# Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises

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#### Abstract

This Article discusses one of the only multilaterally-endorsed grievance mechanisms promoting corporate responsibility — the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises (the Guidelines). The grievance mechanism contained in the Guidelines, accessed by many communities and their NGO supporters, is expected to facilitate the resolution of disputes between corporations and individuals or communities who allege corporate wrongdoing. The Article ultimately emerges as a critique of the lack of clarity in the Guidelines regarding whether the complaint mechanism permits a determination of breaches of the Guidelines or merely mandates mediation between the complainants and the corporation. Using examples of the approaches used in different countries in applying the Guidelines, this Article posits that this confusion, specifically as it relates to approaches to evidence and confidentiality, affects the legitimacy of the Guidelines and therefore limits the promise of the system of dispute resolution.

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#### I. Introduction

At the beginning of the 21st century, at least fifty-one of the one-hundred largest economies in the world were corporations.<sup>1</sup> This trend continues today — in 2013, Exxon Mobil's revenue<sup>2</sup> was larger than the Gross Domestic Product ("GDP") of Venezuela; IBM's<sup>4</sup> was

<sup>1.</sup> Sarah Anderson & John Cavanagh, *Top 200: The Rise of Corporate Global Power*, Institute for Policy Studies, Dec. 2000 at i.

<sup>2.</sup> Exxon Mobil Corp., Marketwatch: Wall St. J. (June 30, 2014), http://www.marketwatch.com/investing/stock/xom/financials, archived at http://perma.cc/C6WL-DBXL (data is in US Dollars).

<sup>3.</sup> Venezuela, RB, Data: Worldbank (June 30, 2014), http://data.worldbank.org/country/venezuela-rb, archived at http://perma.cc/DRE7-WYEU (data is in US dollars).

<sup>4.</sup> International Business Machines Corp., Marketwatch: Wall St. J. (June 30, 2014), http://www.marketwatch.com/investing/Stock/IBM/financials?CountryCode=us, archived at http://perma.cc/U948-X9PS (data is in US Dollars).

larger than Slovenia's;<sup>5</sup> and Wal-Mart's<sup>6</sup> was larger than Pakistan's.<sup>7</sup> Corporations can have an enormous impact on the realization of an individual's human rights, sometimes to the same extent as the states that are obliged to protect those rights.<sup>8</sup> As a result, corporate responsibility has garnered increased attention from the NGO, media and academic communities.

The Organisation for Economic Co-operation and Development ("OECD") Guidelines for Multinational Enterprises ("the Guidelines") are described as "far-reaching recommendations" by adhering governments to multinational enterprises that are incorporated in or operate within their country.9 The Guidelines contain voluntary principles which guide corporations to act responsibly in dealing with human rights, the environment and bribery. 10 Although the Guidelines are not mandatory for corporations, adhering countries are bound to implement the Guidelines by raising awareness about them and creating a grievance mechanism accessible to complainants and corporations. 11 For communities affected by corporate human rights abuses, the Guidelines remain the only international tool of corporate accountability to contain such a mechanism. The Guidelines provide for National Contact Points ("NCPs"), which facilitate the resolution of disputes between corporations and complainants.<sup>12</sup> Overall, the Guidelines have emerged as one of the most widespread, multilaterally endorsed corporate responsibility codes, with approximately forty-five adherent governments, including non-members of the OECD.13

<sup>5.</sup> Slovenia, RB, Data: Worldbank (June 30, 2014), http://data.worldbank.org/country/slovenia,  $archived\ at\ http://perma.cc/DWU2-8WEQ\ (data\ is\ in\ US\ Dollars).$ 

<sup>6.</sup> Walmart Stores Inc., Marketwatch: Wall St. J. (June 30, 2014), http://www.marketwatch.com/investing/Stock/WMT/financials?CountryCode=us, archived at http://perma.cc/PSP2-5RRY (data is in US Dollars).

<sup>7.</sup> Pakistan, Data: Worldbank (June 30, 2014), http://data.worldbank.org/country/pakistan, archived at http://perma.cc/388B-NSYS (data is in US Dollars).

