Germany
39.	Alleged human rights violations in various countries	2014	Germany
40.	Labour conditions in the automobile sector in Germany	2015	Germany
41.	Alleged labour and trade union rights violation in India	2017	Germany
42.	Alleged violation of the Guidelines in Bangladesh	2018	Germany
43.	Labour rights in Italy	2013	Italy

	Name of case	Year closed	Lead NCP
44.	Survival International Italia vs Salini Impregilo S.p.A.	2017	Italy
45.	FIOM-CGIL / NV Bekaert	2018	Italy
46.	Employee rights in the manufacturing sector in Thailand	2017	Japan
47.	Forced labour in Uzbekistan	2015	Korea
48.	Mining in Liberia	2013	Luxembourg
49.	Mining in Mexico	2012	Mexico
50.	Union favouritism in Mexico	2013	Mexico
51.	Human rights breaches related to manufacturing of iron in India	2013	Netherlands
52.	Oil spills in the Niger Delta	2013	Netherlands
53.	Poor employment standards in the Netherlands	2013	Netherlands
54.	Oil sector in Nigeria	2014	Netherlands
55.	Atradius Dutch State Business and NGOs	2016	Netherlands
56.	Mylan N.V. and an individual, Mr. Bart Stapert	2016	Netherlands
57.	Rabobank, Bumitama Agri Group (BGA) and the NGOs Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie	2016	Netherlands
58.	Bralima, Heineken and former employees of Bralima	2017	Netherlands
59.	Philips Lighting/Royal Philips	2017	Netherlands
60.	FS FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters vs Bresser	2018	Netherlands
61.	Nuon Energy N.V. and/or Nuon Wind Development B.V., and Stichting Hou Friesland Mooi	2018	Netherlands
62.	Fisheries and fish processing in Western Sahara	2013	Norway
63.	Human rights breaches related to manufacturing of iron in India	2013	Norway
64.	Bribery allegations in India	2014	Norway
65.	Due diligence in the financial sector in Norway	2015	Norway
66.	Due diligence in the financial sector in Norway	2015	Norway
67.	Hydropower development in Malaysia	2015	Norway
68.	Det norske oljeselskapet DNO ASA the trade union Industri Energi	2018	Norway
69.	Security sector in Brazil, Colombia, Paraguay and Peru	2016	Spain
70.	Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village	2016	Sweden
71.	Tax avoidance in Zambia	2012	Switzerland
72.	Manufacturing in India	2014	Switzerland
73.	Fédération Internationale de Football Association (FIFA) and Americans for Democracy and Human Rights in Bahrain (ADHRB)	2016	Switzerland
74.	Holcim and NGO consortium	2017	Switzerland
75.	Human Rights of the Baka people in environmentally protected areas Cameroon	2017	Switzerland
76.	Displacement of local populations and environmental degradation in Bangladesh	2014	United Kingdom
77.	Supplying of surveillance equipment in Bahrain	2014	United Kingdom
78.	Alleged general policy breaches in Israel and the Palestinian Authority	2015	United Kingdom
79.	Eurasian Natural Resources Corporation (ENRC) and the NGOs Rights and Accountability in Development (RAID) and Action Contre l'Impunité pour les Droits Humains (ACIDH)	2016	United Kingdom
80.	Alleged impacts on local populations of an oil and gas facility in Kazakhstan	2017	United Kingdom
81.	Environmental issues in Australia, Switzerland, and the UK	2012	United States
82.	Agricultural investment in Cambodia	2013	United States
83.	Health and safety concerns in Egypt and Tunisia	2013	United States
84.	Alleged breach of employment and industrial relations in Turkey	2015	United States
85.	Management interference with employees' trade union rights in the United States	2015	United States
86.	ASARCO, Grupo Mexico, USW and Mineros	2016	United States
87.	PepsiCo India and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF)	2016	United States
88.	Starwood Hotels & Resorts Worldwide and IUF	2016	United States
89.	The Boeing Company and Lockheed Martin Corporation and European Centre for Democracy and Human Rights (ECDHR), Defenders for Medical Impartiality, and Arabian Rights Watch Association	2016	United States
90.	Jamaa Resources Initiatives and a U.S. Company for conduct in Kenya	2017	United States
91.	The Coca-Cola Company and IUF regarding alleged conduct in Indonesia	2018	United States

Table 4 below shows that 37 out of 211 closed cases (18%) contain a determination as to whether the company observed the Guidelines. Among these cases, 12 state that the Guidelines were not observed, 19 state that there was no breach of the Guidelines, and six contain both types of determinations. Cases containing both types of determinations indicate that some provisions of the Guidelines were not observed while others were; or that a company may not have observed the Guidelines provisions at a particular point in time, and then observed them at a different point in time.

Table 4 further shows that four NCPs have issued determinations in three or more cases (Denmark, France, Netherlands, United Kingdom), and have all done so both for determinations of observance and non-observance. Two other NCPs (Canada and Norway) have issued determinations of both observance and non-observance. One NCP (Australia) has only issued a determination of non-observance, while six NCPs (Chile, Finland, Italy, Korea, Morocco and Sweden) have only issued determinations of observance.

