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THE IMPACT OF THE OECD'S NATIONAL CONTACT POINTS IN A GLOBALIZED LABOUR MARKET

An analysis of the cases until 2011 and their outcome.

Master Thesis for the LLM International and European
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LIST OF ABBREVIATIONS

CIME: Committee on International Investment and Multinational Enterprises

OECD: Organization for Economic Co-operation and Development

NCP: National Contact Point

NGO: Non Governmental Organizations

MNE: Multinational Enterprises

ILO: International Labour Organization

TUAC: Trade Union Advisory Committee

BIAC: Business and Industry Advisory Committee

UN: United Nations

OEEC: Organization for European Economic Cooperation

ERP: European Recovery Program

CCC: Clean Clothes Campaign

MAI: Multilateral Agreement on Investment

BIS: Department for Business, Innovation and Science

FCO: Foreign and Commonwealth Office

UIF: International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations

ACAS: Advisory, Conciliation and Arbitration Service

CSR: Corporate Social Responsibility

FFI: Fibre & Fabrics International

JKPL: Jeans Knit Pvt. Ltd

GATWU: Garment and Textile Workers' Union

BMWi: Federal Ministry of Economics and Technology

INTRODUCTION:

The effects of the globalization process are quite antagonistic; the potential for good is immense. There is a sense of interdependence growing, the world has made the commitment to share universal values and solidarity among peoples across the world, creating many international and global institutions to protect and advance in these ideals. In the economy market, the process has demonstrated great productive capacity and if it is wisely managed, it can deliver unprecedented material progress, generate better jobs for all and contribute significantly to reducing world poverty.¹

“We recognize that globalization has opened the door to many benefits. It has promoted open societies and open economies and encouraged a free exchange of goods, ideas and knowledge. In many parts of the world, innovation, creativity and entrepreneurship have flourished. In East Asia, growth lifted over 200 million people out of poverty in a single decade. Better communications have enhanced awareness of rights and identities, and enabled social movements to mobilize opinion and strengthen democratic accountability. As a result, a truly global conscience is beginning to emerge, sensitive to the inequities of poverty, gender discrimination, child labour, and environmental degradation, wherever these may occur.”²

However, in the last decades the Multinational Enterprises have multiplied and have become internationalized. This consequently leads to the problem that the enterprises which have a big amount of power are allowed to literally do whatever they want in an impunity reality.

¹ World Commission. “For a fair globalization” Page XI

² IBID Page 3

“The private sector can be a powerful driver of economic prosperity and poverty alleviation, a growing body of evidence confirms that, without the necessary due diligence, disclosure and accountability checks, multinational enterprises can have a significant negative impact on workers, communities and the natural environment. There is now widespread acknowledgement that MNEs are required to be responsible for avoiding or remedying any negative consequences of the full range of their business activities. The principles of “do no harm” and, when things do go wrong, providing a remedy for the victims; must be upheld through corporate accountability mechanisms.”³

With the growing number of concerns regarding the impacts of corporations on human rights, labour rights and the environment, different solutions were put on the table in order to regulate the behaviour of the enterprises. Among these mechanisms we can find the UN global pact, the ILO Declaration for a fair globalization, the International Framework of Agreements, the codes of conduct and, one of the most important, the OECD Guidelines for Multinational Enterprises.

In this work, we are going to explain the notion, evolution, and definition of the Guidelines; the function and structure of the National Contact Points; analyse the most relevant cases; and finally review the impact of the contact points in the reality, review the outcome that this document has brought us during its years of existences.

³ OECD Watch. “10 years go on”. Netherlands. 2010. Page 5

CHAPTER I:

THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

1) WHAT IS THE OECD?

a. DEFINITION AND HISTORY

The Organization for Economic Co-operation and Development (OECD) was constituted in Paris on the 14th of December of 1960. In its objectives can for example be found; creating an economic development and trade expansion in the world economy, achieving sustainable economic growth and employment, rising standard of living in the countries members through the continuous analysis of the statistics of the social and economic issues.⁴

“It describes itself as an "organization helping governments tackle the economic, social and governance challenges of a globalised economy". (...) its purpose is to boost prosperity by providing a web of compatible policies and practices across countries that are part of an ever more globalised world. (...) it publishes research on economic issues, producing regular economic reports on each of the member countries. (...) But it is in essence a 'talking shop' - a forum for member countries to discuss economic policy issues as well as environmental agricultural and energy concerns.”⁵

⁴ BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION OF LABOUR STANDARDS”. In Bulletin of Comparative Labour Relations N° 52. Kluwer Law International. Netherlands. 2004. Page 9.

⁵ <http://news.bbc.co.uk/2/hi/business/92719.stm>

After the Second World War the European leaders agreed that the best way to ensure lasting peace was to encourage co-operation and reconstruction, rather than punish the defeated.⁶

With this idea as base, the Organization for European Economic Cooperation (OEEC) was established in 1947. The OEEC also ran the Marshall Plan for reconstruction of a continent ravaged by war.⁷ Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada, United States and the 18 OEEC members signed the OECD Convention, creating a new entity. The OECD was born officially on the 30th of September of 1961 when the Convention entered into force.⁸

b. MEMBERS

After the successful results of the OECD also other countries were motivated to join the OECD. The first who joined was Japan in 1964, followed by Finland in 1969, Australia in 1971, New Zealand in 1973, etc. Up to date there are 34 countries members worldwide, of which a great number are the world's most advanced countries but also emerging countries like Mexico, Chile and Turkey are member of the OECD. The current members are:^{9 10}

Australia	France	Korea	Slovenia
Austria	Germany	Luxembourg	Spain
Belgium	Greece	Mexico	Sweden
Canada	Hungary	Netherlands	Switzerland
Chile	Iceland	New Zealand	Turkey

⁶ http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1_1,00.html

⁷ Let's recall that the Marshall Plan or also known as the European Recovery Program – ERP- was an United State's initiative that proposed a large-scale economic program of cash grants to Europe that involve no repayment through the years 1947–1951 with the goal of rebuilding a war-devastated region, removing the trade barriers, modernizing industry, and making individual governments recognize the interdependence of their economies.

⁸ Idem.

⁹ <http://www.telegraph.co.uk/finance/economics/8443582/What-is-the-OECD.html>

¹⁰ The Commission of the European Communities sometimes is count as one of the country members.

Czech Republic	Ireland	Norway	United Kingdom
Denmark	Israel	Poland	United States
Estonia	Italy	Portugal	
Finland	Japan	Slovak Republic	

Moreover the OECD has already started negotiations with others big emerging economies like China, India, Brazil, Russia, Indonesia and South Africa. If these countries join 80% of world trade and investment will be under the members of the OECD, giving it a pivotal role in addressing the challenges facing the world economy.¹¹

“The members regularly turn to one another to identify problems, discuss and analyse them, and promote policies to solve them. The track record is striking. The US has seen its national wealth almost triple in the five decades since the OECD was created, calculated in terms of gross domestic product per head of population. Other OECD countries have seen similar, and in some cases even more spectacular, progress.”¹²

c. STRUCTURE AND ACTIVITIES:

The OECD has three organs: ¹³

- a) *The Council*: The decision-making organ of the organization. It consists of representatives from all the member countries plus one representative of the European Commission. The Council meets usually once a year. The decisions are taken by consensus. The work mandated by the Council is carried out by the OECD Secretariat.

¹¹ http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html

¹² http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html

¹³ http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html

- b) *Committees*: Consists of different representatives of the countries members. Its main objective is to review the progress in specific policy areas - economics, trade, science, employment, education or financial markets -. Up to date, there are around 25 committees, working groups and expert groups.
- c) *Secretariat*: Is the organ which supports the activities of committees, and carries out the work in response to priorities decided by the OECD Council. OECD Secretariat is assisted by one or more Deputy Secretaries-General, providing the link between national delegations and the Secretariat.

“Only governments are members of OECD, unlike the ILO for example, which is tripartite and composed of governments, employers’ and trade union organizations. However, business and union organizations have been granted consultative status and regularly participate in the work of committees and working parties”¹⁴

The OECD is a unique forum that let the country members to study and formulate the best policies possible in all economic and social spheres. In its convention, the new organization was charged with promoting policies designed to:

- “Achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus contribute to the development of the world economy”¹⁵
- “Contribute to sound economic expansion in Member as well as non-Member countries in the process of economic development; and

¹⁴ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pág. 9

¹⁵ http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027

contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.”¹⁶

The OECD, among its activities, can realize:¹⁷

- a) **Peer reviews:** A mutual examination of governments carried out at committee level. It is a multilateral surveillance through which the performance of individual countries is monitored.
- b) **Agreements, standards and recommendations:** The outcome of negotiations of members at Committee- level can lead to formal agreements (standards, models, recommendations or guidelines).
- c) **Publication:** The OECD publications are a prime vehicle for disseminating the Organization’s intellectual output.

2) THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES:

a. DEFINITION:

“The OECD Guidelines for Multinational Enterprises were drawn up in the 1970s, a decade during which the activities of corporations became a topic of discussion among international organizations. The sometimes negative impact of corporations on developing countries was given increased attention and harmful activities of companies to countries where they were established met growing opposition. The legal regulation of businesses was

¹⁶ http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027

¹⁷ http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html

called for and international guidelines controlling their conduct were set up by international organizations such as the OECD.”¹⁸

The “Committee on International Investment and Multinational Enterprises” (CIME) was created on the 21st January of 1975. This organ had the responsibility to negotiate and draft guidelines for multinational enterprises and provide intergovernmental consultation procedures.¹⁹

“The secretary General of the OECD underlined in 1975, that Multinational enterprises have been the object of a great deal of comment in recent years, but the discussion has often been emotionally charged and hampered by a lack of qualitative and quantitative information or of agreement on the real political nature of the problem. The rise of MNE and the increasing foreign involvement of business have been deplored by some as likely to limit substantial elements of national sovereignty.”²⁰

On the 21st of June of 1976 the current member states of the OECD - except for Turkey - adopted the Guidelines for Multinational Enterprises as part of a package which consisted on the Declaration on International Investment and Multinational Enterprises, commitments of governments to provide national treatment for foreign controlled enterprises in order to avoid conflicting requirements on enterprises and cooperation regarding investment, incentives and disincentives.²¹

“Since 1976 the world has changed dramatically. Today globalizing economy is driven by the massive introduction of information and communication technologies, which allow knowledge to be stored,

¹⁸ <http://oecdwatch.org/about-oecd/guidelines>

¹⁹ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pág. 9

²⁰ IBID. Page 18

²¹ <http://oecdwatch.org/about-oecd/guidelines>

manipulated and transmitted worldwide without significant costs. Since companies cannot organize all the increasingly available knowledge and expertise in their own house, they tend to increasingly externalize certain tasks and services. Enterprises are massively engaging in outsourcing and networking, entrusting tasks they used to do themselves to other enterprises which can provide them better and more cheaply”²²

The Guidelines set out a responsible approach to areas of business ethics, including:

- a) Employment and industrial relations,²³
- b) Human rights,
- c) Environment,
- d) Information disclosure,
- e) Combating bribery,
- f) Consumer interests,
- g) Science and technology,
- h) Competition, and
- i) Taxation

b. THE 2000 REVIEW OF THE GUIDELINES:

In 2000 the OECD realized the fifth review of the guidelines. Among other problems, this review tried to solve these two mayor problems:²⁴

- a) Whether the content and language of guidelines needed to be adjusted
- b) Whether they have been as effective as they could have been, and if not, what could be done to ensure their efficient implementation.

²² Loc. Cit. BLANPAIN, Roger. “MULTINATIONAL ENTERPRISES ... Page 196.

²³ See Appendix A

²⁴ Loc. Cit. BLANPAIN, Roger. “MULTINATIONAL ENTERPRISES ... Page 197.

“In June 1998, the Committee on International Investment and Multinational Enterprises (CIME) of the Organization for Economic Co-operation and Development (OECD) decided to launch the first Review of the OECD Guidelines since 1991. The OECD Guidelines for Multinational Enterprises are recommendations by OECD governments to their multinational enterprises (MNEs), which establish standards of behaviour for the activities of these enterprises. The Review addressed the operating and implementation procedures as well as the actual text. The aim of this Review was to ensure the relevance and effectiveness of the Guidelines in setting standards for international corporate conduct. In June 2000, the revision was finalized, with a new set of standards and new implementation mechanisms as a result.”²⁵

The other reason was the failure of the Multilateral Agreement on Investment (MAI). There was a strong opposition from the civil society to this agreement. In the view of opposition it was suggested that the Guidelines should be an annex to the MAI in order to offer some responsibilities to balance. When the MAI failed, the Review of the OECD Guidelines was initiated.²⁶

“(…) Reason for reviewing the Guidelines has obviously been to reposition the Guidelines, given the current proliferation of codes of conduct, and other initiatives started by international organizations, trade unions, NGOs and different branch organizations. The Guidelines were losing importance in the non-governmental as well as the governmental sphere. Apart from that, the aim of the OECD is to reposition the Guidelines in such a way that they are complementary to many voluntary initiatives. As the OECD puts it: “The value added of OECD Guidelines (relative to corporate codes) stems in part from their potential for alleviating some of the inherent problems from self-regulation.”²⁷

²⁵ OLDENZIEL, Joris (SOMO) “THE 2000 REVIEW OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A NEW CODE OF CONDUCT? Netherlands. 2000. Page 5

²⁶ Idem.

²⁷ Idem.

In June 2000, after different consultations and dialogues, the revision was concluded. Among the most important changes can be found; the recommendations relating Human Rights and the elimination of child and forced labour. Additionally, all the internationally recognized core labour standards were introduced into the guidelines.²⁸

The most important addition of the review was the adoption of the Decision on the OECD Guidelines for Multinational Enterprises by the Council. This document creates a specific mechanism for addressing the companies that violate the Guidelines through the National Contact Points (NCP).

The Declaration and Guidelines have attracted wide support from non-Members: eight non-OECD Members (Argentina, Brazil, Egypt, Morocco, Latvia, Lithuania, Peru and Romania) have adhered to the Declaration and a number of others have recently requested to adhere (Costa Rica, Colombia, Jordan, Serbia, Tunisia and Ukraine).

c. THE 2011 REVIEW OF THE GUIDELINES:

“The guidelines affirm that every country has the right to prescribe the conditions under which MNEs operate within its national jurisdiction, subject to international law and the international agreements to which it subscribes. They are not a substitute for national law, to which MNEs are fully subject. They represent concerns concerning the international operations of these enterprises.”²⁹

The 25th of May of 2011, the OECD member states including the European Community and other non-members like Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania, established the “Declaration on International Investment and Multinational

²⁸ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pág. 20

²⁹ Loc. Cit. BLANPAIN, Roger. “MULTINATIONAL ENTERPRISES ... Page 196.