<sup>8.</sup> See U.N. Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, U.N. Doc. HR/PUB/11/04, 3, 13 (2011) (under the respect, protect, remedy framework of the Special Representative to the UN Secretary General, states have the primary responsibility to ensure human rights are protected, however, corporations have a responsibility to not infringe human rights).

<sup>9.</sup> About, OEDC, http://mneguidelines.oecd.org/about/, archived at http://perma.cc/K5G5-URLN (last visited May 13, 2015).

<sup>10.</sup> Secretary-General, OECD, OECD Guidelines for Multinational Enterprises 2011 Edition, (Oct. 19, 2011).

<sup>11.</sup> Id. at 19-26.

<sup>12.</sup> Id.

<sup>13.</sup> OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2013: Responsible Business Conduct in Action at 9 (Jan. 14, 2014).

While this system remains nascent, many communities and their NGO supporters have sought access to the NCPs for dispute resolution. However, the Guidelines lack clarity on whether NCPs are mandated to determine breaches of the Guidelines or to mediate between the complainants and the corporation. This uncertainty affects the legitimacy, and therefore the promise, of the system of dispute resolution.

This Article will be divided into three Parts. The first Part will situate the Guidelines in the broader patchwork of regulations, conventions and codes, which seek to hold corporations responsible for human rights abuses. Following a brief examination of the OECD, this Article will discuss the Guidelines and the NCP system. This Part will raise one of the issues that this Article seeks to grapple with: whether NCPs are required or even empowered to determine when a corporation has breached the Guidelines, or whether NCPs are expected to mediate between the parties.

The second Part of the Article focuses on the divergence of practice among NCPs and will highlight the confusion about which approach should be used. The UK and Canadian NCP will be used as archetypes, the former using a determinative approach — finding, reporting and making recommendations on breaches of the Guidelines. On the other hand, the Canadian NCP uses an approach based on mediation. In order to better understand these two approaches, the Article will analyze the goals and structure of the dispute resolution system created by the Guidelines.

The purpose of this Article is not to evaluate which approach would be most effective in holding corporations accountable for human rights abuses. The Article posits that while flexibility in corporate regulation may be beneficial, the very lack of clarity on whether the OECD Guidelines require mediation or determination of a breach creates a troubling inconsistency of approach. Accordingly, the second Part of the Article will focus on two examples that substantiate the effects of this inconsistency: the NCP approaches to evidence and confidentiality. Finally, the third Part will conclude with thoughts on procedural justice, the legitimacy of the Guidelines and the broader regime of corporate responsibility.

## II. EXPLORING THE OECD GUIDELINES

# A. Situating the Guidelines Within the Broader Corporate Responsibility Regime

The OECD Guidelines are but one of a panoply of mechanisms that attempt, to varying degrees of success, to hold corporations responsible for human rights impacts. Julia Black labels this form of regime<sup>14</sup> as poly-centric, where regulation occurs at multiple sites in addition to the state, including at sub-national, national and transnational levels.<sup>15</sup> Poly-centric regimes are often hybrid in nature, using both governmental and non-governmental actors, and employ multiple strategies to achieve outcomes.<sup>16</sup> The corporate responsibility regime, so called to denote a conception that corporations have the responsibility to refrain from bribery, corruption, and abuse of environmental resources or human rights,<sup>17</sup> includes:

Corporate codes / policies which corporations create to regulate themselves;

Industry wide corporate codes, such as the Fitness Industry Code of Practice;  $^{18}$ 

National codes, such as the UK Corporate Governance Code;<sup>19</sup>

National laws, such as the UK Bribery  $Act,^{20}$  or the Alien Tort Claims  $Act;^{21}$ 

<sup>14.</sup> See Preface to Marc Levy et al., The Study of International Regimes, (Int'l. Inst. for Applied Sys. Analysis, Working Paper No. 94-113, 1994) ("Regimes are social institutions that influence the behavior of states and their subjects. They consist of informal and formalized principles and norms, as well as specific rules, procedures and programs.").

<sup>15.</sup> Julia Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, Reg. & Governance 137, 138–43 (2008).

<sup>16.</sup> Id.