Table 4. Cases which include a determination

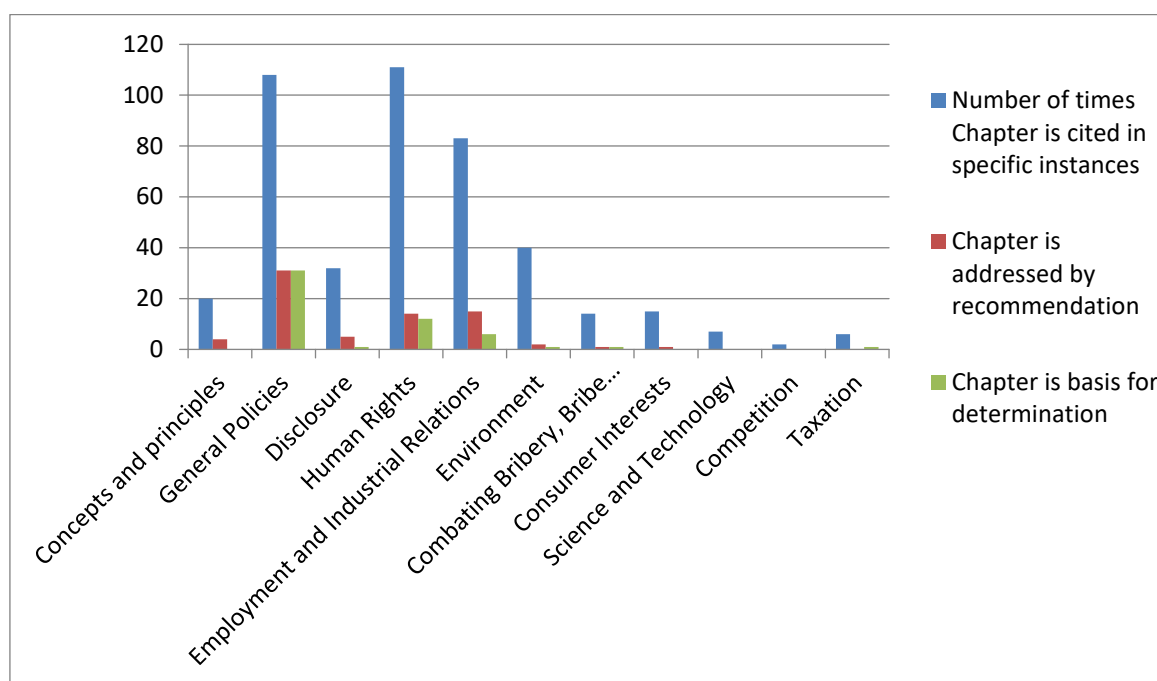
	Name of case	Year closed	Lead NCP	Determination that the Guidelines were not observed	Determination that the Guidelines were observed
1.	Inclusive Development International and Equitable Cambodia, and ANZ Banking Group	2018	Australia	✓	
2.	Gold mining in China's Tibet Autonomous Region	2015	Canada	✓	
3.	Seabridge Gold and the Southeast Alaska Conservation Council	2017	Canada		✓
4.	Violation of intellectual property rights in Chile	2013	Chile		✓
5.	Personal defamation in Denmark	2013	Denmark		✓
6.	Alleged human and labour rights in Denmark and Portugal	2014	Denmark		✓
7.	PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers	2016	Denmark	✓	
8.	Danish Ministry of Defence in regard to the contracting and building of the inspection vessel Lauge Koch	2018	Denmark	✓	
9.	Due diligence of a company financing a mining company in Armenia	2018	Denmark		✓
10.	Higher education institution in Denmark regarding their educational policy and respect for human rights	2018	Denmark		✓
11.	Xayaburi Dam in Laos	2013	Finland		✓
12.	Car manufacturing plant closure in France	2012	France	✓	
13.	Industrialisation of pasturage sites in India	2013	France	✓	✓
14.	Freedom of representation in France	2014	France	✓	✓
15.	Closure of a paper mill in France	2015	France	✓	
16.	Violation of employee rights in Cameroon	2015	France		✓
17.	Alsetex, Etienne Lacroix Group and Americans for Democracy and Human Rights in Bahrain (ADHRB)	2016	France		✓
18.	Somadex and former employees	2016	France		✓
19.	Natixis and UNITE HERE	2017	France	✓	
20.	Vinci and Vinci Airports and ITUC in Cambodia	2018	France		✓
21.	Survival International Italia vs Salini Impregilo S.p.A.	2017	Italy		✓
22.	Human rights due diligence in Italtel S.p.A agreement with the Telecommunications Company of Iran	2018	Italy		✓
23.	Forced labour in Uzbekistan	2015	Korea		✓
24.	Audit company and individual in Morocco	2016	Morocco		✓
25.	Human rights breaches related to manufacturing of iron in India	2013	Netherlands		✓
26.	Atradius Dutch State Business and NGOs	2016	Netherlands	✓	✓
27.	FS FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters vs Bresser	2018	Netherlands	✓	
28.	Human rights breaches related to manufacturing of iron in India	2013	Norway	✓	
29.	Det norske oljeselskapet DNO ASA the trade union Industri Energi	2018	Norway	✓	✓
30.	Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village	2016	Sweden		✓
31.	Business relationships in Russia (Bank B)	2012	United Kingdom		✓
32.	Business relationships in Russia (Bank C)	2012	United Kingdom		✓
33.	Displacement of local populations and environmental degradation in Bangladesh	2014	United Kingdom	✓	✓
34.	Supplying of surveillance equipment in Bahrain	2014	United Kingdom	✓	
35.	Alleged general policy breaches in Israel and the Palestinian Authority	2015	United Kingdom	✓	
36.	Eurasian Natural Resources Corporation (ENRC) and the NGOs Rights and Accountability in Development (RAID) and Action Contre l'Impunité pour les Droits Humains (ACIDH)	2016	United Kingdom	✓	
37.	Alleged impacts on local populations of an oil and gas facility in Kazakhstan	2017	United Kingdom	✓	✓

Factors correlating with the issuance of recommendations and determinations

Guidelines chapter

Figure 1 below shows how many times the various Guidelines Chapters have been raised in specific instances.⁹ It also shows how many times recommendations or determinations have referred to the various chapters. The data shows that to date NCPs most often issued recommendations or determinations in relation to Chapter II on General Policies, and to a lesser extent, Chapter IV on Human Rights (although the most frequently invoked) and Chapter V on Employment and Industrial Relations.

Figure 1. Guidelines Chapters cited in recommendations and determinations



NCP recommendations by chapter

Of the 211 closed specific instances analysed, NCPs issued recommendations in 91 cases. Thirty-six of these recommendations (40%) are not specific to a particular chapter but encourage the companies and the complainants to engage in continued dialogue to find

⁹ Of the 211 closed cases examined: Chapter I (Concepts and Principles) was raised 20 times (9%); Chapter II (General Policies) was raised 108 times (51%); Chapter III (Disclosure) was raised 32 times (15%); Chapter IV (Human Rights) was raised 111 times (53%); Chapter V (Employment and Industrial Relations) was raised 83 times (39%); Chapter VI (Environment) was raised 40 times (19%); Chapter VII (Combating Bribery, Bribe Solicitation and Extortion) was raised 14 times (7%); Chapter VIII (Consumer Interests) was raised 15 times (7%); Chapter IX (Science and Technology) was raised seven times (3%); Chapter X (Competition) was raised twice (1%); and Chapter XI (Taxation) was raised six times (3%). In six cases, no information is available on the Guidelines Chapters raised in the complaint (3%).

solutions to the issues raised, or to follow-up on agreements reached during the NCP process or outside of the process.

Recommendations most frequently refer to Chapter II on General Policies (31 cases). These recommendations most often relate to stakeholder engagement and due diligence, with occasional references made to OECD sectoral due diligence guidance.¹⁰

Fifteen recommendations refer to Chapter V on Employment and Industrial Relations and 14 to Chapter IV on Human Rights. Five recommendations address Chapter III on Disclosure, while four recommendations address Chapter I on Concepts and Principles. Two recommendations address Chapter VI on Environment. Chapter VII on Combating Bribery, Bribe Solicitation and Extortion and VIII on Consumer Interests are each addressed in one recommendation. Other chapters were not addressed by recommendations.

Determinations of non-observance of the Guidelines

The frequency of the Guidelines Chapters addressed by determinations is largely proportionate to the numbers observed for recommendations. In three cases out of the 211 cases surveyed, NCPs generally concluded that the companies involved did not observe the Guidelines due to their lack of engagement with the NCP process (and as a result of a lack of information being provided to the NCPs).¹¹

Chapter II on General Policies has been the most frequently cited chapter for determinations addressing non-observance (12 determinations). In these determinations, the NCPs have highlighted the absence, or inadequacy, of due diligence as the main reason for non-observance.¹²

Chapter IV on Human Rights was cited in seven determinations of non-observance. Inadequate human rights due diligence is a recurring theme in the determinations addressing Chapter IV.¹³ Chapter III on Disclosure and Chapter V on Employment and Industrial Relations were respectively the basis for one and two determinations of non-compliance.