Enterprises”.³⁰ This document is the result of the review of the guidelines for this year, which presents some changes in the procedures of specific instances and in the obligations of the MNE in each chapter.

Based on this declaration and guidelines we are going to review the Chapter IV of the Guidelines and explain the following concepts: the National Contact Points, the CIME, the clarification process and the specific instances.

d. THE EMPLOYMENT AND INDUSTRIAL RELATIONS CHAPTER

The Chapter IV or the “employment and industrial relations chapter” is elaborated by an introduction and 8 paragraphs.

The introduction,

“Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards”³¹

refers to the applicable law and regulations that are meant to acknowledge the fact that multinational enterprises, while operating within the jurisdiction of particular countries, may be subject to national, sub national, as well as supra-national levels of regulation of employment and industrial relations matters.³² With the 2011 review of the guidelines,

³⁰ Declaration on International Investment and Multinational Enterprises – 2011. Considering part.

³¹ Introduction of the Employment and Industrial Relations chapter of the OECD Guidelines for Multinational Enterprises review 2011.

³² BLANPAIN, Roger. “MULTINATIONAL ENTERPRISES AND CODES OF CONDUCT: THE OECD GUIDELINES FOR MNES IN PERSPECTIVE”. In: “Comparative Labour Law and Industrial Relations in Industrialized Market Economies”. Wolters Kluwer. The Netherlands. 2010. Page 198.

there has been an addition on the introduction, which now includes the respect for the international labour standards, which is utilized as based of the chapter.

In the next 8 paragraphs we can determinate the principles and rights for the correct behavior of individual enterprises, which can be also grouped in 11 topics:

- a) Freedom of Association (Paragraphs 1a and 7)
- b) Child Labour (Paragraph 1c)
- c) Forced Labour (Paragraph 1d)
- d) Discrimination and equality (Paragraph 1e)
- e) Collective Bargaining (Paragraphs 1b, 2 and 8)
- f) Provision of information – consultation (Paragraphs 2c and 3)
- g) Health and Safety (Paragraph 4b)
- h) Observance of Employment Standards (Paragraph 4)
- i) Skills and Training (Paragraph 5)
- j) Reasonable notice and cooperation in case of major changes (Paragraph 6)
- k) Access to decision makers (Paragraph 8)

Check the Annex N° 1 for the complete text of the chapter.

The OECD Guidelines are multilaterally endorsed, government-backed set of normative standards that aim to promote responsible business conduct among corporations based or operating in adhering countries. In effect, this means that these governments have “signed up” on behalf of all MNEs based within their borders to uphold the provisions of the Guidelines.³³

“The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises. The Guidelines aim to ensure that the operations of these enterprises are in harmony with

³³ OECD WATCH. “10 years on: assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct”. June - 2010. Page 5.

government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives. The guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable law and internationally recognized standards.”³⁴

With the 2011 review, the employment chapter has been strengthened with the inclusion of the international labour standard/principles established in the International Labour Organization (ILO).

In 1977 the ILO published the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy – which has also been reviewed in 2006. Additionally in 1998, the ILO published the Declaration on Fundamental Principles and Rights at work. These two main declarations have been integrated in the text of the Guidelines in order to promote the observance of these standards; let’s recall that the Guidelines is a non-binding instrument that has the role of promotion of the principles among MNEs.³⁵

“The ILO MNE Declaration sets out principles in the fields of employment, training, working conditions, and industrial relations, while the OECD *Guidelines* cover all major aspects of corporate behavior. The OECD *Guidelines* and the ILO MNE Declaration refer to the behavior expected from enterprises and are intended to parallel and not conflict with each other. The ILO MNE Declaration can therefore be of use in understanding the *Guidelines* to the extent that it is of a greater degree of elaboration.

³⁴ OECD “THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES – 2011 review – RECOMMENDATIONS FOR A RESPONSIBLE BUSINESS IN A GLOBAL CONTEXT”. Preface. Par 1.

³⁵ IBID. Page 34

However, the responsibilities for the follow-up procedures under the ILO MNE Declaration and the *Guidelines* are institutionally separate.”³⁶

In this train of thought we can understand that the following ILO’s conventions have been “integrated” to the guidelines in order to create a reinforcement of the “international standards”. In the Paragraph 1, contain the 1998 ILO’s declaration, however after the 2011 review, each subparagraph, has additionally integrated other important ILO’s convention, the sub paragraph 1.c) contains the ILO Convention 182, Convention 138 and Recommendation 146 concerning the worst forms of child labour and minimum ages for employment . In the subparagraph 1.d) the reference to this core labour right is based on the ILO Convention 29 and 105 about the eradication of forced labour. In the subparagraph 1.e) establish the mandate of non-discrimination and the equality of treatment, where different ILO Conventions are based, like the Convention 111, 159, 183, 200, etcetera.³⁷

One of the most important changes in this chapter is the inclusion of the subparagraph 4.b):

“When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. Theses should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families.”

We can interpret that there is mention on the decent work agenda, which is based in the ILO Declaration for a Fair Globalization of year 2008.

³⁶ IBID. Page 34-35

³⁷ IBID. Pages 35 to 37.

3) THE OECD'S NATIONAL CONTACT POINTS

a. DEFINITION:

“Adhering countries shall set up National Contact Points to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances, taking account of the attached procedural guidance. The business community, worker organizations, other non-governmental organizations and other interested parties shall be informed of the availability of such facilities.”³⁸

The National Contact Points can be defined as the organ which handles the enquiries on the guidelines, can act as a mediator and problem-solving institution for specific instances.³⁹

The NCP can be a government office or inter-ministerial working group responsible for encouraging observance of the Guidelines in a national context.⁴⁰

“The NCP gathers information on national experiences with the Guidelines, handles enquiries, discusses matters related to the Guidelines and assists in solving problems that may arise in this connection. When issues arise concerning implementation of the Guidelines in relation to specific instances of business conduct, the NCP is expected to help resolve them. Generally, issues are dealt with by the NCP in whose country the issue has arisen. Any person or organization may approach a National Contact Point to enquire about a matter related to the Guidelines.”⁴¹

³⁸ Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises - May 2011.

³⁹ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pág. 60

⁴⁰ http://www.oecd.org/document/3/0,3746,en_2649_34889_1933116_1_1_1_1,00.html

⁴¹ http://www.oecd.org/document/3/0,3746,en_2649_34889_1933116_1_1_1_1,00.html

b. RESPONSABILITIES AND DUTIES OF THE NCP

There are 4 activities of the NCP: ⁴²

- a) *Information and promotion*: Undertake promotional activities to inform interested parties about the availability of their facilities and handle enquiries about the guidelines from i) other NCP; ii) the business community, employee organization and other NGOs and iii) governments of non-adhering countries. ⁴³
- b) *Institutional arrangements*: Consistent with the objective of functional equivalence, adhering countries have flexibility in organizing their NCPs, seeking the active support of social partners, including the business community, etc.
- c) *Implementation in specific instances*: The NCP will contribute to the resolution of issues that arise relating to implementation of the guidelines in specific instances. “In addition to promoting the Guidelines, it is the job of the NCPs to consider allegations that a multinational enterprise’s behavior is inconsistent with the Guidelines. Where the NCP takes on a case, it will seek to mediate an agreement between the parties, and, where this is not possible, it will examine the allegations in detail and will make a determination of whether the multinational enterprise has acted inconsistently with the Guidelines.” ⁴⁴
- d) *Reporting*: Annually the NCP will report to the Investment Committee.

“National Contact Points have an important role in enhancing the profile and effectiveness of the Guidelines. While it is enterprises that are responsible for observing the Guidelines in their day-to-day behavior, governments can contribute to improving the effectiveness of the implementation procedures. To this end, they

⁴² OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011 review.

⁴³ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pag. 60

⁴⁴ United Kingdom Gov. “THE UK NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES”. In the electronic resource: <http://www.bis.gov.uk/nationalcontactpoint>

have agreed that better guidance for the conduct and activities of NCPs is warranted, including through annual meetings and Committee oversight. Many of the functions in the Procedural Guidance of the Decision are not new, but reflect experience and recommendations developed over the years (e.g. the 1984 Review Report C/MIN(84)5(Final)). By making them explicit the expected functioning of the implementation mechanisms of the Guidelines is made more transparent.”⁴⁵

b. THE NCP'S STRUCTURE:

The structure of the NCP differs between the countries; each country has adopted a personal structure which fits on their own needs. According to the guidelines review in 2011, the NCP can use different forms of organization to meet its objective. An NCP can consist of senior representatives from one or more Ministries may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organizations and other non-governmental organizations may also be included.⁴⁶

The current structures of the NCP worldwide can be summarized as follows:^{47 48}

- 20 NCP single government departments: Argentina, Austria, Chile, Czech Republic, Egypt, Germany, Greece, Hungary, Ireland, Israel, Italy, Mexico, New Zealand (with a Liaison Group consisting of government, business and trade unions representatives), Peru, Poland, Slovak Republic, Spain, Switzerland and United States.

⁴⁵ OECD Publishing. “THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES”. Paris - France. June 2008. Page 56.

⁴⁶ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011 review.

⁴⁷ OECD “The Annual Report on the OECD Guidelines for Multinational Enterprises 2010” Paris – France. 2010. Page 12.

⁴⁸ Check Annex 2 for the detailed structure of the NCPs worldwide.

- 8 NCP multiple government departments: Brazil, Canada, Iceland, Japan, Korea, Portugal, Turkey and United Kingdom.
- 2 bipartite NCP: Romania and Morocco's NCP is comprised of government and business representatives.
- 9 tripartite NCPs (involving governments, business, and trade unions): Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, Slovenia and Sweden – Several of these also have multiple governmental department NCPs.
- 2 quadripartite NCPs (involving governments, business, trade unions and NGOs): Finland and Norway – which are now in a process of restructuring their NCPs to reflect a mixed structure of four independent appointed experts, including a leader, and two full time secretariats, all localized outside of the government, while administrative responsibility and financial resources for the NCPs will rest with the government; and
- 1 mixed structure of independent experts and government representatives: In 2007, the Dutch NCP has been changed from an interdepartmental office to a mixed structure consisting of four independent experts and four advisors from four ministries.

“Compared with 2000, when the NCP mechanism under the revised Guidelines was created, the inclusion of stakeholders into NCP structures has markedly expanded. The number of NCPs with tri- or quadri-partite organizations has increased while the advisory committees or permanent consultative bodies involving non-government partners has become widespread in countries with government NCP structures. Meetings with business, trade unions and civil society have also intensified. While a few NCPs seem to prefer more informal channels of communication, this year's

reports underscore NCPs' commitment to respond to enquiries about the functioning of the Guidelines and be fully transparent about their activities.”⁴⁹

⁴⁹ OECD Publishing. “THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES”. Paris - France. June 2008. Page 56

CHAPTER II: The evaluation of the follow up since the 2000 review.

i. THE FOLLOW UP IN GENERAL

a. THE PROCEDURE OF CLARIFICATION:

The guidelines were written in general terms which, like other can create different problems of interpretation. For this purpose, it has been established that the different countries or partners can ask for “clarifications” on the meaning and/or request additional information about whether and how the guidelines apply to a particular business situation and how it should be used in the future cases.⁵⁰

“Although clarifications have usually arisen in connection with the activities of a specific enterprise, they are not intended to pronounce a judgment of the appropriateness of that enterprise’s conduct. In this context, it is also important to note that a large number of cases raised with the CIME have not led to clarifications; many were similar to ones raised before them, and the Committee sub-sequently saw no need to issue additional clarifications.”⁵¹

The organ which is responsible to make a clarification to the Guidelines is the Committee on International Investment and Multinational Enterprises (CIME); however, after the 2000’s review its function is also to assist NCPs in carrying out their activities and to make recommendations on how they can improve their performance.⁵²

⁵⁰ Loc. Cit. BLANPAIN, Roger. “MULTINATIONAL ENTERPRISES ...Page 201

⁵¹ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pag.62

⁵² FRIENDS OF EARTH - UK. “A GUIDE TO THE GUIDELINES. Practical Guidance for Individuals, Communities and NGOs on the Organization for Economic Cooperation and Development’s Guidelines for Multinational Enterprises”. Washington – USA. Page 11.

Now, after the 2011 review, the Investment Committee is obligated to consider the requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the guidelines in particular circumstances.⁵³

The request of clarification can come by government's authorities, the Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC); however individuals, communities, NGOs and multinational enterprises cannot directly ask the CIME to provide clarifications at this time.⁵⁴ If there is any enterprise concerned, it also may express its view to the BIAC, which will transmit these ideas to the CIME.⁵⁵ While the CIME's clarifications do not become part of the official text of the Guidelines, they give information on how certain guidelines should be seen and understood.⁵⁶

Since its adoption in 1977 and before the 2000's review, there were only 35 requests for clarification presented to the CIME; 30 of them were introduced in the first decade after the adoption. 24 of those cases were brought by the TUAC, 5 of them for the Belgium government, 2 from the Netherlands, 1 each from France, United Kingdom and Denmark, and 1 jointly by France and Belgium. Only half of all the 35 requests were resulted in clarifications by the CIME. One of the most important cases is the Badger about the co-responsibility of the Parent Company and subsidiaries in different countries, in this case Belgium and United States of America.^{57 58}

“After the 2000 review, the number of cases raised (now designated as “specific instances”) has again considerably increased. *Nota bene*, these have

⁵³ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011 review.

⁵⁴ IDEM

⁵⁵ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pag.73

⁵⁶ Loc. Cit. FRIENDS OF EARTH - UK. “A GUIDE TO THE GUIDELINES... Page 11

⁵⁷ For more information look BLANPAIN, Roger “THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES”. Netherlands. 1977.