<sup>17.</sup> See Shelley Marshall & Kate Macdonald, What Is Corporate Accountability?, CORPORATE ACCOUNTABILITY, http://corporateaccountabilityresearch.net/files/2011/09/What-is-corporate-accountability.pdf, archived at http://perma.cc/6AR7-JJPP.

<sup>18.</sup> Fitness Industry Code of Practice, FITNESS AUSTL. (Jan. 2006), http://www.fair trading.nsw.gov.au/Businesses/Specific\_industries\_and\_businesses/Fitness\_services/Fitness\_Industry\_Code\_of\_Practice.html, archived at http://perma.cc/J4U4-Z9E2.

<sup>19.</sup> UK Corporate Governance Code 2012, https://www.frc.org.uk/Our-Work/Publi cations/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.pdf, archived at http://perma.cc/H6QR-ZPSK.

<sup>20.</sup> UK Bribery Act, 2010, c. 23.

<sup>21.</sup> Alien Tort Statute, 28 U.S.C. § 1350 (1789).

Transnational mechanisms created by the UN, such as the Global Compact<sup>22</sup> or the now defunct Norms on the Responsibilities of Transnational Corporations;<sup>23</sup>

Guidelines for funding such as the International Finance Corporation's Performance Standards<sup>24</sup> or the financial sector's Equator Principles;<sup>25</sup> and,

Mechanisms for promoting corporate disclosure, such as the Global Reporting Initiative  $^{26}$  or the Extractive Industries Transparency Initiative. $^{27}$ 

Reviewing this regime in 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights of the Special Representative of the United Nations Secretary-General on Business & Human Rights ("SRSG"). The Guiding Principles emphasize:

- (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and,
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.  $^{28}$

The emphasis on remedy by the SRSG has focused on facilitating access to grievance mechanisms to address business-related human

<sup>22.</sup> Ten Principles, United Nations Global Compact, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html, archived at http://perma.cc/LI466-M6TG

<sup>23.</sup> UN Subcomm on the Promotion and Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>24.</sup> Performance Standards — 2012 Edition, Int'l Fin. Corp., (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/Topics\_Ext\_Content/IFC\_External\_Corporate\_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/,  $archived\ at\ http://perma.cc/PF8U-A6DL.$ 

<sup>25.</sup> Equator Principles III, Equator Principles (June 4, 2013), http://www.equator-principles.com/index.php/ep3, archived at http://perma.cc/HCF6-F238.

<sup>26.</sup> Due Process Reporting Framework, Global Reporting Initiative, https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx, archived at http://perma.cc/7K88-9LXM.

<sup>27.</sup> Reporting, Extractive Industries Transparency Initiative, http://eiti.org/eiti/requirements, archived at http://perma.cc/8WV-DLKH.

<sup>28.</sup> U.N. Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. pp1.

rights abuses. This aspect of corporate responsibility has been labeled corporate accountability.<sup>29</sup> For victims of corporate human rights abuses, this process may include suing the corporation civilly or making complaints through a corporation's internal grievance procedure. Nevertheless, in instances where the corporation is not a national of the country wherein the abuses occurred, there may be problems involved with suing in tort overseas, including the appropriateness of the forum, vicarious liability when dealing with subsidiary corporations, and the cost and length of the proceedings.<sup>30</sup> Corporations themselves may not have a grievance mechanism and complainants may be wary of using the corporation's internal mechanisms for fear of bias. Many of the transnational mechanisms discussed above do not include a grievance mechanism to provide remedies to those who feel wronged by corporate activity. The avenue for redress created under the Guidelines is unique in that respect. The World Bank Investigation Panel and the IFC Compliance Advisory Ombudsman, grievance processes which monitor compliance with the internal policies of the World Bank and the IFC respectively.31 can only be used where the World Bank or the IFC are involved in funding the project. Therefore, the OECD Guidelines have emerged as the only accessible, transnational instrument with a mechanism for resolving disputes. It is thus particularly important that they provide an effective remedy.