¹⁰ See e.g. Danish NCP, PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers (2014); French NCP, Somadex and former employees (2015).

¹¹ See UK NCP, Alleged general policy breaches in Israel and the Palestinian Authority (2013); Canadian NCP, Gold Mining in China's Tibet Autonomous Region (2014); Norwegian NCP, Human Rights Breaches related to manufacturing of iron in India (2012).

¹² See e.g. Danish NCP, PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers (2014); French NCP, Freedom of Representation in France (2013); French NCP, Naxitis and Unite Here (2016); Norwegian NCP, det Norske Oljeselskapet DNO ASA the trade union Industri Energi (2016).

¹³ See e.g. Danish NCP, PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers (2014); Dutch NCP, Human Rights Breaches related to manufacturing of iron in India (2012); UK NCP, Supplying of Surveillance Equipment to Bahrain (2013).

Determinations that the company observed the Guidelines

Determinations that companies have observed the Guidelines addressed Chapter II on General Policies in 19 cases. Such determinations most frequently recognise that the company conducted appropriate due diligence. Determinations of observance addressed Chapter IV on Human Rights in five cases and V on Employment and Industrial Relations in four cases. Chapter VI on Environment, VII on Combating Bribery, Bribe Solicitation and Extortion and XI on taxation were each the basis of one determination of observance.

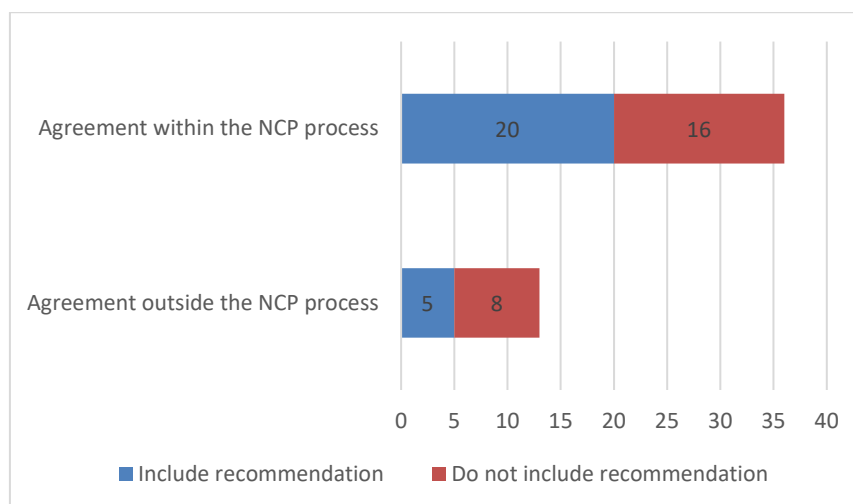
Phase of the specific instance procedure

Recommendations

The data shows that final statements in accepted cases are more likely to contain a recommendation than in non-accepted cases: 64% of all accepted cases reviewed contain a recommendation and 21% of all non-accepted cases reviewed contain a recommendation.¹⁴

Recommendations are also made by NCPs when the parties reached an agreement (see Figure 2 below). Agreements can either be reached within the NCP process (i.e. the parties have reached an agreement in the framework of mediation organised by the NCP) or outside the NCP process (i.e. the parties, while an NCP case was ongoing, have reached an agreement outside the framework of the specific instance process). NCPs have more frequently made recommendations when the agreement was reached within the NCP process: 56% of cases when an agreement was reached by the parties within the NCP process contain a recommendation, and 38% of cases when an agreement was reached outside the NCP process contain a recommendation.¹⁵

Figure 2: Recommendations in cases resulting in agreement



¹⁴ Out of the 211 cases in the sample, 108 are accepted cases, of which 69 contain a recommendation; and 103 are non-accepted cases, of which 22 contain a recommendation.

¹⁵ Out of the 211 cases in the sample, 36 cases resulted in an agreement within the NCP process, of which 20 contain a recommendation; and 13 resulted in an agreement outside the NCP process, of which five contain a recommendation.

Determinations

Determinations are also made both in accepted and non-accepted cases. For those made in non-accepted cases (i.e. when the NCP considers after its initial assessment that the issues raised do not merit further examination), NCPs determined almost exclusively that the company observed the Guidelines (13 out of 103 non-accepted cases handled by 25 NCPs, i.e. 13%¹⁶). There is one specific instance where the NCP determined that a company did not observe the Guidelines at one point, but then later started to observe the Guidelines. As observance started before the submission of the specific instance, the NCP closed the case after the initial assessment.¹⁷

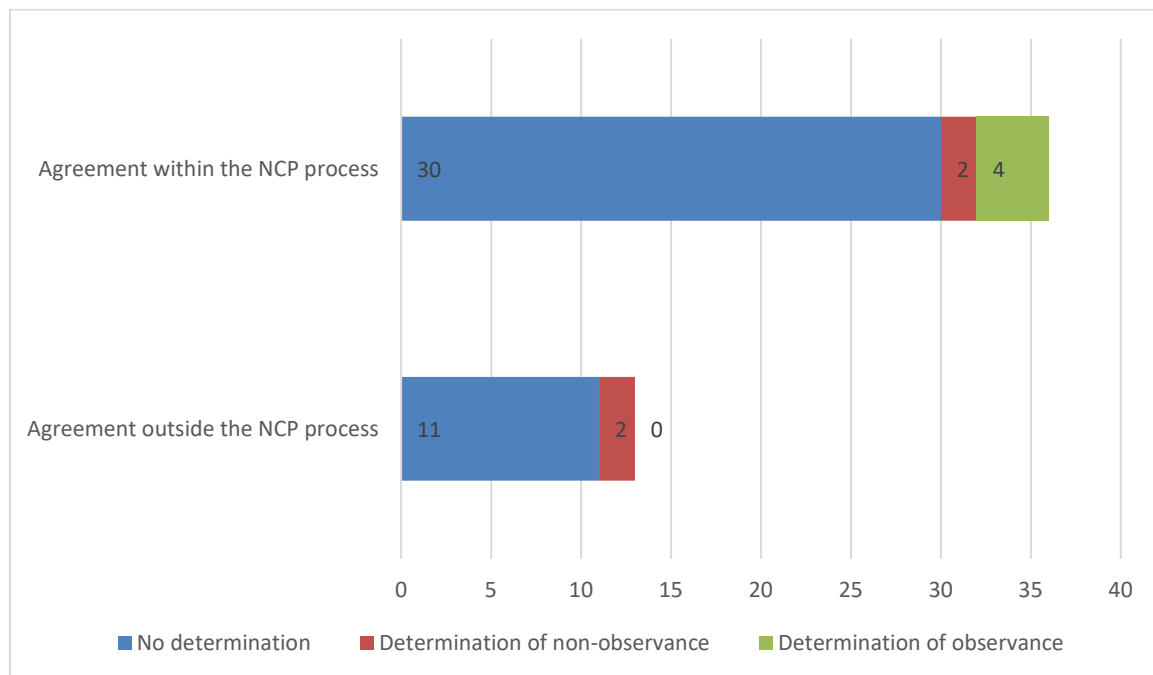
The majority of determinations are however made in accepted cases. 24 final statements made in 108 accepted cases (22%) handled by 24 NCPs¹⁸ contain a determination. 13 of these statements contain a determination that the Guidelines were not observed. Nine contain a determination that the Guidelines were observed. Five contain both types of determinations, i.e. that certain provisions were not observed and others were; or that issues existed in the past but no longer do.