⁵⁸ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Pag.65-66.

been raised at the level of NCP's, and no issues has been raised after 2000 have yet reached the CIME.”⁵⁹

The Committee has to ensure to enhancing the effectiveness of the guidelines and to fostering the functional equivalence of NCPs taking into consideration:⁶⁰

- a) The reports of the NCPs
- b) The substantiated submission by an adhering country, an advisory body or the NGO OECD Watch on whether an NCP is fulfilling its responsibilities with regards to its handling of specific instances.
- c) Issuing a clarification where an adhering country, and advisory body or the OECD Watch makes a substantiated submission on whether the NCP has correctly interpreted the guidelines in specific instances.
- d) Make recommendations to improve the functionality of the NCP and its effective implementation.
- e) Co-operate with international partners.
- f) Engage with interested non-adhering countries on matters covered by the guidelines and their implementations.

b. THE PROCEDURE OF COMPLAINT AFTER THE 2000 AND 2011 REVIEW (THE SPECIFIC INSTANCES):

In order to initiate a specific instance is necessary to present a formal request of complaint to the NCP. The difference with the procedure of clarification is that any “interested party” such as a group of individuals, a local community, enterprises, business and labour organization like a trade union or an NGO can file a complaint under the Guidelines. If an enterprise is directly concerned, the NCP should contact the enterprise to inform it that an issue related to the Guidelines has been raised. ⁶¹

⁵⁹ Idem.

⁶⁰ Idem

⁶¹ Loc. Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION... Page 73.

“In 2000, as part of the most recent revision of the Guidelines, a new complaint procedure was agreed upon that allows non-governmental organizations (NGOs) to submit complaints concerning alleged breaches of the Guidelines to a government’s National Contact Point (NCP). Before the revision in 2000, only trade unions could submit complaints. As of March 2006, the Trade Union Advisory Committee to the OECD (TUAC) had recorded 63 trade union complaints. As of September 2006, about 55 complaints had been filed by NGOs.”⁶²

i. THE PROCESS:

In order to initiate a specific instance is necessary to present a formal request of complaint to the NCP. The difference with the procedure of clarification is that any “interested party” such as a group of individuals, a local community, enterprises, business and labour organization like a trade union or an NGO can file a complaint under the Guidelines..⁶³

“When issues arise relating to implementation of the guidelines in specific instances, the NCP is expected to help resolve them. This section of the Procedural Guidance provides guidance to NCPs on how to handle specific instances”⁶⁴

In the first phase, is important to determinate the relevant NCP to present the complaint. The relevance can be determinate by taking into consideration the country where the act (which is object of the complaint) has been committed or where is the company’s home country.

⁶² OECD Watch. “GUIDE TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES’ COMPLAINTS PROCEDURE”. November 2006. Page 7.

⁶³ IBID. Page 17.

⁶⁴ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011. Page 77.

“It will always be important to “assess the structure of the company, the political context of the country, the character of the NCP and potential allies” when deciding where to file a complaint (...) For example, *Milieudefensie* (Friends of the Earth-Netherlands) deliberately filed a complaint against a Chilean subsidiary of a Dutch company at the Dutch NCP. The Dutch NCP then referred the complaint to the Chilean NCP. Had *Milieudefensie* submitted the complaint directly to the Chilean NCP, the Dutch NCP might not have been as involved in handling the matter.”⁶⁵

The complaint must clearly indicate which of the guidelines have been violated (making a reference to the specific paragraphs). Also, there has to be a description of the company’s activities considered to be in a fault with guidelines; this accusation must be supported with all the necessary documentation and evidence (the burden of proof is on the complainant).⁶⁶

Once it’s submitted, the NCP has to determine if the case can be considered as “relevant of applicable law and procedures” as well as “how similar issues have been or are being treated in other domestic or international proceedings.” The NCP should respond to the complainants about how it intends to proceed after making an initial assessment.⁶⁷

“The NCP will first make an assessment of whether the complaints or issues raised merit examination, inter alia by determining whether the issues are bona fide and substantiated, and whether consideration of the specific issues would contribute to the purposes and effectiveness of the guidelines.”⁶⁸

In the second phase, the NCP is able to a) seek advice from relevant authorities, and/or representatives of the business community, employee organizations, other NGOs, and relevant experts; d) consult the National Contact Point in the other country or countries

⁶⁵ Loc. Cit. FRIENDS OF EARTH-UK. “A GUIDE TO THE GUIDELINES... Page 11

⁶⁶ Loc. Cit. FRIENDS OF EARTH-UK. “A GUIDE TO THE GUIDELINES... Page 12.

⁶⁷ IBID Page 13.

⁶⁸ IBID. Page 62.

concerned; and/or c) seek the guidance of the CIME if it has doubt about the interpretation of the Guidelines in particular circumstances.⁶⁹

“The effectiveness of the specific instances procedure depends on good faith behavior of all parties involved in the procedures. Good faith behavior in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.”⁷⁰

The NCPs in the whole process must act and be consistent with the core criteria for functional equivalence in their activities, these principles are:⁷¹

- a) Impartial.
- b) Predictable.
- c) Equitable.
- d) Compatible with the Guidelines.

The NCP will try to offer an agreement to the parties involved; facilitating the access to a consensual and non-adversarial treat, trough conciliation or mediation. However, if the parties involved do not achieve a consensus or agreement on the issues raised, the NCP will only make recommendations (as a statement) on the implementation of the Guidelines, which is available for everyone – also the parties are free to communicate it -. ⁷²

⁶⁹ Loc. Cit. FRIENDS OF EARTH-UK. “A GUIDE TO THE GUIDELINES... Page 12.

⁷⁰ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011. Page 77.

⁷¹ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011. Page 78 and 79

⁷² THE OECD GUIDELINES FOR MULTINALTIONAL ENTERPRISES. 2011

“NCPs are expected to always make the results of a specific instance publicly available in accordance with paragraphs C-3 and C-4 of the Procedural Guidance. When the NCP, after having carried out its initial assessment, decides that the issues raised in the specific instance do not merit further consideration, it will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision; it may draft the statement so as to protect the identity of the party.”⁷³

If the parties involved fail to reach agreement or if the NCP finds that one of the parties is unwilling to participate in good faith, the contact point will issue a statement, and make recommendations as appropriate. This 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.⁷⁴

In the other hand, if the parties involved reach agreement, the parties should address in their agreement how and to what extent the content of the agreement is to be made publicly available. The NCP will make publicly available a report with the results of the proceedings. The parties may also agree to seek the assistance of the NCP in following-up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP.⁷⁵

“Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant to the administration of government

⁷³ OECD – Implementation Procedures of the OECD Guidelines for Multinational Enterprises - May 2011. Page 80

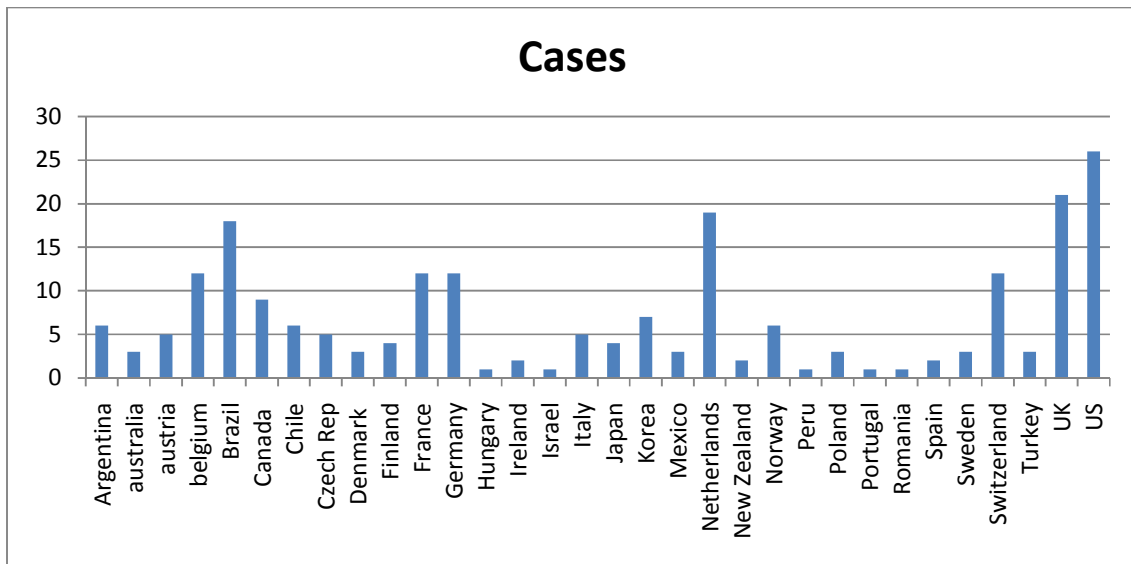
⁷⁴ IBID. Page 80 and 81.

⁷⁵ Idem.

programmes and policies. In order to foster policy coherence, NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency’s policies and programmes. This provision does not change the voluntary nature of the *Guidelines*.”

c. THE CASES SINCE 2000:

After the review of 2000, and according to the Annual Report of 2010, there has been 224 requests of specific instances presented to the NCPs in this distribution: Argentina (6), Australia (3), Austria (5), Belgium (12), Brazil (18), Canada (9), Chile (6), Czech Republic (5), Denmark (3), Finland (4), France (12), Germany (12), Hungary (1), Ireland (2), Israel (1), Italy (5), Japan (4), Korea (7), Mexico (3), Netherlands (19), New Zealand (2), Norway (6), Peru (1), Poland (3), Portugal (1), Romania (1), Spain (2), Sweden (3), Switzerland (12), Turkey (3), United Kingdom (21), and United States (26).⁷⁶



⁷⁶ Loc. Cit. OECD “The Annual Report 2010 ... Page 21

Since the annual report of 2008, the NCP which has received the most complaints and started the specific instance is Switzerland.

According to the OECD Watch, the average duration of an OECD Guidelines case filed by an NGO is just over two years, around 24.32 months, with some cases going on for more than seven years, 85 months.⁷⁷

In the financial aspect, the OECD Watch points out, that although there are no comprehensive statistics available, one NGO recently estimated that the total financial cost of their average-length OECD Guidelines specific instance approximated 100'000.00 euro including personnel costs, travel, research and documentation.⁷⁸

ii. THE FOLLOW UP BY THE NCPS IN PRACTICE:

a. THE UNITED KINGDOM NATIONAL CONTACT POINT:

i. DESCRIPTION AND STRUCTURE:

The current structure of the United Kingdom's National Contact Point, as we pointed out in previous lines, is a multiple government department which is subordinated to the UK Department for Business, Innovation and Skills (BIS). Since 2007, a Steering Board has been established to monitor the work of the NCP and provide it with strategic guidance. The Steering Board meets regularly and is composed of representatives of relevant Government Departments and four external members nominated by the Trades Union

⁷⁷ IBID. Page 10

⁷⁸ IBID. Page 11

Congress, the Confederation of British Industry, the All Party Parliamentary Group on the Great Lakes Region of Africa, and the NGO community.⁷⁹

The UK NCP has also worked with Foreign and Commonwealth Office (FCO) to provide guidance to British Embassy staff on the OECD Guidelines so that they can assist UK companies operating overseas. The UK NCP will be a lead representative of the UK Government in forthcoming negotiations to update the OECD Guidelines.⁸⁰

In the promotion area, the UK NCP carried out an awareness campaign on the Guidelines, including an electronic bulletin sent to thirty five thousand decision makers within large companies, advertising on news websites, and direct mailing of the UN NCP booklet to one thousand one hundred fifty multinational companies in the UK. This booklet has proved to be a useful tool in raising awareness of the guidelines with over three thousand three hundreds copies circulated to stakeholders since it was published in October 2009, at various meetings, events and seminars. The booklet has also been translated into French and Spanish,⁸¹ all three versions of the booklet are available in the UK NCP website: <http://www.bis.gov.uk/nationalcontactpoint>.

ii. THE MOST IMPORTANT CASES:

Between the cases that the NCP has taken we can find:⁸²

⁷⁹ <http://www.bis.gov.uk/files/file53566.pdf>

⁸⁰ Idem.

⁸¹ Loc. Cit. OECD "The Annual Report 2010... Page 19

⁸² OECD. "OECD Guidelines for Multinational Enterprises: SPECIFIC INSTANCES CONSIDERED BY NATIONAL CONTACT POINTS until the 7th of October of 2009" France – Paris. 2009. Pages 23 to 25.

1. Corner house against BAE System

- a. *Date:* 01/04/2005

- b. *Parties:*
 - i. The accusers:
 - 1. Corner House

 - ii. The accused:
 - 1. BAE Systems.
 - 2. Roll Roys
 - 3. Airbus

- c. *Summary:* In April 05, Corner House filed a complaint against BAE System, Roll Roys and Airbus, after the companies refused to adhere to the UKs Export Credit Guarantee Departments new anti-corruption measures. The complaint notes that in 2004; were introduced new anti-corruption measures that required companies to provide information about the agents they use in ECGD-backed transactions, including how much they are paid in commission. The companies refused, claiming the information was confidential. Despite assurances the information would remain safe, the companies continued to rebuff ECGD. In the end, the companies were assured by the ECGD that the new policy would not apply to them.⁸³

- d. *State:* Closed

- e. *Comment:* The UK NCP accepted the complaint in May 2005; the cases were subsequently put on hold pending the outcome of a public consultation initiated by the ECGD on its anti-corruption measures. The complaint against Airbus was referred to the French NCP, but action was suspended in

⁸³ http://oecdwatch.org/cases/Case_75

August 2005 because the ECGD had allegedly engaged in consultation about payments through agents.⁸⁴

In September 2009, the UK NCP explained that the case had apparently been lost by the NCP due to staff changes. The NCP apologized and stated that it had only become aware of the case after reviewing OECD Watch's June 2009 submission to the OECD, which classified the case as "blocked".⁸⁵

The case was reactivated in December 2009 when the complainants confirmed they wished to pursue the case. The NCP offered to mediate a meeting between the parties, but the companies rejected the offer. In November 2010, the NCP closed the case and issued a final statement concluding that it was unable to determine whether or not the companies had breached the Guidelines. The NCP was able to determine that the companies had requested that they be allowed to withhold the names of agents, but could not determine whether the companies had actually withheld those names. The NCP concluded that the request in itself was not a violation of the Guidelines.⁸⁶

i. RAID against Oryx

a. *Date:* 28/06/2004

b. *Parties:*

i. The accusers:

4. RAID (Right and Accountability for Development)

⁸⁴ Idem

⁸⁵ Idem

⁸⁶ Idem.

ii. The accused:

5. Oryx National Resources

c. *Summary:* In October 2002, a United Nations Panel of Experts accused 85 OECD-based companies of violating the Guidelines for their direct or indirect roles in the illegal exploitation of natural resources in the Democratic Republic of Congo. Oryx, one of these companies, was cited by the Panel, because of its involvement in illicit diamond trading. The Panel alleged that there was a secret profit sharing agreement whereby Oryx and the Government of Zimbabwe were each to take 40 per cent of the net cash inflow from Sengamines, one of the Congolese state-run diamond company richest diamond concessions. Fact that was completely true, in effect Oryx was being used as a front for Zimbabwean Defense Forces and its military company. According to the complainants there is also evidence that Sengamines served as a front for illegal foreign exchange transactions using several routes into and out of the Country.⁸⁷

d. *State:* Concluded

e. *Comment:* In July 2004, the UK NCP accepted the complaint; however, RAID was prohibited from taking part in the negotiation process for one year while the NCP engaged in extensive discussions with Oryx. Most of the complaint was rejected on the grounds that a UN Panel had resolved the issue. In April 2005, the NCP insisted RAID re-submit its complaint. RAID was allowed to participate in the proceedings in April 2005, but under very restrictive and summary procedures. RAID was able to comment on the NCP's draft statement, which was the only area in which the UK NCP followed the Guidelines' complaint procedures. The majority of issues raised in the complaint were disallowed by the NCP on grounds that they had been "resolved" by the UN Panel. The final statement was highly

⁸⁷ http://oecdwatch.org/cases/Case_39

unsatisfactory for the complainants and did not incorporate any of its recommendations.⁸⁸

About this last case, it is necessary to highlight that this is not the only case about this topic, there is the RAID against Das Air, RAID against Ridgepoint, RAID against Tremalt, etc; in which the base of the complaints were the United Nations Panel of Experts accusation to the 85 OECD-based companies of violating the Guidelines for their direct or indirect roles in the illegal exploitation of natural resources in the Democratic Republic of Congo.

iii. ANALYSIS OF THE “UIF” AGAINST UNILEVER PLC IN PAKISTAN CASE

This specific instance began in the 27th of October of 2008, when “International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers” Associations (IUF) presented a complaint to the UK NCP on behalf of one of its affiliates, the “National Federation of Food, Beverage and Tobacco Workers of Pakistan” and the “Action Committee for the Dismissed Workers of Unilever - Rahim Yar Khan Factory.”⁸⁹ “Unilever Pakistan Ltd” is a subsidiary of the UK registered company, “Unilever PLC”.⁹⁰

The base of the accusation presented by the IUF, were that Unilever had terminated the contracts of 292 temporary employees seeking permanent employee status, within a context of intimidation and with the direct aim of preventing trade union membership. The IUF also alleged that the employees were dismissed and replaced with agency contract workers in

⁸⁸ Idem.

⁸⁹ UK National Contact Point. “Final Statement on the Complaint from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations against Unilever plc on Pakistan’s Rahim Yar Khan factory” London – England. 2009. Par. 5

⁹⁰ Idem

order to employ workers on inferior terms and conditions and render employment at the factory even more precarious.⁹¹

“The IUF claimed that there was already a lack of job security in the factory due to the systematic reduction in permanent employment and the promotion of temporary and casual labour with the aim of weakening trade union representation, and that this prevented Unilever from contributing to economic and social progress with a view to achieving sustainable development.”⁹²

The accusations raised by the IUF are direct breach on the following points of the Guidelines:⁹³

- (a) Chapter II (1): [Enterprises should] contribute to economic, social and environmental progress with a view to achieving sustainable development”.

- (b) Chapter IV (1) (a): [Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices], respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives with a view to reaching agreements on employment conditions”.

“The IUF has filed a complaint at the Dutch and UK National Contact Point for the OECD Guidelines against the Anglo-Dutch TNC Unilever for labour

⁹¹ IBID Par. 7.

⁹² Idem

⁹³ IBID Par. 6.

rights violations in India. The complaint states that Hindustan Lever has repeatedly violated the letter and the spirit of Chapter IV of the Guidelines which sets out norms and standards defining employers' general obligation to engage in good faith collective bargaining with trade unions.”⁹⁴

In the other hand, the accused pointed out in its own defense that the terminations of the contracts were part of the reorganization and restructuring process of Unilever Pakistan’s operations to achieve operational efficiency and cost competitiveness and were not made with the aim of preventing trade union membership. It contended that its outsourcing decision at Rahim Yar Khan, resulting in the hire of agency contract workers, was made further to agreements with the local bargaining agent and the recognized trade union at the factory, the Unilever Employees Federation of Pakistan, who did not support IUF’s complaint.⁹⁵

As it is pointed out in the previous paragraphs, the 27th of October of 2008 the IUF submitted the complaint to the UK NCP. On the 15th of December of 2008, the UK NCP published its Initial Assessment in which it accepted the Specific Instance – let’s recall that this is only the acceptance and doesn’t mean that NCP is deciding or realizing a pre-judgment -. ⁹⁶

After the admittance, the UK NCP contacted both parties to confirm whether they were willing to accept the UK NCP sponsored conciliation/mediation process with the aim of reaching a mutually acceptable outcome. However, in this specific case, both parties asked for a delay in the conciliation/mediation because they still wanted to reach an agreement through bilateral meetings.⁹⁷

⁹⁴ <http://oecdwatch.org/news-en/iuf-files-complaint-against-unilever>

⁹⁵ Loc. Cit. UK National Contact Point. “Final Statement on the Complaint from the International Union of Food ... Par. 8.

⁹⁶ IBID. Par. 9

⁹⁷ IBID. Par. 10

After 2 months, on the 3rd of March of 2009, the IUF asked the UK NCP to arrange and facilitate a conciliation/mediation meeting. The UK NCP appointed as the Advisory, Conciliation and Arbitration Service (ACAS) Arbitrator and Mediator John Mulholland to serve as conciliator-mediator.⁹⁸

The first meeting took place on the 29th of April of 2009 in London. The parties met again on the 26th of May and 24th of June of the same year in the same place.⁹⁹ On the June meeting, both parties reached to an understanding, which paved the way for the agreement attached to this Final Statement.¹⁰⁰

It was agreed that Unilever will establish an additional 120 permanent posts at the factory Rahim Yar Khan. For those workers, each of them will receive a scholarship equivalent to one year basic salary and will be offered a permanent employment contract on attainment of a secondary school certificate.¹⁰¹ Additionally, the 120 employees will be selected applying the already established Unilever selection criteria. For those workers who were dismissed in October 2007, the company will offer them a permanent employment plus one payment of 50,000 Pakistan Rupees conditional on their written confirmation of withdrawal of any related court cases; and for those workers who will undertake educational training will also be eligible for a payment of 50,000 Pakistan Rupees on receipt of a written confirmation of withdrawal of any related court cases.¹⁰²

⁹⁸ IBID. Par. 11.

⁹⁹ IBID. Par. 12

¹⁰⁰ IBID. Par 13.

¹⁰¹ "Agreement between Unilever and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) relating to Rahim Yar Khan Factory, Pakistan." London – England. 2009. Par. 1 and 2.

¹⁰² IBID. Par. 8 and 9

At last, the implementation of this agreement will be jointly monitored by Unilever and the IUF at national and international levels.¹⁰³

“In 2009, the UK NCP published four final statements. Two of these statements, concerning the activities of UNILEVER PLC in Pakistan, reflect the successful outcome of mediation sponsored by the UK NCP. The alleged breaches of Chapter II (General policies) and Chapter IV (Employment and Industrial Relations) were brought to the OECD, the first instance in October 2008, and the second in March 2009, by a trade union (International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Association (IUF). The UK NCP accepted the complaints and commences a conciliation/mediation process between the parties using an independent mediator in an effort to reach a mutually acceptable resolution. The result of the independent conciliation mediation process was an exemplary success as both undertook specific commitment with regard to the issues presented.”¹⁰⁴

iv. ANALYSIS OF THE SURVIVAL INTERNATIONAL AGAINST VEDANTA RESOURCES PLC CASE

Survival International – the complainant - is a UK based NGO which seeks to support tribal peoples worldwide through educational programs, advocacy and campaigns to protect their rights. One of its stated objects is to promote for the public benefit the human rights of indigenous peoples established by United Nations covenants and declarations.¹⁰⁵

¹⁰³ Idem.

¹⁰⁴ Loc. Cit. OECD “The Annual Report 2010... Page 27.

¹⁰⁵ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises - Complaint from Survival International against Vedanta Resources plc. London – England. 2009. Par. 6

In the other hand, Vedanta – the company accused - is an UK registered mining company operating directly or through subsidiaries in India, Zambia and Australia. Vedanta's activities focus on aluminum, copper, zinc, lead and iron mining. Vedanta has a controlling stake in a number of subsidiaries¹⁰⁶ but only two are relevant in this case: Sterlite Industries (India) Limited (Sterlite Industries), based in Mumbai (Maharashtra) 59.9% of which is controlled by Vedanta; and Vedanta Aluminum Limited, based in Lanjigarh (Orissa), 70.5% of which is owned directly by Vedanta, and 29.5% of which is owned by Sterlite Industries.¹⁰⁷

The 19th of December of 2008, Survival International presented its complaint to the UK NCP in relation to the operations of Vedanta in the Niyamgiri Hills, situated in the State of Orissa (India).¹⁰⁸

The complaint has its fundament on the construction of a bauxite mine near Lanjigarh (Kalahandi and Rayagada Districts - Orissa - India). "This project was originally proposed by Sterlite Industries on the basis of an existing agreement between Vedanta Aluminum Limited and Orissa Mining Corporation Limited, a company owned by the State of Orissa. Vedanta Aluminum Limited applied to the Supreme Court of India for clearance on the project. Following the Supreme Court of India's Order of 23 November 2007, Vedanta Aluminum Limited's application was dismissed but Sterlite Industries (and only Sterlite Industries) was granted leave to re-apply. In August 2008, the Supreme Court granted Sterlite Industries clearance for the use of forest land for bauxite mining subject to final approval from the Indian Ministry of Environment and Forests. Sterlite Industries therefore formally retains the lead on the Lanjigarh project. Neither Vedanta nor the complainant dispute that overall responsibility for the Lanjigarh project rests with Vedanta."¹⁰⁹

¹⁰⁶ See <http://www.vedantaresources.com/uploads/vedanta-group-structure-lar.jpg>

¹⁰⁷ Loc. Cit Final Statement Complaint from Survival International... Par. 7.

¹⁰⁸ IBID. Par. 9

¹⁰⁹ IBID. Par. 8

In its complaint, the accuser alleged that Vedanta has failed to consult with the indigenous group affected by its operations, the Dongria Kondh.^{110 111}

“It has not commissioned an indigenous rights impact assessment with the full participation and engagement of the Dongria Kondh, nor does it have a human rights or indigenous people policy. Survival International appears to have brought its complaint on behalf of the Dongria Kondh, as opposed to other local indigenous communities, because they are the community most vulnerable to the effects of the construction of the mine.”¹¹²

Additionally, the accuser claimed that Vedanta has failed to respect India’s international commitments under the United Nations International Covenant on Civil and Political Rights, in specific the Articles N° 2 (1), 18° and 27°. Also, the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in specific the article N° 5(c) (d) (v) and (e); the Convention on Biological Diversity the Article N° 8(j); the United Nation’s Declaration on the Rights of Indigenous People, in specific the Articles N° 12, 18, 19 and 32; and India’s domestic law, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.¹¹³ And, for the guidelines, the accuser pointed out that Vedanta’s conduct is contrary to the following provisions of the Guidelines¹¹⁴, in special the Chapter II - General Policies- articles N° II(2) and II(7); also they are accused to infringed the Chapter V- Environment- the article V (2) (b)

“The Dongria Kondh tribe in India is literally fighting to protect the lands they, and perhaps their very existence, depend on. The Dongria live in the Niyamgiri Hills in the eastern State of Orissa, and they

¹¹⁰ Some sources refer to this community as the “Dongria Kondh” or as “Dongria Kandha”.

¹¹¹ This group lives within 4 to 5 Km from the mine but revere as sacred the area on which the mine is being built, and depend for their livelihood on the area affected by the mine’s operations.

¹¹² Loc. Cit Final Statement Complaint from Survival International... Par. 10 (a)

¹¹³ IBID. Par. 10 (b) and (c)

¹¹⁴ IBID. Par. 11

worship one mountain above all other: Niyam Dongar. This mountain is literally a god to them, and they believe the surrounding Niyamgiri Hills and the trees growing there, which provide the tribe's 8000 people with all they need for their existence, have divine powers. But if the British mining company Vedanta Resources has its way, the Dongria's sacred mountain will soon be home to an open-pit bauxite mine. The company is currently on a course where, if allowed to proceed, they will mine the Niyam Dongar without ever having held meaningful consultations with the Dongria or assessing the potential impacts to their human rights."¹¹⁵

Vedanta set out its response in the 20th of January and 13th of February 2009, denying that it has breached the Guidelines and asked the UK NCP not to accept Survival International's complaint on the basis that the accuser has not provided evidence of rejection of the local community; also that the mine project has been approved by the Supreme Court of India and by the State of Orissa, these institutions have already considered the impact of the project on the local community, including the consultation process; at last, the company ensures that its operations comply with corporate social responsibility standards and annually publishes a "Sustainable Development Report" to reflect its progress in this area.¹¹⁶

The specific instance was initiated with the reception of the complaint on the 19th of December of 2008. On the same day, the UK NCP sent the complaint to Vedanta which responded on 20 January and on 13 February 2009 – as we already pointed out-. On the 27th of January of 2009 Survival International met with the UK NCP however Vedanta was unable to arrive to the meeting, the company and the NCP communicated by an exchange of e-mails and letters. On the 27th of March of 2009, the Initial Assessment was published.¹¹⁷

¹¹⁵ Loc. Cit. OECD Watch. "10 years on ... Page 52.

¹¹⁶ Loc. Cit Final Statement Complaint from Survival International... Par. 12 (a) (b) and (c).

¹¹⁷ IBID. Par. 13, 14 and 15.