# B. Situating the Guidelines Within the OECD Itself

From its origins as the Organization for European Economic Cooperation ("OEEC"), created in April 1948 to administer the Marshall Plan for the reconstruction of Europe after WWII,<sup>32</sup> the OECD has maintained its pro-market stance and has become a major player in creating regulatory instruments. The OECD acts as a research and networking organization for its members based on their domestic

<sup>29.</sup> See Marshall, supra note 17 (although some have used the terms "responsibility" and "accountability "interchangeably, corporate accountability involves mechanisms to ensure that corporations act in accordance with their responsibilities.").

<sup>30.</sup> See Shin Imai, Bernadette Maheandiran, Valerie Crystal, Accountability Across Borders: Mining in Guatemala and the Canadian Justice System, Osgoode CLPE Research Paper No. 26/2012, (2012).

<sup>31.</sup> Compliance Advisor Ombudsman, http://www.cao-ombudsman.org/ Inspection Panel, World Bank, www.inspectionpanel.org, archived at http://perma.cc/7EYP-SNV8.

<sup>32.</sup> James Salzman, Decentralized Administrative Law in the Organization for Economic Cooperation and Development, 68 Law & Contemp. Probs. 189, 190 (2005) [hereinafter Decentralized Administrative Law in the OECD].

needs.<sup>33</sup> There are presently thirty-four members of the OECD, representing primarily the countries of Western Europe and North America.<sup>34</sup> Its members produce two-thirds of the world's goods and services,<sup>35</sup> and as such have been called an "exclusive club" and "a private setting for wealthy industrialized governments."<sup>36</sup>

The OECD, through its Ministerial Council, which is composed of a representative from each member state as well as from the European Union, drafts and creates recommendations (non-binding instruments), decisions (binding instruments), and agreements with other governmental bodies.<sup>37</sup> The OECD has built significant transnational coalitions, enabled by the decentralized nature of the organization, with the respective national ministers setting each specialty directorate's work plan.<sup>38</sup> For example, the OECD has coordinated action on corruption and bribery,<sup>39</sup> anti-spamming policies, and standardization of international student assessment,<sup>40</sup> and created a model convention for bilateral conventions on tax coordination and cooperation.<sup>41</sup>

In addition to governmental representatives, labour organizations and business organizations are represented at the OECD through the Trade Union Advisory Committee ("TUAC")<sup>42</sup> and the

<sup>33.</sup> James Salzman, Organization for Economic Cooperation and Development's Role in International Law, 43 Geo. Wash. Int'l L. Rev. 255, 257 (2011) [hereinafter OECD's Role].

<sup>34.</sup> The member countries are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See List of OECD Member Countries — Ratification of the Convention on the OECD, OECD, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm, archived at http://perma.cc/5KKQ-EV3P.

<sup>35.</sup> OECD's Role, supra note 33, at 256.

<sup>36.</sup> Sarah Fick Vendzules, *The Struggle for Legitimacy in Environmental Standards Systems: The OECD Guidelines for Multinational Enterprises*, 21, Colo. J. Int'l Envil. L. & Pol'y 451, 465 (2010).

<sup>37.</sup> OECD's Role, supra note 33, at 258–59; see also Ministerial Council Meeting, OECD, http://www.oecd.org/mcm/home/, archived at http://perma.cc/72AD-TD2Q.

<sup>38.</sup> OECD's Role, supra note 33, at 258.

<sup>39.</sup> Anti-Bribery Convention, OECD, http://www.oecd.org/daf/anti-bribery/oecd antibriberyconvention.htm, archived at http://perma.cc/5YEP-WM5C.

<sup>40.</sup> Programme for International Student Assessment, OECD, http://www.oecd.org/pisa, archived at http://perma.cc/Z48A-E23X.

<sup>41.</sup> Michael McIntyre, Options for Greater International Coordination and Cooperation in the Tax Treaty Area, 56/6 Bulletin For International Fiscal Documentation 250 (2002).

<sup>42.</sup> Trade Union Advisory Committee to the OECD, http://www.tuac.org/en/public/index.phtml, archived at http://perma.cc/7PEA-BGJS.