As shown in Figure 3 below, in accepted cases, when an agreement is reached by the parties within the NCP process, the NCP rarely makes a determination. This is the case for determinations of non-observance (only two out of 36 cases with agreement or 6%), and for determinations of observance (only four out of 36 cases or 11%). Likewise, in the 13 cases when the parties reached an agreement outside of the NCP process, no determination of non-observance was made and determinations of observance were made in two of the 13 cases (15%).

¹⁶ The 25 NCPs having handled non-accepted cases over the period considered are the NCPs of Argentina, Australia, Belgium, Brazil, Canada, Chile, Colombia, Denmark, France, Germany, Italy, Korea, Latvia, Mexico, Morocco, the Netherlands, New Zealand, Norway, Poland, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The NCPs that issued a determination in at least one non-accepted case are the NCPs from Canada, Chile, Denmark, France, Italy, Korea, Morocco, and the United Kingdom.

¹⁷ French NCP, Freedom of Representation in France (2013).

¹⁸ The 24 NCPs having handled accepted cases over the period considered are the NCPs of Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, Peru, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The NCPs that issued a determination in at least one accepted case are the NCPs from Australia, Canada, Denmark, Finland, France, Italy, Netherlands, Norway, Sweden, and the United Kingdom.

Figure 3: Determinations in cases resulting in agreement

It would therefore seem that NCPs that choose to make determinations will most often defer to the agreements concluded by the parties, and some NCPs have stated explicitly that they will not review the substance of the complaint when the parties reach an agreement.¹⁹ One NCP, after the parties had reached an agreement themselves in relation to a specific instance,²⁰ verified that the agreement complied with the Guidelines before issuing its final statement.²¹

Complexity of the case

Another factor to be considered in relation to NCP practice regarding determinations and recommendations is the level of complexity of the case. Factors adding to the complexity of a case may include issues occurring in a non-adhering country; issues raised which took place a long time ago; or issues that are relevant to a large number of Guidelines Chapters.

¹⁹ See e.g. UK NCP, Lead production in the UK (2011). This is consistent with Section 4.6 of the UK NCP rules of procedure.

²⁰ The Danish NCP rules of procedure (section 2) provide that, after a positive initial assessment, the NCP will encourage the parties to resolve the matter themselves until maximum two and a half months after receipt of the complaint, failing which the NCP will start investigating the case. See <https://businessconduct.dk/procedure>.

²¹ Danish NCP, PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers (2014), follow up statement of 17 January 2018.

Location of the issues

Out of the 85 cases in which the issues raised took place in the home country of the NCP, the NCPs formulated recommendations in 28 cases (33%) and made determinations in 10 cases (12%).

Out of the 15 cases in which the issues raised took place in another adherent country, the NCP formulated recommendations in 9 cases (60%) and made determinations in 3 cases (20%).

Out of the 95 cases in which the issues raised took place in one or several non-adherent countries, recommendations were issued in 50 cases (53%) and determinations in 24 cases (25%).

The data shows that the fact that the issues raised took place in a non-adherent country is not a deterrent to the making of recommendations or determinations by NCPs. This is despite the obstacles this might represent, for instance in terms of active participation of the submitter (travel and correspondence costs) or of access to evidence.

Number of Guidelines chapters cited

In the 76 cases in which only one Chapter of the Guidelines was cited, a recommendation was issued in 20 cases (26%) and a determination was made in 13 cases (17%). In the 62 cases in which two Chapters of the Guidelines were cited, a recommendation was made in 31 cases (50%) and a determination was made in 13 cases (21%). In the 40 cases in which three Chapters of the Guidelines were raised, a recommendation was issued in 24 cases (60%) and a determination was made in nine cases (23%). In the 27 cases in which four or more Chapters of the Guidelines were raised, a recommendation was issued in 16 cases (59%) and a determination was made in six cases (22%).

The complexity of the case in terms of the substantive breadth of the issues raised does not seem to be a barrier to the issuance of determinations and recommendations. For instance, cases in which two or more Chapters of the Guidelines are cited generally have given rise to more determinations and recommendations. This may indicate that the conduct of the enterprise may be more problematic and therefore calls for recommendations or determinations, or simply that the case is better documented, thereby giving the NCP more material on which to rely when considering whether to issue a recommendation and/or determination.

Date of the issues

The date on which the issues occurred (or an indication thereof) was reported in 86 of 211 closed cases in the sample. Of those, 18 concerned issues which took place over 15 years ago. In those 18 cases, five contained recommendations (28%) and three contained determinations (17%). Comparatively, in the 22 cases in which the issues took place five or fewer years ago, 15 contained recommendations (68%) and seven contained determinations (32%).

NCPs have on occasion noted that the fact that the issues date back a long time may add complexity to the case.²² However, even though the numbers are not fully conclusive due to the small size of the samples, this factor does not seem to have had a strong impact on the willingness of NCPs to make determinations. NCPs seem more likely to issue

²² French NCP, Industrialisation of Pasturage Sites in India (2012), Final Statement, p. 3.

recommendations in cases in which the issues are more recent. This may be because the situation is still current and there is an opportunity to address it.

Language and format of recommendations

This mapping of recommendations and determinations has shown wide variation as to the language and format of both.

Recommendations

An examination of all recommendations in the sample of cases under review demonstrated that recommendations have taken three forms. They may either be *specific*, i.e. list a number of precise actions to be taken by the company to address the issues which are the object of the complaint (see Box 2); *medium specific*, i.e. list a number of general actions to be taken by the company so that the situation at hand may be resolved or would not happen again in the future (see Box 3); or *general*, i.e. list general actions to be taken so that the company might be in a better position to comply with the Guidelines in the future (see Box 4).

Box 2. Example of a specific recommendation

Industrialisation of Pasturage Sites in India (2012)

French NCP

‘Considering the importance of putting in place the compensation measures for Thervoy villagers, the NCP recommends that the Group continue using its influence on its Indian partners to ensure the full implementation of the Madras High Court decision of 16 September 2009. The NCP asks the Regional Economic Department of the French Embassy in India to monitor the steps that the Indian authorities will need to take to ensure that every compensation measure decided by the Madras High Court in 2009 is implemented, and to keep it informed on the issue.

Because the NCP considers the impact study a priority, it recommends that the Group proceed promptly with its launch, if possible before the end of 2013, after discussions and agreement with renowned experts and with the communities that may be impacted by Group activities. The NCP recommends that the terms of reference for the study should be consistent with OECD recommendations, in particular with respect to human rights and the environment (including identification of industrial risks) to ensure due diligence and the Group’s CSR strategy, particularly in environmental protection, human rights, employment, and training matters.