“On 6 April 2009, Vedanta declined the UK NCP’s offer of conciliation/mediation. As a result, the UK NCP informed both parties on 9 April 2009 that it would move to an examination of the complaint. The UK NCP asked both parties to provide evidence to support their position in respect of the complaint by 8 May 2009. This deadline was extended at Vedanta’s request. Survival International submitted a great deal of evidence in support of its allegations but Vedanta submitted no evidence in support of the claims made in its responses of 20 January and 13 February 2009, save for a copy of its 2008 Sustainable Development Report.”¹¹⁸

Due to denial, the UK NCP required evidence from other relevant UK Government Departments, business, trade union’s organizations and civil society, however none was provided.¹¹⁹ The NCP could not find any record of the views of the Dongria Kondh about the construction of the bauxite mine in the Niyamgiri Hills ever having been collected and/or taken into consideration by the company.¹²⁰

Evidences from the Central Empowered Committee and Sterlite Industries’ environmental impact assessment shows that the Lanjigarh mining project would affect the environment in the Niyamgiri Hills and that, indeed, will cause the displacement of the local people. The UK NCP concludes that Vedanta has not complied with the Guidelines because it has to date failed to put in place an adequate and timely consultation mechanism to engage fully the Dongria Kondh about the potential environmental and health and safety impact of the construction of the mine on them.¹²¹

¹¹⁸ IBID. Par. 16.

¹¹⁹ IBID. Par. 17.

¹²⁰ IBID. Par. 64.

¹²¹ IBID. Par. 65

The UK NCP concluded that Vedanta has breached the Chapter II (2) of the Guidelines, not respecting the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People. Vedanta failed to engage the Dongria Kondh in adequate and timely consultations on the impact that the construction of the bauxite mine would have on their recognized rights and freedoms; and, also, it did not take any other measures to consider the impact of the construction of the mine on those rights and freedoms, or to balance the impact against the need to promote the success of the company.¹²²

“(Survival International) filed an OECD Guidelines complaint against Vedanta with the UK NCP in September 2008, because their attempts to deal directly with the company had been rebuffed. Their complaint was straightforward: Vedanta was moving forward with their bauxite mine without properly consulting the Dongria, and in doing so, they were violating their human and indigenous peoples' rights. In September 2009, the UK NCP concurred with SI's allegations. In its final statement, the NCP called on Vedanta to “immediately and adequately engage with the Dongria Kondh” and “include a human and indigenous rights impact assessment in its project management process”.¹²³

The UK NCP gave some recommendations in order help Vedanta bring its practices in line with the Guidelines. They should include a human and indigenous rights impact assessment in its project management process, paying particular attention to the creation of an adequate consultation process.¹²⁴ The NCP require to both parties to provide an update by the 29th of

¹²² IBID. Par. 67

¹²³ Loc. Cit. OECD Watch. “10 years on ... Page 53.

¹²⁴ IBID. Par. 75.

December of 2009, about the implementation of the UK NCP's recommendations listed in the Final Statement.

The 23rd of December of 2009 and on the 22nd of February of 2010 Survival International sent its update on Vedanta's implementation of the recommendation.¹²⁵ In Survival International's submission, it was expressed that a team of the accuser visited the zone of Orissa from the 3rd to 11th of December of 2009. The team reported that access to the area affected by the project was obstructed by people allegedly paid by the company to prevent the team from meeting the community of Dongria Kondh.¹²⁶

Using other route, the team was able to visited Muniguda, Trilochanapur and three Dongria Kondh's villages closest to the mine site: Phuladumer, Palaberi, and Lakhpadar. In which, the residents expressed to the team, that they had been served with notices stating that the state authorities would be acquiring the land for "public purposes".¹²⁷

On the 29th of December of 2009 and the 26th of February 2010, the UK NCP received Vedanta's response.¹²⁸ The company expressed that there will be no displacement from the proposed mining project as there is no inhabitation at the proposed mining site.¹²⁹ Also, Vedanta alleged that the construction of the mine is being progressed in compliance with Indian law and regulations, in joint venture with the Government of Orissa and with the approval of the Supreme Court of India and central government.¹³⁰ At last, Vedanta claim that these actions are in correct line with the final statement and recommendations realized by the UK NCP and denied that it has paid local villagers to obstruct Survival

¹²⁵UK NCP. "Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises - Complaint from Survival International against Vedanta Resources plc". London – England. 2010. Par. 11

¹²⁶ IBID. Par. 12

¹²⁷ IBID. Par. 13

¹²⁸ IBID. Par. 16

¹²⁹ IBID. Par 17

¹³⁰ IBID. Par 18

International's activities or that it has made any promises in return for the villagers' support of the mining project.¹³¹

“Despite the UK NCP's exemplary handling of the case, Vendata's refusal to abide by the NCP's recommendations means that the Dongria are still faced with a very real threat. The lack of consequences attached to even the most flagrant violations of the OECD Guidelines means that the NCP, despite its clear final statement and recommendations for improvement, is powerless to help the victims of corporate abuse if the company in questions refuses to cooperate.”¹³²

iii. THE DUTCH NATIONAL CONTACT POINT:

a. DESCRIPTION AND STRUCTURE:

The current structure of the Dutch National Contact Point, as we pointed out in previous lines, is a mixed structure of independent experts and government representatives. In 2007, the Dutch NCP has been modified by Government decree as an independent body, comprising four independent members from various fields and for official representatives from different government ministries. The Ministry of Economic Affairs runs the NCP secretariat, while the NCP communications manager has been assigned to the Corporate Social Responsibility (CSR) Netherlands centre of expertise. This decision was made with a view to ensuring synergy with public information activities by CSR Netherlands in specific sectors.¹³³

¹³¹ *IBID.* Par. 20 and 21.

¹³² *Loc. Cit.* OECD Watch. “10 years on ... Page 53

¹³³ <http://www.oecdguidelines.nl/ncp/organisation/>

Currently, the Dutch NCP is composed by 4 independent mediators and 4 government representatives whom give advisory consultation – between them are the Economic Affairs, the social affairs and employment, the housing, spatial planning and environment and the foreign affairs representatives.¹³⁴

b. THE PEER REVIEW:

During the 2008 Annual National Contact Point meeting in Paris, the Dutch NCP announced it would submit itself to a peer review; this is the first time that a NCP, by own determination, ask for a peer review to its own.

“In June 2007, the Dutch government restructured its National Contact Point for the OECD Guidelines with an independent board, supported by a secretariat and advised by four ministries involved in the subject matter, responsible business conduct. The Dutch ministry of Economic Affairs is responsible for the NCP and hosts its secretariat.”¹³⁵

In the fall of 2009, this peer review was carried out by the NCPs of the member states of Canada, Chile, France, Japan and the United Kingdom which at the end presented the review to the OECD Investment Committee Working Group.¹³⁶

“The objectives of the peer review were to: (I) evaluate the structure, practice, effect and results of the Dutch NCP; (II) to create a learning process for all participating NCPs; (III) to assess issues which may serve as

¹³⁴ Idem.

¹³⁵ Report of the NCP Peer Review Team 2010. “Dutch National Contact Point: Aspirations and Expectations Met?” 2010. Page 6

¹³⁶ Loc. Cit. OECD “The Annual Report 2010... Page 20.

useful input into any possible future revision of the OECD Guidelines; and (IV) to provide a review report which may be used as input for the Dutch NCP's preparation of its own evaluation report for the Dutch Parliament by the end of 2010. Apart from these four goals, the project has proved to be a valuable, ad-hoc learning platform for all participating NCPs.”¹³⁷

On the 24th of March of 2010, the final report was issued, in it, the member states expressed twenty-eight recommendations relating to: ¹³⁸

- a) The structure of the NCP (from 1 to 7)
- b) The NCP's promotional activities (from 8 to 16)
- c) The NCP's dealing with specific instances (from 17 to 28)

For the first part - regarding the structure of the NCP - the recommendations are divided in five different subthemes: i) the members of the NCP, ii) the composition and position of the NCP Secretariat, iii) the absence of an appeal mechanism, iv) the stakeholders meetings, and lastly the v) NCP's resources.¹³⁹

About the members, it was recommended that each year a new member from the ministry in charge should be appointed for four years, in order to succeed one member, so that institutional memory is preserved.¹⁴⁰

With regard to the NCP's promotional activities, the peer review team recommends to consult with stakeholders on how to further enhance the relevance of its stakeholders

¹³⁷ Idem.

¹³⁸ Idem.

¹³⁹ Report of the NCP Peer Review Team 2010. "Dutch National Contact Point: Aspirations and Expectations Met?" 2010.

¹⁴⁰ Idem.

meetings; follow up on the call from the key stakeholders to meet more regularly next to the stakeholders meetings; to align its annual communication plan with the schedule of annual reporting; and to team up with other NCPs and/or the OECD to enjoy the economies of scale in promotional activities, mainly with regard to multilingual access to information.¹⁴¹

“Several lessons learned were drawn from review process, such as the importance of overall promotional activities and several challenges relating to the NCP specific instance procedure. A few of the highlighted challenges relating to the specific instance procedure are establishment of clear and appropriate timelines for initial assessments, examination and issuing final statements, management of parallel procedures, (local) fact finding and the need for better protection of persons or organizations logging complaints where fear of retaliation over the notification exists. A number of NCPs also found the structural change in the Dutch NCP to an Independent Board, of great interest and deserving further reflection. Finally, although the main goal of a peer review is evaluative in nature, much of the additional value of this NCP peer review was the peer learning platform that was promoted during the six month peer review process. This experience was well received by all parties involved; the review team would like to encourage other NCPs to also initiate knowledge sharing and mutual learning events, either through general review or more thematic discussions.”¹⁴²

c. THE MOST IMPORTANT CASES:

i. ICN against Adidas:

a. Date: 20/06/2001

¹⁴¹ Idem.

¹⁴² Loc. Cit. OECD “The Annual Report 2010... Page 20.

b. *Parties:*

i. The accusers:

6. Indian Committee of Netherlands

ii. The accused:

7. Adidas Benelux

- c. *Summary:* The complaint states that Adidas' Indian supplier has violated labour rights in the production of footballs, based on the report “The dark side of football - child and adult labour in India’s football industry and the role of FIFA” (June 2000) and subsequent fieldwork.

In November 1999, there was strong evidence that this supplier was using child labourers. Even though Sports Goods Foundation of India stated no licensed production took place in Batala. Adidas has not provided any evidence to the contrary.¹⁴³

d. *State:* Concluded

- e. *Comment:* After accepting the case in November 2001, the NCP organized a meeting with the parties in March 2002. The meeting concluded with an agreement between Adidas and ICN. Based on information provided by Adidas, the NCP concluded that the company sufficiently encouraged its suppliers to operate in a socially responsible manner through its code of conduct. The NCP also stated that it had not found any evidence of the use of child labour. In December 2002, the NCP, ICN and Adidas issued a joint statement with some agreement on the need for monitoring of codes of conduct.¹⁴⁴

¹⁴³ http://oecdwatch.org/cases/Case_8

¹⁴⁴ *Idem.*

ii. Amnesty International and Friends of the Earth against Shell

a. *Date:* 25/01/2011

b. *Parties:*

i. The accusers:

8. Amnesty International
9. Friends of the Earth International
10. Friends of the Earth Netherlands

ii. The accused:

11. Royal Dutch Shell

c. *Summary:* The accusers alleged that Royal Dutch Shell has breached the OECD Guidelines by making false, misleading and incomplete statements about incidents of sabotage to its operations in the Niger Delta and the sources of pollution in the region.¹⁴⁵

d. *State:* Pending

e. *Comment:* On its initial assessment the Dutch NCP accepted the case as a specific instance in February 2011. The NCP is discussing terms for mediation meetings with both parties.¹⁴⁶

iii. Fenceline Community and Friends of the Earth Netherlands against Royal Dutch Shell

a. *Date:* 15/05/2006

¹⁴⁵ http://oecdwatch.org/cases/Case_197

¹⁴⁶ *Idem.*

b. *Parties:*

i. The accusers:

- 12. Friends of the Earth Netherlands
- 13. Friends of the Earth International
- 14. The Fenceline Community for Human Safety

ii. The accused:

- 15. Royal Dutch Shell

c. *Summary:* The complaint accused Shell of withholding information from local residents and employees about the environmental, health, and safety impacts of its Pandacan oil depot, which is situated in the heart Manila. The complaint also alleges that Shell's plans and procedures to mitigate potential hazards at its oil depot were insufficient and that Shell was improperly involved in local political activities.¹⁴⁷

d. *State:* Concluded

e. *Comment:* After the initial assessment, the Dutch NCP engaged in extensive communication, including numerous meetings, phone calls, letters and e-mails, with both parties throughout the process. Members of the NCP visited Manila in November 2008 to discuss the issues with the local expert and the Philippine parties to the complaint. The NCP members were joined by two independent Dutch health, safety, and environmental experts to conduct research at the Shell part of the oil depot. In 2009 the NCP attempted to bring the international and local parties together for mediation meetings in Manila, but the NCP was unsuccessful in getting the parties to agree on the terms and topics of the mediation, the issue of relocation of the depot being at the core of the issue. The case was closed, the NCP issued a final

¹⁴⁷ http://oecdwatch.org/cases/Case_93

statement in August 2009, more than three years after the complaint was filed.¹⁴⁸

The complainants blame the NCP's failure to reach a mediated solution on Shell's obstinacy and obstruction of the specific instance process. The complainants believe that while the NCP genuinely did its best to come to a mediated solution, its hands were tied as it lacked the authority to force a large company like Shell to even come to the negotiation table.¹⁴⁹

iii. THE ANALYSIS OF THE G-STAR AGAINST THE GARMENT AND TEXTILE WORKERS UNION CASE

Jeans Knit Pvt. Ltd. (JKPL) is a company 100% undertook by Fibre & Fabrics International (FFI), an enterprise registered in the Registrar of Companies of Bangalore. Its manufacturing process is divided among five units. Three of them are owned by FFI directly, and the other two units are held by Jeans Knit Pvt. Ltd.¹⁵⁰

The workers of the washing unit claimed that they were facing harassment and abuse from the supervisors and the management of the unit. About 100 workers of the unit were leaving for ill treatment every month.¹⁵¹

“The practice of humiliating workers in case of not meeting production targets, even to the extent of stripping and beating them had become too much to bear for the workers.”¹⁵²

¹⁴⁸ Idem.

¹⁴⁹ Idem.

¹⁵⁰ DUTCH NCP. “Fact Finding Report of Violation of the Rights of Workers at Washing Unit of Fibre & Fabrics International Pvt. Ltd. (FFI), Peenya Industrial Area, Bangalore. 2006. Page 1

¹⁵¹ IBID. Page 2

¹⁵² Idem.