Business and Industry Advisory Committee ("BIAC") respectively.<sup>43</sup> These two advisory groups contribute to meetings, global forums and consultations with OECD leadership, delegates from various government ministries, and working groups in approximately thirty-eight areas of OECD practice.<sup>44</sup> Unlike labour and business interests, NGOs do not have a formal role in the OECD but are often informally present to assist with interpretation.<sup>45</sup>

#### C. The History and Modern Usage of the Guidelines

The Guidelines emerged in the context of the involvement of multinationals in the internal politics of their host countries in the 1970s, specifically, in the alleged involvement of American multinational enterprises in supporting the military coup overthrowing the democratically elected Chilean President Allende in 1973.<sup>46</sup> In response to this involvement, developing countries spurred discussions in the UN around a legally-binding Code of Conduct on Transnational Corporations.<sup>47</sup> James Salzman suggests that the Guidelines were a method of stymying these binding regulations.<sup>48</sup>

The Guidelines were created in 1976 as part of a set of investment measures included under the OECD Declaration on International Investment and Multinational Enterprises (the Declaration).<sup>49</sup> The Declaration forms part of the constitution of the OECD, and therefore adherence to the Declaration is necessary for admission.<sup>50</sup> However, ten countries have adopted the Guidelines without being

<sup>43.</sup> Business and Industry Advisory Committee to the OECD, http://www.biac.org/, archived at http://perma.cc/GW4E-Q4JG.

<sup>44.</sup> Trade Union Advisory Committee to the OECD, *supra* note 42; Business And Industry Advisory Committee to the OECD, *supra* note 43.

<sup>45.</sup> Decentralized Administrative Law in the OECD, supra note 32 at 218.

<sup>46.</sup> Orlando Letelier, The Chicago Boys' in Chile: Economic Freedom's' Awful Toll, The Nation, Aug. 1976; Paul E. Sigmund, The "Invisible Blockade" and the Overthrow of Allende, 52(2) Foreign Affairs 322, 323 (1974).

<sup>47.</sup> Peter Hansen and Victora Aranda, Address: An Emerging International Framework for Transnational Corporations, 14 Fordham Int'l L.J. 881, 886–87(1990–1991); Elisa Morgera, An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review, 18(4) Geo. Int'l Envil. L. Rev. 751, 753 (2006).

<sup>48.</sup> Decentralized Administrative Law in the OECD, supra note 32, at 276.

<sup>49.</sup> Halina Ward, *The OECD Guidelines for Multinational Enterprises and Non-Adhering Countries: Opportunities and Challenges of Engagement*, OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT: INVESTMENT FOR DEVELOPMENT, New Delhi (October 2004).

<sup>50.</sup> Frequently Asked Questions, OECD, http://www.oecd.org/daf/inv/mne/theoecd guidelinesformultinationalenterprisesfrequently askedquestions.htm, archived at http://perma.cc/3SU3-B3NA.

part of the OECD, namely Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.<sup>51</sup> Tunisia and Costa Rica became the forty-fourth and forty-fifth adherents to the Guidelines in 2012 and 2013 respectively.<sup>52</sup>

The Guidelines, as described above, are recommendations to multinational enterprises from adhering governments, which are required to implement the Guidelines. These voluntary principles and standards, which encourage responsible business conduct in a variety of areas including human rights, employment and industrial relations, disclosure, environment, bribery and corruption, science and technology, competition, consumer interests, and taxation, essentially form the shared expectations of the governments.<sup>53</sup> As indicated earlier, although the Guidelines are not mandatory for corporations, adhering countries are bound to implement the Guidelines by creating NCPs and raising awareness about the Guidelines.<sup>54</sup>

The initial version of the Guidelines contained general recommendations entailing that countries "should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders," as well as specific policies on employment and industrial relations.<sup>55</sup> The 1991 revision of the Guidelines added new provisions on environmental protection, while changes made in 2000 were further reaching.<sup>56</sup> The extra-territorial application of the Guidelines was clarified, as countries were to encourage the corporations incorporated within their territory to observe the Guidelines wherever they operate. Further, references to human rights and sustainable development and new sections on bribery and consumer interests were added, and sections on employment, industrial relations and disclosure were updated.<sup>57</sup>

In 2011, a human rights section was added. The prior iterations only contained a general recommendation on human rights, which stated that corporations should "(r)espect the human rights of those

<sup>51.</sup> Id.; Annual Report on the OECD Guidelines for Multinational Enterprises 2012, OECD, 7 (Jan. 2013); Annual Report on the OECD Guidelines for Multinational Enterprises 2013, supra note 13.