The NCP recommends that the Group keeps it updated, as it has undertaken to do. The NCP recommends that the Group ensure the involvement of local communities in the study follow-up. To this end, the NCP recommends that the Michelin Group set up or participate in a more appropriate mechanism to follow up on human rights matters. It further recommends that a more formal system be developed to ensure that communities’ views are expressed. These issues could be included in the terms of reference of the human rights impact study, and could be followed-up by the NCP.’

As indicated by the French NCP in this case, specific recommendations lend themselves to follow up and sometimes lead to the publication of follow up statements to record progress (such as in the case above).

Box 3. Example of medium specific recommendation

Agricultural Investment in Cambodia case (2012)

US NCP

The NCP recommends [American Sugar Refiners Inc.] evaluate the issues raised by the NGOs and consider how to address them, even if the conditions may not exist now to address them through the NCP process. In particular, the NCP recommends that ASR conduct a corporate human rights policy review process, consistent with the recommendations of the Guidelines and the UN Guiding Principles. Such a policy process could include consultations with external stakeholders.

Box 4. Examples of general recommendations

Fédération Internationale de Football Association (FIFA) and Americans for Democracy and Human Rights in Bahrain (ADHRB) (2015)

Swiss NCP

‘The Swiss NCP recommends to FIFA to address the topic of human rights with its member associations on a general basis in the relevant FIFA bodies.’

Lafarge Holcim Ltd and Ricardo Molina, an individual (2016)

Argentinian NCP

[T]he [Argentinian NCP] encourages the parties to consider finding a way to generate the conditions required to engage in dialogue and constructively work for the resolution of the issues in which they are involved.

Recommendations made by NCPs in non-accepted specific instances tend to use general language.²³ Some NCPs include standard language recommending that all companies comply with the Guidelines, either in general,²⁴ or in relation to the relevant Guidelines Chapter.²⁵ Likewise, NCPs regularly encourage or recommend the parties to keep communication channels open and seek to resolve the issue even when they are not able to accept the case or offer mediation.²⁶

Recommendations made in accepted cases take all three forms. Out of 69 concluded cases that include a recommendation, 30 are specific (43%), 22 are medium specific (32%) and 17 are general (25%). Most of the general recommendations do not relate to any Guidelines Chapter in particular, whereas the medium and specific recommendations do (see above).

Looking only at cases where the parties reached an agreement within the NCP process (20 cases), in 6 final statements out of 20 (30%), the recommendations made by NCPs are specific. In 9 final statements out of 20 (47%), the recommendations are medium specific. In 5 final statements out of 20 (20%), the recommendations are general.

Determinations

An examination of all determinations in the sample of cases under review showed that determinations could be divided into two types: direct or indirect. Most determinations are direct (in 28 out of 37 cases, or 76%), i.e. they state clearly that they are meant to signal whether the company has observed the Guidelines and are presented as an outcome of the specific instance.

Direct determinations are often accompanied by clarifications as to the factual or evidential basis on which they rely, and in this regard often point to the fact that the conclusions are drawn from materials submitted by the parties. In cases in which the company does not engage or submit information to the NCP, this may lead the NCP to qualify its determination by indicating that the company declined the opportunity to challenge the determination (as shown in a few examples below).

²³ Out of 22 recommendations contained in non-accepted cases, 13 (59%) are general, six (27%) are medium specific, and 3 (14%) are specific.

²⁴ See e.g. Mexican NCP, Union Favoritism in Mexico (2012); US NCP, Jamaa Resources Initiatives and a U.S. Company for conduct in Kenya (2016).

²⁵ See e.g. Belgian NCP, Brussels Airlines and Mr. Teumagnie (2016); US NCP, The Boeing Company and Lockheed Martin Corporation and European Centre for Democracy and Human Rights (ECDHR), Defenders for Medical Impartiality, and Arabian Rights Watch Association (2016).

²⁶ See e.g. Canadian NCP, Seabridge Gold and the Southeast Alaska Conservation Council (2016); Colombian NCP, Hoteles Decameron Colombia S.A.S. (Hodecol S.A.S) and the National Union of the Gastronomic, Hotel and Tourism Industry Workers of Colombia (SINTHOL) (2016).

Box 5. Example of direct determinations of non-observance

PWT Group and the NGOs Clean Clothes Campaign Denmark and Active Consumers (2014)

Danish NCP

‘The documents presented by PWT Group do not provide documentation of the use of risk and decision-making systems, e.g. checklists, in connection with inspections and visits to New Wave Style. On this basis, the NCP finds that PWT Group did not apply processes for due diligence that meet the OECD Guidelines. In particular, PWT Group failed to make demands that New Wave Style ensure its employees’ basic human and labour rights, including to take adequate steps to ensure occupational health and safety in their operations, (ref chapter V, section 4c of the OECD Guidelines).’

Det norske oljeselskapet DNO ASA the trade union Industri Energi (2016)

Norwegian NCP

‘In the situation concerned, DNO could, in the NCP’s opinion, have notified the employee representatives far earlier of a possible suspension of production. DNO should, as the crisis unfolded, have carried out a risk-based due diligence in line with the Guidelines’ general requirements in Chapter II paragraph 10. Although a war-like situation prevailed in Yemen in 2015, it must have been possible for DNO to engage in meaningful dialogue with employee representatives relating to collective dismissal and suspension of production, at least with the help of electronic communication. A company like DNO, with operations in high-risk, demanding areas of the world, must be expected to have considered alternative ways of giving reasonable notice of collective dismissals to the employee representatives and their organisations. It is the NCP’s opinion that it would be natural for DNO to have consulted with the employee representatives in advance on alternative notification procedures, if the security situation were to indicate a temporary suspension of production and possible lay-offs. Nor has DNO refuted that other international companies in Yemen managed to meet the expected standards for notification and consultation. On this basis, the NCP finds that DNO has not complied with the OECD Guidelines on this point.’

Gold mining in China’s Tibet Autonomous Region (2014)

Canadian NCP

‘In the absence of receipt of information from the Company on its operations and their alignment with the OECD Guidelines, and based on the information provided by the Notifier, it is the prima facie assessment of the NCP that the Company has not demonstrated that it is operating in a manner that can be considered to be consistent with the voluntary OECD Guidelines for Multinational Enterprises.’

Determinations noting observance of the Guidelines may also state that they rely on parties' submissions and that, on that basis, it *cannot be established* whether there was a breach of the Guidelines. This formulation stops short of a clear statement that there has been no breach of the Guidelines. Other such determinations may indicate that even though the case does not demonstrate a breach of the Guidelines, the conduct of the company is still lacking in certain areas, thereby warranting recommendations by the NCP. Finally, some of these determinations make a link between compliance with the Guidelines and compliance with national law.

Box 6. Examples of direct determinations of observance

Alleged human and labour rights in Denmark and Portugal (2013)

Danish NCP

'The NCP has found that it has not been established that the subject of the complaint has withheld employees' passports and thus have made a gross violation of the OECD Guidelines for Multinational Enterprises (OECD Guidelines). On this basis, the NCP has no reason to express critique in this concrete case.'