On February 11th and March 24th of 2006 the Garment and Textile Workers' Union (GATWU) sent two letters to the management asking for a meeting in order to talk about the violations. According to the GATWU these letters have not received any response.¹⁵³

For this reason, the GATWU requested to the members of human rights organizations and social activists to conduct a fact finding to ascertain the facts of the allegations. In the 13th of October of 2006, the union joint by following NGOs - the "Civil Initiatives for Development and Peace", "Clean Clothes Campaign International Secretariat", "Indian Committee of the Netherlands" and the "Schone Kleren Campgne" – presented the complaint to the DUTCH NCP.¹⁵⁴

The complaint stated that G Star's Indian suppliers, Fibres and Fabrics International (FFI) and Jeans Knit Pvt. Ltd. (JKPL), have violated labour rights, including freedom of association, the right to collective bargaining, payment of a living wage, discrimination in employment, working hours, overtime work, occupational health and safety, punishment, abuse, harassment, and lack of legally binding employment relations.¹⁵⁵

In November 2006, the Dutch NCP accepted the complaint after a number of informal meetings with the parties. The NCP agreed that an "investment nexus" existed.¹⁵⁶

The NCP tried to bring the parties together for mediation but G-Star refused to be part of this process, reason why no formal agreement could realized. The NCP decided to organize an informal meeting between the parties in June 2007.¹⁵⁷

¹⁵³ Idem.

¹⁵⁴ http://oecdwatch.org/cases/Case_109/view?set_language=en

¹⁵⁵ Idem.

¹⁵⁶ Idem.

¹⁵⁷ Idem.

During those days, the Indian court charged the accusers NGOs and their internet providers with criminal defamation, which brought a more prominent role for the Dutch government was required. Additionally, in February 2007 a civil judge in Bangalore reinforced a restraining order on five Indian labour organizations. The restraining order was a heavy blow to the fundamental right to freedom of speech and freedom of association in India.¹⁵⁸

“In 2006, the International Secretariat for the CCC and the India Committee of the Netherlands submitted a complaint against G-Star, because Indian NGOs and unions had documented dozen of labour rights violations by the company’s Indian supplier. In an outrageous move, the supplier took legal action to silence the Indian NGOs and unions after they, working with the CCC, initially tried to engage in a direct dialogue with the companies.”¹⁵⁹

For request of the Dutch Minister for Economic Affairs, the former Dutch Prime Minister Ruud Lubbers intervened in the case as a mediator. In January 2008, Mr. Lubbers brokered an agreement between the parties. “This agreement is to pave the way for a sustainable mechanism to solve possible future labour conflicts at FFI/JKPL. An important outcome of the mediation is that, with the consent of all parties, an ombudsman will be installed who will follow up on complaints from FFI/JKPL employees and labour rights organizations. After some deliberation, all parties concerned agreed upon Dr. Justice V.S. Mali math, former Chief Justice of Karnataka and Kerala High Courts and ex-member of the Indian National Human Rights Commission, to take the role of ombudsman. A “Committee of Custodians” will serve as a sounding board for the ombudsman and safeguard that all parties adhere to the agreement. The Committee will include Mr. Lubbers, Mr. Ashok Khosla, an Indian national who has previously worked for the Indian government and the United Nations, as well as Mr. A.P. Venkateswaran, former ambassador for India in China

¹⁵⁸ Idem.

¹⁵⁹ Loc. Cit OECD WATCH “10 years on ... Page 19.

and Russia. The ombudsman will aim for solutions that are acceptable to all parties. When dealing with complaints confidentiality is crucial. The ombudsperson will regularly report on the processing of complaints.”¹⁶⁰ Finally in the agreement has established the withdrawal of all court cases undertaken by FFI/JKPL against Indian and Dutch parties.

In this case we can see that the Dutch NCP did not play a role in reaching this agreement, it was thanks to the former Prime Minister Lubbers that these issues arrived to an end. The NCP declared that the mediation by Lubbers made the NCP procedure redundant. However the CCC and ICN did not agree with this point of view.

iv. THE GERMAN NATIONAL CONTACT POINT:

a. DESCRIPTION AND STRUCTURE

The current structure of the Germany’s National Contact Point, as we pointed out in previous lines, is a single government department which is subordinated to the Federal Ministry of Economics and Technology (BMWi).¹⁶¹ Nowadays, the German NCP is creating a handbook, to be finalized in conjunction with the update to the Guidelines, which should include information of the interrelation between the OECD Guidelines, ILO Tripartite Declaration and UN Global Compact. Additionally, Procedural Guidance explaining the handling of specific instance procedures in the German structure has been made available on the German NCP web page along with summarized reasoning for the rejection of specific instances.¹⁶²

¹⁶⁰ http://oecdwatch.org/cases/Case_109/view?set_language=en

¹⁶¹ <http://www.bmwi.de/English/Navigation/External-economic-policy/oecd-guidelines-for-multinational-enterprises,did=326672.html>

¹⁶² Loc. Cit. OECD “The Annual Report 2010... Page 14.

The German NCP, in the area of promotion of the OECD Guidelines, they have aimed to strengthen responsible business on an international scale. This NCP has promoted the guidelines with presentations, lectures, preparation of speeches and active participation in responsible business-related events organized by stakeholders and multi stakeholder initiatives, governments universities, etc. “The Guidelines are highlighted in the context of the German Governmental Reports on Human Rights and, with specific reference to the Risk Awareness Tool, in the Governmental Report on Crisis Prevention. Additionally, work on a handbook for German companies has begun to further promote the Guidelines and five special guidance to small and medium sizes enterprises with interpreting and implementing the Guidelines in their commercial activities abroad.”¹⁶³

b. MOST IMPORTANT CASES:

i. CCC against Adidas:

a. *Date:* 5/09/2002

b. *Parties:*

i. The accusers:

1. Clean Clothes Campaign Austria
2. Clean Clothes Campaign Germany
3. SÜDWIND – Institut für Ökonomie und Ökumene

ii. The accused:

1. Adidas Salomon AG

c. *Summary:* The complaint was directed towards Adidas representations in Austria as well as towards its headquarter in Germany. The complaint alleges that Adidas’ suppliers in Indonesia are violating labour rights. Specifically, workers have been denied the right to organize and to collective bargaining. They have been subjected to intimidation ranging

¹⁶³ IBID. Page 17.

from humiliation, arbitrary arrests and threats to their health and safety. As a result, workers are unwilling to speak out about abuses out of fear of retaliation. In addition, workers do not receive a living wage. The low wages impacts parents, particularly women, who are frequently forced to live away from their children.¹⁶⁴

d. *State:* Concluded

e. *Comment:* The German NCP concluded the present case with a final statement in September 2004 after the parties failed to come to an agreement on a course of action. In the document, the NCP makes proposals for future action. CCC was disappointed in the outcome given the time and resources spent preparing the complaint and participating in the process. Adidas has taken some positive steps, but CCC does not find them to be satisfactory. The issue of minimum wage is not addressed in the Guidelines, but Adidas agreed to act on this part of the complaint.¹⁶⁵

ii. German watch against Volkswagen

a. *Date:* 07/05/2007

b. *Parties:*

iii. The accusers:

1. German watch

iv. The accused:

1. Volkswagen AG

¹⁶⁴ http://oecdwatch.org/cases/Case_27

¹⁶⁵ *Idem.*

c. *Summary:* Due to VW's climate damaging product range and business strategy, German watch accuses the company of violating the Guidelines in 15 concrete cases, grouped into the following categories: a) evaluation of climate protection; b) VW does not have a properly forecast and evaluation of the actual emissions of its products; c) VW has achieved less progress in complying with the self-commitment (ACEA Agreement) than the company agreed to with the European Commission in 1998; d) VW advertises massively for vehicles with high fuel consumption, but fails to transparently inform consumers about the climate impact of such automobiles; e) VW has directly and indirectly (through association memberships) been involved in the distribution of false information about climate change or planned policy measures; and f) VW has directly and indirectly lobbied against various climate policy frameworks that include legislation to limit the consumption of new passenger cars.¹⁶⁶

d. *State:* Rejected.

e. *Comment:* On the 20th of November of 2007, the German NCP rejected the case claiming that the alleged violations are beyond the scope of the Guidelines. German watch does not agree with the NCP's decision not to investigate the case and is considering further steps, including legal approaches.¹⁶⁷

iii. Greenpeace Germany against Vattenfall:

a. *Date:* 29/10/2009

b. *Parties:*

¹⁶⁶ http://oecdwatch.org/cases/Case_119

¹⁶⁷ *Idem.*

- v. The accusers:
 - 1. Greenpeace Germany
 - vi. The accused:
 - 1. Vattenfall AB
- c. *Summary:* Greenpeace Germany filed a complaint against Vattenfall AB, for undermining German environmental law and consumer protection issues. The complaint alleges that the company Vattenfalls Hamburg-Moorburg coal-fired power plant violates the OECD Guidelines on national environmental policies and consumer protection. Greenpeace states that despite the company's claims that it is committed to climate protection issues, Vattenfall generates the highest levels of CO2 emissions per kilowatt-hour of any power company in Germany.¹⁶⁸
- d. *State:* Rejected
- e. *Comment:* In March 2010 the German NCP rejected Green peace's complaint, claiming that some of the allegations were not substantiated, some did not fall under the jurisdiction of the OECD Guidelines, and some were already being dealt with in the German courts. At the end, the German government and Vattenfall reached an agreement in August 2010 regarding the Moorburg dispute.¹⁶⁹

iv. GERMANWATCH AGAINST CONTINENTAL AG

a. *Date:* 27/05/2002

b. *Parties:*

¹⁶⁸ http://oecdwatch.org/cases/Case_170

¹⁶⁹ *Idem*

vii. Accuser:

1. Foodfirst Information & Action Network
2. German watch Trade Union
3. Sindicato Nacional Revolucionario de Trabajadores de Euzkadi

viii. Accused:

1. Continental AG

c. *Summary:* Continental's subsidiary, Euzkadi, closed its tire factory in Mexico without proper notification to employees and trade unions. Prior to the closure, problems between the accused and the trade union had existed. One month after Euzkadi closed the factory, the trade union went on strike.

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d. *State:* Concluded

e. *Comment:* The complaint was accepted by the German NCP in May 2002, but later transferred to the Mexican NCP in June 2002. After a lengthy legal battle, Mexico's highest court ruled the closure was "existent" in February 2004, which has been interpreted by Mexican lawyers that the closure was illegal. The conflict was settled in the presence of the Mexican President Vicente Fox in January 2005. After a three-year strike against the illegal closure of the factory, the workers have achieved the fulfillment of their most important demands: the factory has been reopened and they are back to their jobs. The workers have received a total of 50 percent in shares of the tire factory.

¹⁷⁰ http://oecdwatch.org/cases/Case_24

Although this case was not resolved by the German or Mexican NCPs, the complainants believe the case served as a tool for international pressure.¹⁷¹

b. ANALYSIS OF THE GERMAN-WATCH AGAINST BAYER CASE

In India, since the introduction of hybrid cottonseeds in the early 1970s, has changed in the quantity and quality its cotton production, a new system of employing female children as 'bonded labourers'¹⁷² has come into practice on hybrid cottonseed farms in south India. Local seed farmers, who cultivate hybrid cottonseeds for national and Multinational Seed Companies, secure the labour of girls by offering loans to their parents in advance of cultivation, compelling the girls to work at the terms set by the employer for the entire season, and, in practice, for several years. These girls work long days, are paid very little, are deprived of an education and are exposed for long periods to dangerous agricultural chemicals.¹⁷³

“On Indian cotton plantations, children are still used as workers for pollinating the cotton hybrid plants. They are taken away from schooling during the field-work season and can often no longer be re-integrated into

¹⁷¹ *Idem.*

¹⁷² In India, traditional forms of bonded labour in agriculture have been historically largely associated with men and boys, with instances of women, especially girls, working as bonded labourers being relatively rare (see Marla, 1981:20-22 and Patnaik and Dingwaney, 1985:259). In his report, Marla estimates the population of the bonded labourers in the late 1970s in India. According to him, 97.7% of bonded labourers are men and boys, while 2.3% of them are adult women. There are no girls working as bonded labourers.

¹⁷³ VENKATESWARLU, Davuluri. “CHILD LABOUR AND TRANS-NATIONAL SEED COMPANIES IN HYBRID COTTONSEED PRODUCTION IN ANDHRA PRADESH”. Edited by the INDIA COMMITTEE OF NETHERLANDS [ICN]. The Netherlands. 2003. Page 4.

regular classroom education; they are frequently exposed to possible health hazards from pesticides.”¹⁷⁴

In this background, on the 11th of October of 2004, the non-governmental organizations: “German Watch”, “Global March”, and “Coordination gegen Bayer-Gefahren” submitted a complaint against the “Bayer CropScience company” to the German NCP. The complainants allege that Bayer suppliers in India have violated the OECD Guidelines chapter on employment and industrial relations by using child labour by employing children in cotton cultivation and that Bayer CropScience tolerate this activity and not take any adequate measures to counter the practice.^{175 176}

“The case is based on a 2003 study which found that cottonseed farms, largely in South India, employ children in large numbers, predominantly girls between 6 and 14 years of age. Many of them work in bonded labour. Because the use of large quantities of pesticides their health conditions are negatively affected all the time. The study found that around 2,000 children were working for suppliers of Proagro, a subsidiary of the German company Bayer AG. Bayer has failed to address these concerns, which form the basis of the complaint.”¹⁷⁷

In response, Bayer CropScience argues that all reasonable means had been taken to prevent that practice; they claimed a child protection program had been instituted to prevent child labor in the sub-contractors of that subsidiary owned by Bayer AG since mid 2002.¹⁷⁸

¹⁷⁴ German NCP. FINAL STATEMENT ON THE COMPLAINT FILED AGAINST BAYER CROPSCIENCE BY GERMAN WATCH, GLOBAL MARCH, AND COORDINATION GEGEN BAYER-GEFAHREN”. Germany. 2007. Page 1

¹⁷⁵ IBID Page 2.