<sup>52.</sup> Annual Report on the OECD Guidelines for Multinational Enterprises 2012, OECD, 7 (Jan. 2013); Annual Report on the OECD Guidelines for Multinational Enterprises 2013, supra note 13.

<sup>53.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10.

<sup>54.</sup> See id. at 3.

<sup>55.</sup> John Kline, Political Activities by Transnational Corporations: Bright Lines Versus Grev Boundaries, 12(1) Transnational Corporations (Apr. 2003) at 5.

<sup>56.</sup> Morgera, supra note 47, at 754.

<sup>57.</sup> Ward, supra note 49, at 2.

affected by their activities consistent with the host government's international obligations and commitments."<sup>58</sup> Mirroring the respect, protect, remedy framework outlined by the SRSG in the Guiding Principles, <sup>59</sup> the 2011 update to the Guidelines reflects the U N understanding that while states retain the duty to protect human rights, corporations must respect human rights and avoid causing or contributing to adverse human rights impacts within the context of their own activities, have a policy commitment to human rights, seek ways to alleviate or prevent negative human rights impacts, undertake human rights due diligence, seek ways to prevent or alleviate negative human rights impacts and provide remedies where such negative impacts have occurred.<sup>60</sup>

# D. Implementing the Guidelines: The National Contact Point System

After the 1998 Budapest conference where the states concluded that the Guidelines were no longer representative of the "state of the art" in codes,"<sup>61</sup> the Guidelines were revised in 2000 to include the NCP system of implementation. An NCP's role is to respond to questions about the Guidelines from its own government and governments of non-adhering countries and report annually to the OECD's Committee on Investment and Multinational Enterprises ("CIME").<sup>62</sup>

Most importantly, NCPs are also tasked with resolving issues that relate to the implementation of the Guidelines in "specific instances." Typically, these issues arise when a complaint alleges that a corporation has failed to abide by the Guidelines. The NCP must make an initial assessment of whether the issues raised merit further examination. In so doing, the NCP determines whether the issue is relevant to the implementation of the Guidelines, considering the following criteria: the parties' interests; "whether the issue is material and substantiated . . .; the relevance of applicable law and procedures . . .; how similar issues have been, or are being, treated in

<sup>58.</sup> Kline, supra note 55, at 10.

<sup>59.</sup> Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future, OECD, 1, 3 (Jan. 2012).

<sup>60.</sup> Id.

<sup>61.</sup> Summary of Proceedings, Conference on the OECD Guidelines for Multinational Enterprises, OECD Committee on International Investment and Multinational Enterprise, Budapest, Hungary, (Nov. 16–18, 1998), DAFFE/IME(98)18 (unclassified) at 3.

<sup>62.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10, at 72–74.

<sup>63.</sup> Id. at 68.

other domestic or international proceedings; [and finally,] whether the considerations of the specific issue will contribute to the purposes and effectiveness of the Guidelines."<sup>64</sup> In practice, as will be later discussed, there can be a divergence in approach in deciding whether an issue merits further examination.<sup>65</sup>

If the NCP decides that the issue merits further examination, it will offer to facilitate access to non-adversarial means of dispute resolution, the process of which will be detailed below.<sup>66</sup> The Commentary to the Guidelines indicates that NCPs are permitted to pursue fact-finding activities even where it has not been possible to bring the parties involved together, but this function remains under-utilized.<sup>67</sup> The Guidelines contain no institutional mechanism for monitoring whether recommendations have been followed.<sup>68</sup>

The Commentary to the Guidelines indicates that typically the "issues will be dealt with by the NCP of the country in which the issues have arisen." However, where both the country where the corporation is incorporated or headquartered and the country in which the issues have arisen have NCPs, issues should be pursued bilaterally or by the country in which the issues have arisen in consultation with the home country of the corporation. This avoids the issue of "forum-shopping" by complainants.