Alsetex, Etienne Lacroix Group and Americans for Democracy and Human Rights in Bahrain (ADHRB) (2015)

French NCP

'The NCP notes that Alsetex was in full compliance with French regulations. It concludes that, in the instant case, the French government, as part of its authorisation process, carried out the due diligence recommended by the OECD. By complying with the government's decisions, which the NCP has no mandate to evaluate, the enterprise was, ipso facto, in compliance with the requirements of responsible business conduct vis-à-vis human rights. States have the duty to protect human rights. It is not within the NCP's mandate to decide on actions and decisions made by government authorities. By complying with the embargo put in place in 2011, Alsetex did not contribute to human rights violations in Bahrain.'

Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village (2012)

Swedish NCP

'The NCPs are of the view that Statkraft has carried out consultations in line with the expectations set out in the OECD Guidelines, but that the actual implementation of the process could have been better facilitated, among other things to foster mutual trust with a view to obtaining the Saami village's consent.'

A minority of determinations are made indirectly (in 9 out of 37 cases, or 24%), i.e. they are not explicitly presented as such but still give an indication of the NCP's opinion as to observance of the Guidelines.

Box 7. Examples of indirect determinations

Atradius Dutch State Business and NGOs (2015)

Dutch NCP

As the NCP takes the view that ADSB as an MNE under the Guidelines, is ‘directly linked’ to possible adverse impacts to which its business relationships (Van Oord) have ‘contributed’; it may not quite have fulfilled its duty to use its leverage over these business relationships, as described in paragraph II.A.12 of the Guidelines, to prevent or mitigate these possible adverse impacts.

Business relationships in Russia (Bank C) (2012)

UK NCP

The NCP considers that UK Bank C could reasonably regard the arrangements put in place to meet Equator Principles requirements (and so meet its Guidelines obligations on self-regulatory practices) as also meeting its Guidelines obligations in respect of business partners.

Survival International Italia vs Salini Impregilo S.p.A. (2016)

Italian NCP

Based on all the above, it is evident that, after an initial lack of information, several forms of consultation have been implemented since 2007 and, in a more structured way, from 2008-2009 to date.

(emphasis added)

4. Trends, challenges and opportunities

The data set out in the mapping shows that a number of trends emerge in relation to recommendations and determinations. This section reviews these trends. Additionally, challenges and opportunities are associated with each practice, which this section also seeks to analyse.

Recommendations

Trends

Figure 4 below shows that the rate at which recommendations are made has grown over the period considered. This is true for accepted cases (from 33% in 2012 to 92% in 2018), and to a lesser extent, for non-accepted cases (from 17% in 2012 to 27% in 2018, with a peak to 44% in 2017).

In line with the strong call made by the Procedural Guidance regarding the issuance of recommendations by NCPs (see above), there is consensus among the NCP network that making recommendations is part of the role of NCPs when appropriate. The practice however extends beyond the strict terms of the Procedural Guidance, which only calls for making recommendations in accepted cases when parties have not reached agreement or not engaged in good faith.

NCPs most often make recommendations in accepted cases, but have also made recommendations in non-accepted cases. Such recommendations may encourage the parties to continue dialoguing despite the non-acceptance of the case; or reflect the fact that, even though one or several criteria for accepting the case is not met, the NCP still considers that, based on the information received, it is in a position to recommend a particular course of action to the company. Likewise, recommendations are more frequent in cases not resulting in agreement, but have also been made in cases resulting in agreement. Recommendations may in such cases include suggestions on how to implement the agreement, or address issues which the NCP may feel are not covered by the agreement.

Challenges and opportunities

NCPs consider that recommendations fall squarely within their role as non-judicial bodies in charge of contributing to the resolution of issues arising in relation to the Guidelines. A strength associated with recommendations is that they are forward-looking and solutions-oriented, thereby allowing to maintain the non-adversarial character of the specific instance process.

Recommendations also help clarify the conduct expected of companies in relation to the specific issues at hand. The wording of recommendations is therefore an important element in this regard. Precisely worded recommendations will give better guidance to the company on the course of action to take, and therefore it appears that specific recommendations have the most value when they are possible. Such recommendations have included:

- A reference to the Guidelines Chapter and paragraph to which it refers, and when applicable, the sectoral Guidance developed by the OECD;²⁷
- A reference to additional normative sources, such as the UN Guiding Principles on Business and Human Rights,²⁸ human rights treaties, relevant ILO Conventions,²⁹ or domestic regulations or guidance documents;³⁰
- Clear suggestions on conduct to adopt in order to comply with these standards, possibly in contrast to the conduct that led to the issues;³¹
- An indication of third parties to be engaged by the company in following the recommendations (e.g. stakeholders; business relations; authorities);³²
- A timeline and/or an implementation plan for putting in place recommended actions;³³
- A suggestion of remedy.³⁴

NCPs have also indicated that specific recommendations were essential in order to carry out effective follow up. Follow up and monitoring of the company's implementation of the recommendations will be more effective if such recommendations contain concrete and time-bound suggested actions.

When specific recommendations are not possible or appropriate, medium specific or general recommendations can also have value. General recommendations may for example serve to restate the expectations contained in the Guidelines and flag them to companies and stakeholders even when a case is not accepted;³⁵ or to encourage the parties to continue dialogue.³⁶ NCPs will formulate medium specific recommendations for various purposes.

²⁷ See e.g. Canadian NCP, Banro Corporation and group of former employees (2016)

²⁸ See e.g. Italian NCP, Salini Impregilo S.p.A and Survival International Italia concerning activities in Ethiopia (2016).

²⁹ See e.g. Brazilian NCP, Mass layoffs in the banking sector in Brazil (2012).

³⁰ See e.g. Canadian NCP, Gold mining in China's Tibet Autonomous Region (2014).

³¹ See e.g. French NCP, Michelin Group, and four NGOs and a trade union (2012).

³² See e.g. Belgian NCP, Socfin Group/Socapalm and Sherpa concerning operations in Cameroon (2016); French NCP, Michelin Group, and four NGOs and a trade union (2012); Dutch NCP, Mylan N.V. and an individual, Mr. Bart Stapert (2015); UK NCP, Alleged impacts on local populations of an oil and gas facility in Kazakhstan (2013).

³³ See e.g. Canadian NCP, Banro Corporation and group of former employees (2016); Germany various countries; Norway human rights breaches; Swiss NCP, Holcim and NGO consortium (2015); UK NCP, Alleged impacts on local populations of an oil and gas facility in Kazakhstan (2013).