¹⁷⁶ http://oecdwatch.org/cases/Case_50/view?set_language=en

¹⁷⁷ Idem

¹⁷⁸ Loc. Cit. German NCP. FINAL STATEMENT.... Page 2

Bayer refused the invitation of the German NCP to a joint meeting. The NCP had to hold separate meetings. In those meetings Bayer explained that it has a plan on how to face the problem. The complainants felt that having separate meetings with the complainant and the company compromised the NCP's (supposed) independent/objective nature because it put the NCP into the role of having to present the views and arguments of the company to the NGOs.¹⁷⁹

“In December 2005, the complainants sent a letter to Bayer with questions regarding the company's action plan. Despite a promise to do so, Bayer failed to respond. Independent research revealed that there were still 450-500 children working in the fields in the 2005/06 season producing for ProAgro/Bayer. After additional (separate) meetings in 2006 and 2007, the results of independent research indicating structural problems in Bayer's implementation of the action plan were handed over, along with an analysis by the complainants, to the NCP in June 2007 for consideration.”¹⁸⁰

In August 2007, the NCP concluded the complaint with a final statement. The accusers do not feel that the statement appropriately reflects their position. The complainants pledged to continue to monitor the situation on the ground and see how/whether the German NCP assumes the monitoring role that is foreseen in the final statement.¹⁸¹

“For the same reason, there was no possibility of a joint final statement being issued by the parties to the proceedings. However, Bayer Crop Science stated its willingness to issue a declaration of voluntary commitment. The National Contact Point herewith closes the complaint proceedings, and refers

¹⁷⁹ http://oecdwatch.org/cases/Case_50/view?set_language=en

¹⁸⁰ Idem.

¹⁸¹ Idem.

to Bayer Crop Science's Declaration of Voluntary Commitment for any individual questions that might arise.”¹⁸²

¹⁸² Loc. Cit. German NCP. FINAL STATEMENT.... Page 2

CHAPTER III: THE IMPACT OF THE NCP ON THE REALITY

1. THE STATISTICS SO FAR:

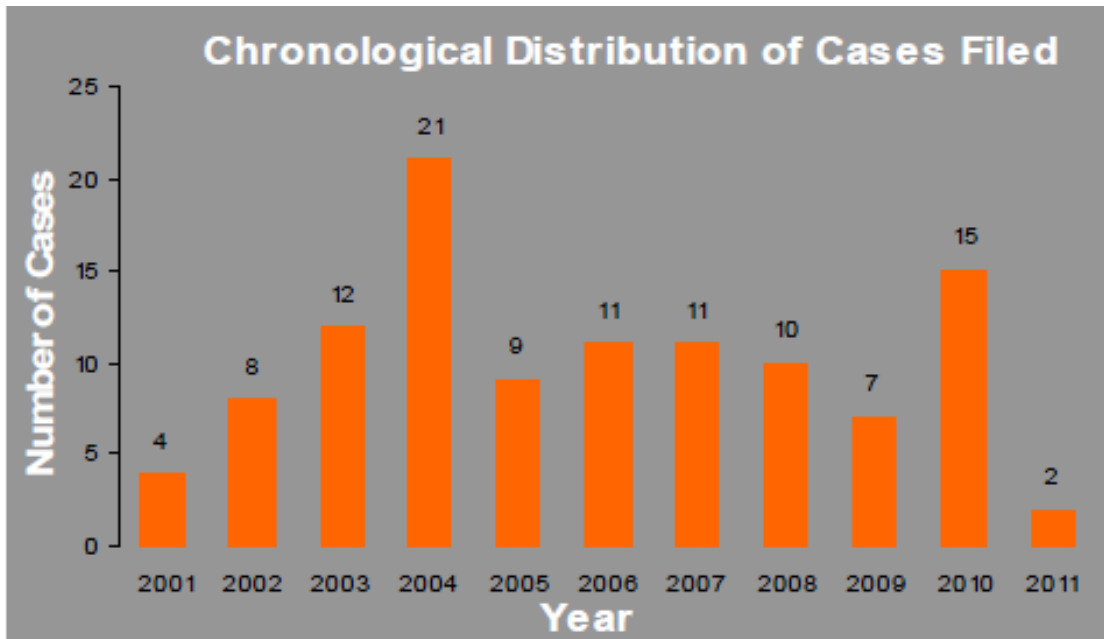
Since the creation of the specific instance (2000) until 2010, there have been a total of 224 cases presented to NCPs worldwide.

According to the Annual Report on the OECD Guidelines for Multinational Enterprises of 2010, around 194 cases have been considered by the NCPs in these years. This amount may vary, according to the statistics of the NCPs, because there are many cases which have been considered by one NCP and then transferred to another. The reason why are they not considered as one is because each NCP uses its resources to apply for the cooperation mandate.¹⁸³

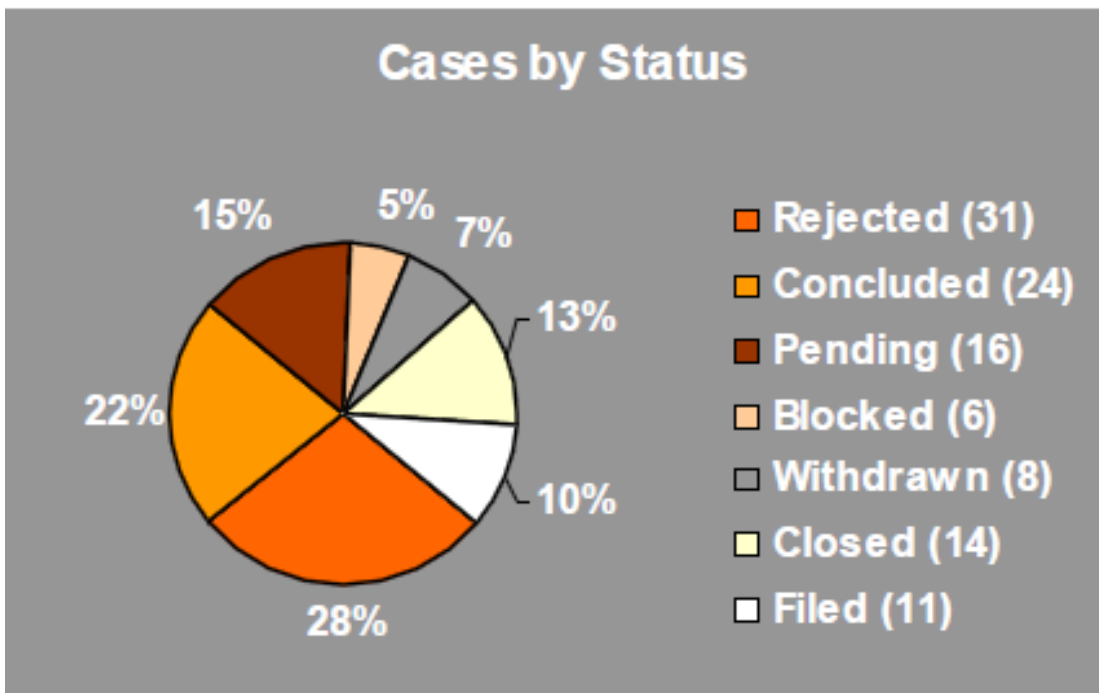
From the total amount only 110 of those cases were presented by a Non Governmental Organization; so far 28% (31 cases) have been rejected, 22% (24 cases) have been concluded and 15% (16) are still pending.¹⁸⁴

¹⁸³ Loc. Cit. OECD. "Annual Report 2010 ... Page 215.

¹⁸⁴ Loc. Cit. OECD Watch. "10 years on... Page 9



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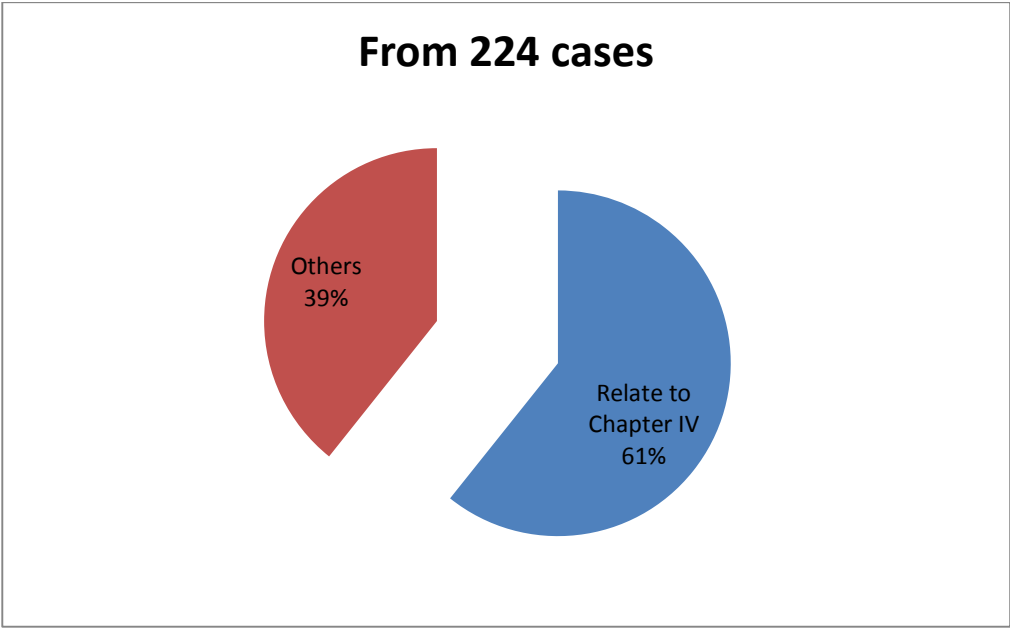
¹⁸⁵ OECD Watch. "Quarterly case update March 2011". Netherlands. March 2011. Page 16

¹⁸⁶ Loc. Cit. OECD Watch. "Quarterly 2011"... Page 16

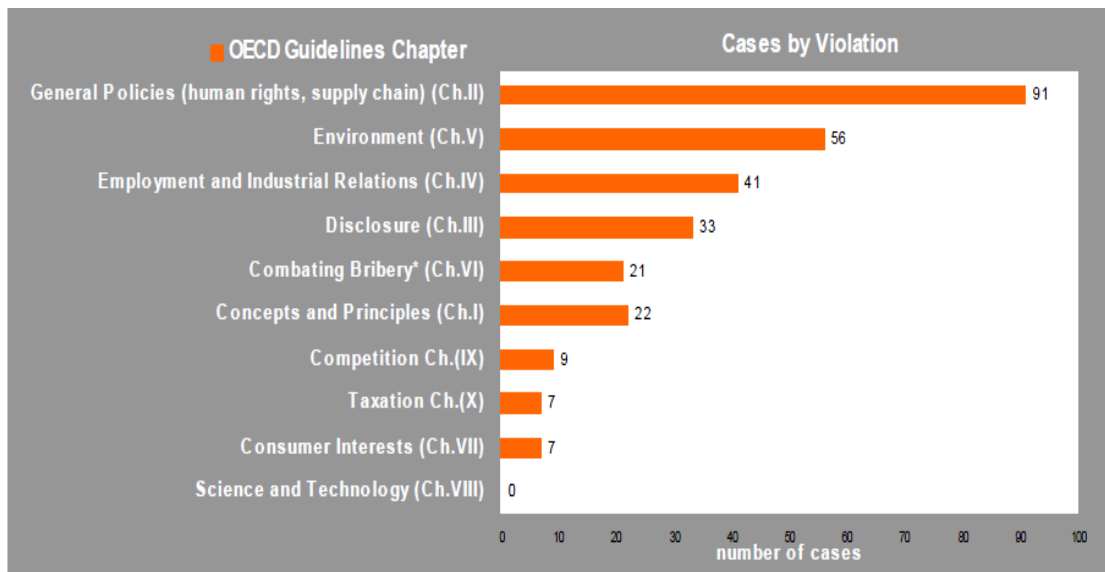
In the matter of topics, the most requested chapters in the specific instances deal with the Chapter II (General Policies – Human rights and supply chain), followed by the Chapter V (environment) and Chapter IV (Employment and Industrial Relations). The only chapter that has not been referenced in the context of a specific instance is chapter relate to Science and Technology.

From the total amount of cases presented, 136 cases were related to the Employment and Industrial Relations chapter.

From the 136 cases, 110 of them were submitted by NGOs, the rest of them, in majority, were presented by trade unions of workers.



From the cases submitted by NGOs:



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The most discussed topics in the procedures of complaint related to the Chapter IV are:¹⁸⁸

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- The (non) definition of the term “Multinational Enterprises”
- Responsibilities of the various entities of a MNE. Responsibility of the mother Company.
- Freedom of association
- Effective communication
- Reasonable notice of change in operations
- Transfer of a unit or of employees. Unfair influence during negotiations.
- Conduct of negotiations. Access to real decision makers.
- Providing information for a true and fair view of the enterprise.
- Future production and investment matters.

“Most specific instances dealt with Chapter IV (Employment and Industrial Relations). A rising number of cases also involved violation of human rights,

¹⁸⁷ Idem.

¹⁸⁸ Loc. Cit. OECD “The Annual Report 2008 ... Page 21.

¹⁸⁹ . Cit. BLANPAIN, Roger and Michele, COLUCCI. “THE GLOBALIZATION...

a majority of them within the resources sector. Complaints relating to Chapter V (environment) have also increased over the past few years. The only Guidelines chapter that has not been referenced in the context of a specific instance is Chapter VIII (Science and Technology). Smoother and more productive consultations among NCPs stand out as significant developments during the reviewed period. In particular, the New Zealand NCP reports working closely with assistance from Germany and Australia, on a recent initial assessment involving the employment practices of an enterprise in the telecommunications sector in New Zealand. The rise of specific instances in non- OECD adhering countries has also continued. The most noticeable development during the reporting period, however, was the increased recourse to mediation as a means for resolving specific instances. 9 specific instances were managed through mediation during this time frame, in a majority of cases resulting in positive outcomes for all parties involved.”¹⁹⁰

2. THE IMPACT OF THE GUIDELINES AND THE NCP

a. The most important cases

The Employment chapter and the specific instances have brought a great positive outcome. Since 2001, many NCPs have created notable agreements in the labour area (and also in the rest of the other chapters).

i. IN THE UK NCP:

The UK NCP, until 2010, has reviewed 9 cases related to the IV chapter in total. Among those cases, the most important are:

¹⁹⁰ Loc. Cit. OECD “The Annual Report 2010... Page 26.

- a. The G4S case: Between the 2006 and 2008. The case was related to infractions in overtime payment and holiday bonuses, refusal to allow medical visits, refusal to leave, access to toilets or water for security officers in private homes, etc. The parties agreed to mediation commanded by the UK NCP in March 2008. From these meetings the parties achieve an agreement.
- b. The Peugeot case: Between the 2006 and 2008. In this case, the NCP found that the company failed to meet the requirements establish on the paragraphs IV.2.b; IV.2.c; IV.3 and IV.6. Even though there was no successful mediation, the NCP publish a final statement with some recommendations to the accused company.