The number of specific instances has been rising significantly. In 2012, there were 28 new specific instances raised and 24 concluded with the involvement of 16 NCPs.<sup>71</sup> In 2013, the number of new specific instances rose to 36.<sup>72</sup> In 2013, 40 were estimated to have been concluded.<sup>73</sup> Overall, more than 300 specific instances have been considered since 2000. The most common complaint is one brought by

<sup>64.</sup> Id. at 83.

<sup>65.</sup> Jernej Letnar Èerniè, Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises, 4 Hanse Law Rev. 71, 85–86 (2008) (Ger.).

<sup>66.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10, at 72–73.

<sup>67.</sup> Èerniè, supra note 65, at 86.

<sup>68.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10, at 72 -74.

<sup>69.</sup> Id. at 82.

<sup>70.</sup> Id.

<sup>71. 2012</sup> Annual Report on the OECD Guidelines for Multinational Enterprises, supra note 52, at 8.

<sup>72.</sup> Annual Report on the OECD Guidelines for Multinational Enterprises 2013, supra note 13, at 13.

<sup>73.</sup> Id. at 42.

NGOs in support of complainants who range from individuals to communities to unions. As of 2010, 49% of all specific instances alleged a violation of human rights, while 33% alleged violations of labour rights and 21% alleged corruption or bribery.<sup>74</sup>

The nature and composition of NCPs varies greatly from country to country. For example, in Canada, the NCP is a federal government interdepartmental committee chaired by the Department of Foreign Affairs and International Trade. In the UK, the NCP is overseen by a steering committee composed of multiple stakeholders, including the government, labour organizations and representatives of business communities.

The CIME is responsible for the interpretation of the Guidelines<sup>77</sup> and for providing guidance to the NCPs. The CIME also convenes the annual meetings of NCPs where they discuss best practices. These meetings are held in conjunction with the annual Roundtables on Corporate Responsibility, during which the NCPs discuss a different, pressing issue each year.<sup>78</sup>

While the NCPs provide a necessary forum for individuals who have suffered human rights abuses to access a remedy, many, including the SRSG, have criticized the NCP system for not meeting its potential.<sup>79</sup> First, NCPs have been criticized for their lack of enforcement of recommendations.<sup>80</sup> Other shortcomings identified by the

<sup>74.</sup> Joris Oldenziel, Joseph Wilde-Ramsing & Patricia Feeney, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, OECD WATCH, 9 (2010).

<sup>75.</sup> Terms of Reference for Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, Department of Foreign Affairs, Trade and Development (July 21, 2014) http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms\_of\_ref-mandat.aspx?lang=eng#instit, archived at http://perma.cc/B4BR-UN3X.

<sup>76.</sup> UK National Contact Point for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, Department for Business, Innovation & Skills, https://www.gov.uk/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises#uk-ncp-steering-board, archived at http://perma.cc/4T6R-24X6.

<sup>77.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10, at 74.

<sup>78. 2012</sup> Annual Report on the OECD Guidelines for Multinational Enterprises, supra note 52, at 43 (In 2012, there was a mediation capacity building session held, which included presentations from the Consensus Building Institute ("CBI"), the World Bank, and several NCPs discussing their own experiences with mediation).

<sup>79.</sup> Oldenziel et al., supra note 74, at 33.

<sup>80.</sup> Id.

SRSG also include a possible conflict of interests owing to the structure of the NCPs (a lack of oversight from independent bodies), limited resources to investigate complaints, insufficient training to provide effective mediation, unclear deadlines, and minimal transparency.<sup>81</sup>

To address some of these criticisms, the 2011 update has included the criteria of impartiality, predictability, equitability and compatibility to guide the NCPs. Furthermore, there is an expectation of good faith on the part of the complainant and corporation and greater support for mediation. The role of peer learning has also been reinforced, through voluntary peer reviews, in order to ensure functional equivalence among NCPs. Furthermore, the supporting role of the CIME has been strengthened.<sup>82</sup> However, the approach the NCPs should take to resolve disputes has not been clarified.