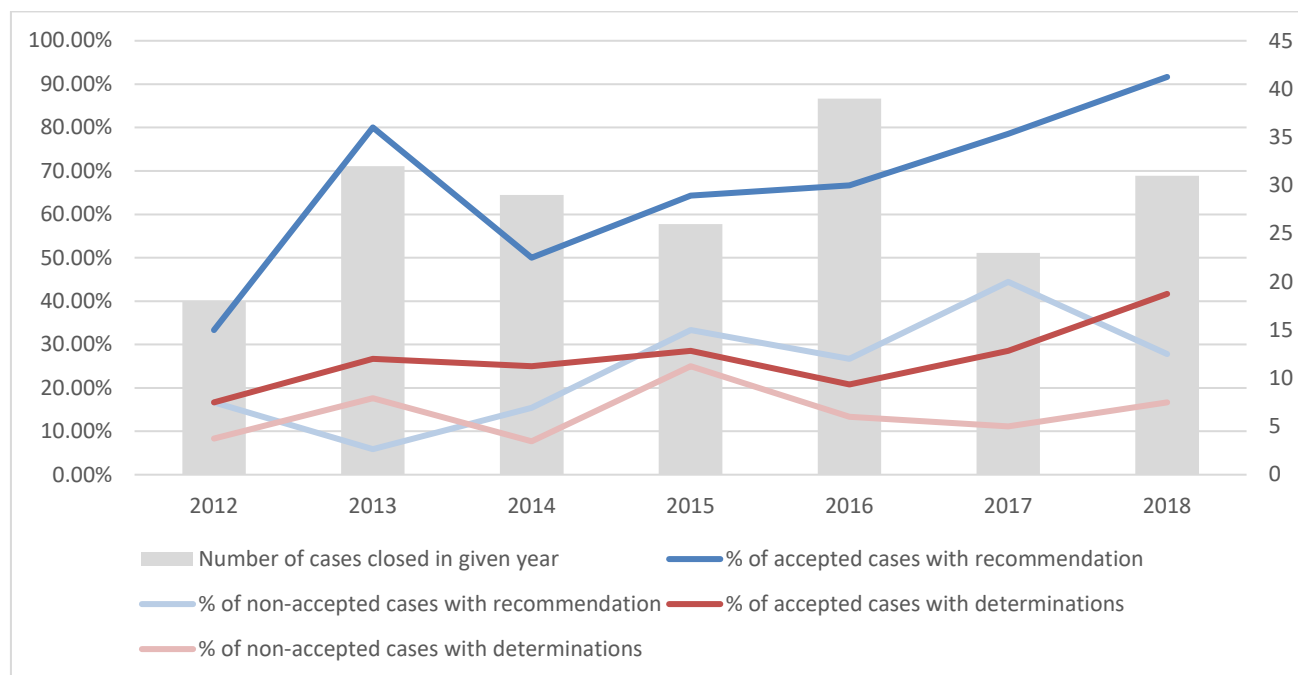
³⁴ See e.g. French NCP, Closure of a paper mill in France (2014).

³⁵ See e.g. Mexican NCP, Union favouritism in Mexico (2012).

³⁶ See e.g. Colombian NCP, Hoteles Decamerón Colombia S.A.S. (Hodecol S.A.S) and the National Union of the Gastronomic, Hotel and Tourism Industry Workers of Colombia (SINTHOL) (2016).

First, these recommendations may invite a company to rethink its general practices (e.g. its code of conduct) so that they align with the Guidelines.³⁷ They may suggest appropriate courses of actions in future similar situations;³⁸ or comment on the issues raised in general when the NCP has not been able to ascertain all the facts of the matter at hand.³⁹

Figure 4. Percentage of closed cases per year containing recommendations and determinations



Determinations

Trends

Figure 4 shows that the ratio of cases containing determinations in accepted cases has increased over the period considered (from 13% in 2012 to 42% in 2018). In non-accepted cases, an increase can also be observed, though this practice remains fairly marginal throughout the period considered (from 8% in 2012 to 17% in 2018).

As indicated, the Guidelines make no mention of determinations, which have emerged from the practice of certain NCPs. Currently, such practice is not generalised across the NCP network. As indicated above, to date 13 NCPs have issued determinations in at least one case, but only four have done so in three cases or more. Six NCPs have only issued

³⁷ See e.g. French NCP, Somadex and former employees (2015); Belgian NCP, Environmental issues relating to the construction of a harbour (2013); US NCP, Starwood Hotels & Resorts Worldwide and International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) (2015).

³⁸ See e.g. Dutch NCP, Heineken, Bralima and former employees of Bralima (2015); Finnish NCP, Xayaburi Dam in Laos (2012); Spanish NCP, Human rights issues in the workplace involving a Spanish Security Services company in Brazil, Colombia, Paraguay, Peru and Chile (2018).

³⁹ See e.g. Norwegian NCP, Bribery allegations in India (2013).

determinations of observance, one has only issued a determination of non-observance, and six have issued both types of determinations.

Challenges and opportunities

Determinations and the role of NCPs

Feedback from NCPs indicate that the practice of issuing determinations has an impact on how they and their stakeholders view the role of NCPs in relation to handling specific instances.

On the one hand, some NCPs have questioned whether issuing determinations regarding company observance of the Guidelines was compatible with the way they envisioned their role as a non-judicial grievance mechanism. NCPs for instance stressed that determinations should be strictly distinguished from the mediation process, and that mediation should in any event not result in a determination, lest it would lose its neutrality and credibility. Relatedly, certain NCPs shared the concern that issuing determinations may hinder the possibilities for helping parties engage with each other to find solutions for the future, as the prospect of a determination might make the process adversarial and lead parties to defend themselves rather than constructively look for solutions. Such a prospect may also discourage companies to come to the table or communicate information knowing that the process may result in a determination.

On the other hand, some NCPs were of the opinion that determinations may help NCPs fulfil their role of furthering the effectiveness of the Guidelines by raising their normative value and their profile as an international standard of conduct, while falling short of a sanction in the judicial sense. For example, some NCPs have pointed to the pedagogical value of determinations in explaining how and why a certain practice does or does not comply with the Guidelines. This may enhance the effectiveness of the Guidelines by shedding light on concrete expectations linked to particular Guidelines provisions. Additionally, certain NCPs were of the opinion that generalising the practice of determinations may encourage companies to participate earnestly in the NCP process and work towards an agreement so as to avoid the negative publicity associated with a determination.

Some NCPs also noted that their approach to determinations may depend on cultural factors, as these NCPs experienced different reactions to determinations depending on the company's location.

Whether or not to issue a determination should therefore depend on whether, based on the circumstances of the case, the NCP believes that it may help further the effectiveness of the Guidelines.

The links between recommendations and determinations

NCPs have flagged that close links may exist between recommendations and determinations. In particular, certain NCPs have questioned whether a sharp distinction should always be made between recommendations and determinations. This would be particularly relevant when very precise recommendations indicate that a company should not repeat past practice. These, even though worded as recommendations, also signal that a company has not observed the Guidelines, perhaps even more clearly than an indirect determination. Some NCPs were of the view that some of the challenges and opportunities

linked to the issuance of determinations (especially regarding the role of the NCP as a non-judicial grievance mechanism) were applicable to the issuance of recommendations.

Other NCPs were of the opinion that clear determinations are necessary in light of the recommendations process. Namely, a clear determination of observance will help explain why the NCP will not respond favourably to a submitter's request for a recommendation. Conversely, a clear determination of non-observance acts as a necessary starting point for robust recommendations. It first adds legitimacy to the recommendations by grounding them firmly in the norm. Second, it helps define the scope and substance of the recommendation by clearly identifying the behaviour which the recommendation addresses.