Other cases are the BATCO case, related to the employees' right to representation; the Unilever (doom dooma factory) case, related to the right of representation, the Unilever (Khanewal factory) case, related to the status of temporary workers; and the already discussed, Vedanta and Unilever (Rahim Yar Kham factory) cases.

ii. IN THE GERMAN NCP

The German NCP has reviewed only 3 cases related to the employment chapter.¹⁹¹ Two of these three cases have already been detail in the second chapter; the third one is the DGB against Bayer case.

On the 27th of June of 2003, the German NCP received a complaint from the German Confederation of Trade Unions (DGB) against Bayer AG. DGB argued that a subsidiary of Bayer AG in the Philippines had unlawfully recognized one of two competing company

¹⁹¹ Idem.

unions as a contracting party to a collective bargaining agreement in the period from 1998 to 2002.¹⁹²

iii. IN THE DUTCH NCP

The Dutch NCP is the organ that has review the most number of cases related to the Employment chapter. Since the year 2001, this organ has considered 18 cases in total¹⁹³.

The first case related to the employment chapter after the 2000 review – and one of the most important - was the “Adidas and the India Committee of the Netherlands case”. The case was presented in June 2001. In this case Adidas and ICN achieve an agreement thank to the mediation/conciliation process promoted by the Dutch NCP.

From the total amount of cases considered by the Dutch NCP, 8 of them were concluded with a positive outcome. 5 of these 8 cases, were withdrawn by the own accusers because the parties achieved an agreement before the NCP’s mediation meetings.

iv. OTHERS:

In the year 2001, the Canadian NCP was in charge of the “Oxfam Canada, RAID, *et al.* against the Canadian mining company First Quantum Mining”. The process was concluded with the reach of an agreement. In this document they parties agreed to remove the threat of forcible evictions from mining areas in Zambia and to negotiate a phased resettlement program for settlers.

Other important cases are the “GSL” and “BHP Billiton”, both of them handled by the Australian NCP; and “Accor Services” handled in to the Argentine NCP. These three cases

¹⁹² <http://tuacoecdmneguidelines.org/CaseDescription.asp?id=48>

¹⁹³ Loc. Cit. OECD “The Annual Report 2010

the NCPs could achieve positive outcomes. As a mediator the NCP help the parties to settled agreements solving their problems.¹⁹⁴

b. THE IMPACT ON THE REALITY:

“Despite approximately 25% (26 cases) of the specific instances filed by NGOs being concluded with an NCP-mediated agreement or final statement, it is telling that only a handful of cases have actually led to improved corporate behavior and/or improvements on the ground. Those cases that can count a change of behavior among their positive elements include a case against GSL in which, as a result of an agreement facilitated by the Australian NCP, the company improved its performance on human rights (related to detention centers for underage immigrants in Australia); a case against Bayer in which the German company accepted responsibility for child labour in its cottonseed supply chain and took action to improve the situation; and a recent case against Accor Services, in which the Argentine NCP facilitated an agreement that saw the company contribute financially to help improve its performance on transparency and bribery/corruption.”¹⁹⁵

The guidelines has a tacit positive impact, the most important outcome is that the guidelines and the NCP are documents created by consensus in order to restrain the damage of the globalization, in special with the Multinational Enterprises.

From the review of the cases, we can determinate that the Guidelines, so far, have influenced positively in the global conduct and behavior of the enterprises.

¹⁹⁴ Loc. Cit. OECD “The Annual Report 2010... Page 21 and 22.

¹⁹⁵ IBID. Page 22.

“The Guidelines have become one of the key global benchmarks of CSR, and they undeniably influence and define what government expects of business. The Guidelines have had ripple effects on other CSR processes and instruments such as the Global Compact and ISO 26000. Professor Ruggie has frequently referenced the OECD Guidelines throughout his mandate and in his “Protect, Respect, Remedy” framework, for example. Furthermore, there is evidence that the Guidelines are influencing socially responsible investors and financial institutions.”¹⁹⁶

The critics of the OECD Guidelines claim that the NCP *per se* doesn't have any power of coercion – like the ILO, codes of conducts or International Framework of Agreements - and it needs a proper mechanism of control of its recommendations.

“The lack of powers and mandate of NCPs has contributed to their inability to provide effective redress. The question as to whether the OECD Guidelines can provide an effective remedy raises two separate questions:

1. What powers and mandate do NCPs need in order to investigate, monitor, get companies to engage in the process, obtain information, make an informed decision if mediation fails, and ensure follow up?
2. What power do NCPs and their governments have to impose sanctions or attach other official consequences to NCP statements of breaches of the Guidelines?”¹⁹⁷

As an example of the critics, in 2009 the UK Parliament's Joint Committee of Human Rights called on the UK Government to help develop an international consensus for enhancing access to a remedy; stated that:

¹⁹⁶ IBID. Page 21

¹⁹⁷ Idem.

“As a non-judicial mechanism for satisfying individuals who may have a complaint against a UK company, [the NCP] falls far short of the necessary criteria and powers needed by an effective remedial body, including the need for independence from Government and the power to provide an effective remedy. There is little incentive for individuals to use a complaints mechanism which offers no prospect of any sanction against a company, compensation or any guarantee that action will be taken to make the company change its behavior.”¹⁹⁸

Is true that the NCPs don't have *per se* the power enough to coercion. Is also true that the voluntary nature of the guidelines is an impediment sometimes and only a political decision will solve it. But, from the cases, we also may understand that the NCPs have a great influence in the behavior of the MNEs, and here is where its power resides.

The lack of power that the NCP has, have been filled up by the press media and public influence. To put an example, in the case of the German - Watch against Continental AG, where, even though the case was never officially concluded, the complaint attract the media and eventually led to a number of parliamentarians getting involved in the case.

“Even in instances where there is no agreement, settlement, or immediate improvement in the situation, the OECD Guidelines cases can sometimes have an indirect positive effect. In some cases, the mere fact that a complaint exists, can prompt a resolution of the case in another forum. In a case lodged by German watch against Continental, for example, although there was no agreement within the specific instance process or even a final statement by either the Mexican or the German NCP, the complaint attracted media attention and eventually members of the German parliament helped to settle

¹⁹⁸ *Idem.*

the case. A Guidelines complaint can generate media attention, raise awareness, and lead to increased public pressure on companies to improve their behavior. It is also a means of alerting governments about the issues at stake. For example, although a case raised by the Australian Conservation Foundation against ANZ Bank was rejected by the Australian NCP, the case resulted in a review of the applicability of the Guidelines to the financial sector, and ANZ became the first Australian bank to develop a forestry and biodiversity policy.”¹⁹⁹

And for the argument that the NCPs need a follow up mechanism, we must highlight the Vedanta case presented to the UK NCP - detailed in the previous chapter -. This case has much importance for this critic, because in its final statement, the NCP created its own follow up mechanism, something completely new for any NCP before.

“In a recent article published in the journal *Public Administration*, researchers at Bocconi University in Milan, Italy, found that while corporate behavior is “unlikely” to change simply as a result of the existence of the OECD Guidelines, the Guidelines’ “soft sanctioning power has the potential to alter corporate behavior in the long run” if the Guidelines’ ability to “consistently discriminate between good and bad performers” is improved. 28 This means that the Guidelines’ “specific instance” grievance mechanism is where their unique added value lies and is a key determinant of the positive impact that they can have. It makes sense then, to assess the positive impact of the OECD Guidelines by evaluating the degree to which OECD Guidelines cases have contributed to some form of remedy or resolution for the victims of corporate abuse, a behavioral change within the company, or improvements in the environmental and human rights conditions on the ground.”²⁰⁰

¹⁹⁹ IBID. Page 22

²⁰⁰ IBID. Page 21.

CONCLUSIONS AND RECOMMENDATIONS:

- The Organization for Economic Co-operation and Development (OECD) was constituted in Paris on the 14th of December of 1960
- It describes itself as an "organization helping governments tackle the economic, social and governance challenges of a globalised economy". (...) its purpose is to boost prosperity by providing a web of compatible policies and practices across countries that are part of an ever more globalised world
- The OECD is a unique forum that let the country members to study and formulate the best policies possible in all economic and social spheres
- The OECD Guidelines for Multinational Enterprises were drawn up in the 1970s, a decade during which the activities of corporations became a topic of discussion among international organizations. The sometimes negative impact of corporations on developing countries was given increased attention and harmful activities of companies to countries where they were established met growing opposition.
- The Guidelines set out a responsible approach to areas of business ethics, including:
 - a) Employment and industrial relations,
 - b) Human rights,
 - c) Environment,
 - d) Information disclosure,
 - e) Combating bribery,
 - f) Consumer interests,
 - g) Science and technology,
 - h) Competition, and
 - i) Taxation

- The Chapter IV or the “employment and industrial relations chapter” is elaborated by an introduction and 8 paragraphs which group the principles and rights for the correct behavior of individual enterprises, which can be also resume in 11 topics:
 - a) Freedom of Association (Paragraphs 1a and 7)
 - b) Child Labour (Paragraph 1c)
 - c) Forced Labour (Paragraph 1d)
 - d) Discrimination and equality (Paragraph 1e)
 - e) Collective Bargaining (Paragraphs 1b, 2 and 8)
 - f) Provision of information – consultation (Paragraphs 2c and 3)
 - g) Health and Safety (Paragraph 4b)
 - h) Observance of Employment Standards (Paragraph 4)
 - i) Skills and Training (Paragraph 5)
 - j) Reasonable notice and cooperation in case of major changes (Paragraph 6)
 - k) Access to decision makers (Paragraph 8)

- After the 2000 review, the most important addition was the adoption of the Decision on the OECD Guidelines for Multinational Enterprises by the Council. This document creates a specific mechanism for addressing the companies that violate the Guidelines through the National Contact Points (NCP). This new procedure was called “specific instance”.

- In order to initiate a specific instance or process of complaint is necessary to present a formal request of complaint to the NCP. Any “interested party” such as a group of individuals, a local community, enterprises, business and labour organization like a trade union or an NGO can file a complaint under the Guidelines.

- In order to initiate a specific instance is necessary to present a formal request of complaint to the NCP. The difference with the procedure of clarification is that any “interested party” such as a group of individuals, a local community, enterprises, business and labour organization like a trade union or an NGO can file a complaint under the Guidelines.

- The NCPs in the whole process must act and be consistent with the core criteria for functional equivalence in their activities, these principles are:
 - a) Impartial.
 - b) Predictable.
 - c) Equitable.
 - d) Compatible with the Guidelines

- Since the creation of the specific instance until 2010, there have been a total of 224 cases presented to NCPs worldwide. According to the Annual Report on the OECD Guidelines for Multinational Enterprises of 2010, around 194 cases have been considered by the NCPs in these years

- From the total amount only 110 of those cases were presented by a Non Governmental Organization; so far 28% (31 cases) have been rejected, 22% (24 cases) have been concluded and 15% (16) are still pending

- The most requested chapters in the specific instances are the Chapter II (General Policies – Human rights and supply chain), followed by the Chapter V (environment) and Chapter IV (Employment and Industrial Relations). From the total amount of cases presented, 136 cases were related to the Employment and Industrial Relations chapter. And from the 136, 110 cases were submitted by NGOs, the rest of them, in majority, were presented by trade unions of workers.

- The most discussed topics in the procedures of complaint related to the Chapter IV are:
 - The (non) definition of the term “Multinational Enterprises”
 - Responsibilities of the various entities of a MNE. Responsibility of the mother Company.
 - Freedom of association
 - Effective communication

- Reasonable notice of change in operations
 - Transfer of a unit or of employees. Unfair influence during negotiations.
 - Conduct of negotiations. Access to real decision makers.
 - Providing information for a true and fair view of the enterprise.
 - Future production and investment matters.
- Approximately 25% (26 cases) of the specific instances filed by NGOs being concluded with an NCP-mediated agreement or final statement. As we can, that proof that the cases have actually led to improved corporate behavior and/or improvements on the ground.
 - From all the cases review and detailed in the present work, we may conclude that the guidelines has a tacit positive impact, the most important outcome is that the guidelines and the NCP are documents created by consensus in order to restrain the damage of the globalization, in special with the Multinational Enterprises. The Guidelines, so far, have influenced positively in the global conduct and behavior of the enterprises.
 - The lack of power that the NCP has, have been filled up by the press media and public influence. For the lack of control and follow up mechanisms, the Vedanta case presented to the UK NCP has shown us a NCP can created its own follow up mechanism.
 - The guidelines are not a complete document, it is now in its 6th review and it will be more of them. The guidelines, step by step, have improved learning from the reviews and the cases; now is one of the most useful mechanisms of control for the MNEs.

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ELECTRONIC RESOURCES:

- <http://www.oecdguidelines.nl/ncp/closedcomplaints/>
- <http://www.oecdguidelines.nl/ncp/organisation/>
- <http://www.vedantaresources.com/uploads/vedanta-group-structure-lar.jpg>
- <http://www.bis.gov.uk/files/file53566.pdf>
- <http://news.bbc.co.uk/2/hi/business/92719.stm>
- http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html
- <http://www.telegraph.co.uk/finance/economics/8443582/What-is-the-OECD.html>
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- http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1027
- <http://oecdwatch.org/about-oecd/guidelines>
- http://www.oecd.org/document/3/0,3746,en_2649_34889_1933116_1_1_1_1,00.html
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- http://oecdwatch.org/cases/Case_8
- http://oecdwatch.org/cases/Case_75
- http://oecdwatch.org/cases/Case_39
- http://oecdwatch.org/cases/Case_119
- http://oecdwatch.org/cases/Case_27
- http://oecdwatch.org/cases/Case_109/view?set_language=en

ANNEX 1:

V. Employment and Industrial Relations

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards:

1. a) Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing;

b) Respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment;

c) Contribute to the effective abolition of child labour, and take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency;

d) Contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that forced or compulsory labour does not exist in their operations;

e) Be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status, unless selectivity concerning worker

characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.

2. a) Provide such facilities to workers□ representatives as may be necessary to assist in the development of effective collective agreements;

b) Provide information to workers□ representatives which is needed for meaningful negotiations on conditions of employment;

c) Provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.

3. Promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern.

4. a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;

b) When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families;

c) Take adequate steps to ensure occupational health and safety in their operations.

5. In their operations, to the greatest extent practicable, employ local workers and provide training with a view to improving skill levels, in co-operation with worker representatives and, where appropriate, relevant governmental authorities.

6. In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of the workers in their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.

7. In the context of *bona fide* negotiations with workers' representatives on conditions of employment, or while workers are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer workers from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.

8. Enable authorised representatives of the workers in their employment to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.