Legal implications of determinations

Some NCPs indicated that the practice of issuing determinations raised questions of a legal nature that would require additional research. For some NCPs, issuing determinations might require amending their domestic legal mandate or their rules of procedure. To date the rules of procedure of just eight NCPs mention determinations (although a number of NCPs have issued determinations without such a provision).

Second, actual or expected determinations that a company did not observe the Guidelines may generate strong reactions from the company, and expose NCPs to legal threats and potential lawsuits, raising the question whether the personal liability of NCP members may be engaged in such cases. Finally, it is unclear how an NCP's determination that a company has or has not observed the Guidelines might influence parallel or future judicial proceedings involving the same or different companies, in respect of the same or of similar issues.

Procedural challenges

NCPs have noted that procedural challenges were associated with determinations. Since determinations involve confronting the company's conduct with the Guidelines, they require accessing sufficient and reliable evidence to draw conclusions regarding observance. This will be challenging if the case is old, or if the NCP has limited means to engage in fact-finding. Accordingly, some NCPs state explicitly that their determinations are based strictly on information provided by the parties or available to the NCP.

Related to the issue of evidence is the question of procedural safeguards in issuing determinations. A number of NCPs have established strategies to ensure that both parties can share their point of view on all aspects of the issues. This may involve systematically sharing the materials received by the NCP (save those for which reasonable measures were taken to preserve confidentiality) and providing opportunities to respond; circulating drafts of decisions in advance and seeking comments; or establishing a formal review mechanism in order to ensure that procedural rules and guarantees are being followed.

5. Stakeholder perspectives

BIAC

BIAC is of the opinion that the dialogue and mediation function of NCPs is essential, and that the trust that companies have in NCPs comes from their facilitating discussions to try to reach practical and forward-looking solutions in the interest of all parties.

BIAC stresses that the Guidelines define NCPs as platforms to help resolve issues that arise with the implementation of the Guidelines. When needed, NCPs may provide mediation to try to find a solution to the issues raised in accordance with the Guidelines, provide assistance to the parties, offer ‘good offices’ to contribute to the resolution of an issue, and facilitate access to consensual and non-adversarial procedures.

Conversely, viewing NCPs as (semi-)legal determinative bodies could potentially serve as a disincentive for companies to engage. According to BIAC, NCPs should focus on providing forward-looking recommendations to proactively help companies comply with the Guidelines in the light of the concrete circumstances and help provide guidance for implementation and future development. The NCP’s impartial recommendations and findings may also feed into the company’s communication with its stakeholders.

OECD Watch

OECD Watch agrees that recommendations are an important tool to promote observance of the Guidelines, and insists that NCPs should conduct follow up monitoring.

OECD Watch advocates that NCPs issue determinations in cases where the parties do not agree to participate in mediation, or do not reach a mediated agreement. OECD Watch stresses that determinations should signal both observance and non-observance. OECD Watch is of the opinion that determinations provide an incentive for parties to engage in dialogue. OECD Watch shared that, in its view, there was a strong correlation between an NCP’s practice of issuing determinations and agreements reached in cases handled by that NCP. Additionally, OECD Watch indicated that determinations could in certain cases in and of themselves be a solution to the issues, thereby corresponding to the nature of NCPs as ‘solutions-oriented’ bodies. Finally, OECD Watch suggested that NCPs issue a determination in case a company had not followed up on its recommendations.

In terms of challenges posed by determinations, OECD Watch is of the opinion that, as experts on the Guidelines, NCPs are entitled to evaluate whether companies operating in or from their territory are abiding by them, and that this does not call into question their role as a non-judicial mechanism. OECD Watch moreover encourages NCPs to carry out investigations and site visits to collect sufficient evidence to feed into determinations.

TUAC

TUAC considers that NCPs should always issue recommendations in specific instances where no agreement is reached between the parties. They should also review their implementation in a timely matter, in line with the rules of the Guidelines.⁴⁰ The follow-up protocol agreed at the German NCP by Deutsche Post DHL, UNI Global Union and the International Transport Workers' Federation (ITF) provides a striking example of the value of combining NCP recommendations with ongoing NCP support and follow-up.⁴¹

Far from providing a disincentive, TUAC considers that the success of NCP mediation depends on NCPs making a commitment to issue a determination in the event that mediation is refused or fails. The 'background threat' of a determination is the 'stick' that helps bring companies to the NCP mediation table.⁴² Even if NCPs consider that the 'proper approach to whether or not to issue a determination may depend on cultural and contextual factors' (see below, para. 86), this is wholly separate from the need for *all* NCPs to create incentives for companies to come to the table by making public their commitment to issue determinations.

Finally, TUAC is of the opinion that there are no grounds for NCPs to make determinations in non-accepted cases (see above, para. 30). The fact that the company may have observed the Guidelines is not listed in the Procedural Guidance as one of the elements to be taken into account by NCPs during initial assessment. NCPs also lack a basis for determining that a company has observed the Guidelines in a case that they have rejected for other reasons. Determinations should only be made on the basis of an investigation into the facts and circumstances of the case, conducted *after* the Initial Assessment and *after* mediation has either been refused or has failed. This practice merits further investigation by the OECD Secretariat.

⁴⁰ The Guidelines encourage NCPs "*to follow-up with the parties on their response to these recommendations*" and to include "*the timeframe for doing so*" in the NCP statement: OECD Guidelines for Multinational Enterprises, Commentary on the Procedural Guidance, para. 36.

⁴¹ Facilitating Social Dialogue Under the OECD Guidelines for Multinational Enterprises: <http://www.oecd.org/investment/mne/Facilitating-social-dialogue-under-the-OECD-Guidelines-for-MNEs.pdf>

⁴² See analogously an analysis of the role of mediation in the UK civil justice system in Hazel Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2010), p. 125: '[m]ediation without the credible threat of judicial determination is the sound of one hand clapping.'

6. Conclusion

The mapping and analysis show that NCPs and stakeholders view recommendations as a key part of the NCP role. The mapping showed that a large section of NCPs which have closed a case in the period under review have issued recommendations. The mapping also shows that NCPs have issued recommendations in all types of cases, and that the complexity of a case was generally not a barrier to the issuance of recommendations. The mapping also showed that NCPs are more likely to issue recommendations in accepted cases, and in relation to Chapter II issues.

Strengths associated with recommendations are that they indicate in a forward-looking and solutions-oriented manner how a company can improve performance in relation to a particular context. It was also highlighted that recommendations should be accompanied by follow up monitoring by the NCP.

The mapping and analysis show that NCPs and stakeholders are divided as to whether determinations should play a central part – or any part at all – in the specific instance process. NCP practice is quite mixed ranging from a few NCPs who regularly issue determinations to those who have not issued either a determination of observance or non-observance.

Challenges and opportunities are associated with determinations and NCPs have shared different experiences in terms of whether determinations incentivise or disincentivise companies to enter into dialogue and reach an agreement. Some NCPs have shared that the proper approach to whether or not to issue a determination in a case may depend on cultural and contextual factors.

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