#### E. Breaches of the Guidelines: What Are NCPs Empowered to Do?

As discussed above, where issues merit further examination, the NCP should "offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, [...] assist the parties in dealing with the issues."<sup>83</sup> The parties' consent is necessary and the NCP will not proceed further with mediation or conciliation without it. At the close of the procedure, if no agreement has been reached, or when a party is averse to participating in the procedures, a statement is required, at minimum describing "the issues raised, the reasons why the NCP decided that the issues raised merited further examination and the procedures the NCP initiated in assisting the parties" and including recommendations on the implementation of the Guidelines. Where appropriate, the statement may contain reasons why an agreement could not be reached.<sup>84</sup>

There are different ways to interpret the requirements of a statement under the Guidelines. An NCP could explain why the instance merited further examination by indicating how the Guidelines were

<sup>81.</sup> Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 8th Sess., U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) at 26.

<sup>82.</sup> OECD Guidelines for Multinational Enterprises 2011 Edition, supra note 10, at 74.

<sup>83.</sup> Id. at 73.

<sup>84.</sup> Id, at 73.

breached.<sup>85</sup> On the other hand, an NCP could merely state that the issues raised were pertinent to the Guidelines, without delving into whether or not the allegations of the complainant were well founded. While the emphasis is on consensual and non-adversarial procedures, such as mediation, the Guidelines indicate that recommendations should be made on the implementation of the Guidelines, suggesting scope to determine whether the corporation has adhered to them. Although the 2011 update has reiterated that the NCP must release a statement irrespective of outcome, it does not clarify the approach to be taken. The Guidelines therefore can create a divergence of practice.

John Evans, General Secretary of TUAC, noted that there are different approaches taken by NCPs and criticized the 2011 update as follows:

The best performing NCPs play two distinct roles: offering their good offices for mediation and, where this fails, making an assessment of a company's observance of the *Guidelines* (determination). These mediation and determination roles are interdependent: mediation is the 'carrot' and the threat of determination the 'stick' to bring parties to the NCP mediation table. While the *Update* strengthened mediation, it failed to strengthen determination, thus leaving the NCP system weak. <sup>86</sup>

This comment highlights the perspective that mediation should not be the endpoint of the grievance mechanism.

The General Secretary of BIAC, on the other hand, noted that the NCPs' role as mediators to resolve potential issues was not altered under the 2011 update and stated that there was no introduction of a "(quasi-judicial) prerogative to formulate a judgment on the behaviour of companies."

These statements by the two advisory bodies to the OECD illustrate a fundamental confusion about what the NCP system is meant to accomplish and the process by which it should do so.

<sup>85.</sup> Sorcha MacLeod, Towards Normative Transformation: Re-conceptualising Business and Human Rights 224l (2012) (unpublished Ph.D. dissertation, University of Glasgow) (on file with author).

<sup>86.</sup> John Evans, Responsible Business Conduct: Re-shaping Global Business, 50 Columbia Fdi Perspectives (Nov. 7, 2011).

<sup>87.</sup> Tadahiro Asami, Towards the Successful Implementation of the Updated OECD Guidelines for Multinational Enterprises, 56 COLUMBIA FDI PERSPECTIVES (January 17, 2012).

#### III. MEDIATION VERSUS DETERMINATION

## A. Defining the Processes

Can these two approaches or processes outlined above be reconciled and exist within the NCP system? To best answer this question, this Article will provide some definitions of the main processes of dispute resolution, followed by a discussion of the Canadian and UK NCPs as archetypes of the mediation and determinative approaches respectively. Finally, the framework for evaluating dispute resolution systems synthesized by Stephanie Smith and Janet Martinez, lecturers in Alternative Dispute Resolution at Stanford Law School, will be applied to the NCP system. Smith and Martinez look at dispute resolution mechanisms as systems, defined as encompassing "one or more internal processes that have been adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution," therefore allowing for more than one dispute resolution process to be used.<sup>88</sup>

The CPR International Institute for Conflict Prevention and Resolution provides definitions on the main processes of dispute resolution.<sup>89</sup> For the purposes of this Article, the definitions are listed as follows:

Adjudication: The resolution of disputes by a neutral third party vested (by law or agreement) with authority to bind the disputants to the terms of an award or decision. Trial and arbitration are common adjudicative processes.

Arbitration: A voluntary adjudicative method of dispute resolution in which an independent, impartial and neutral third party (an arbitrator or arbitral panel) considers arguments and evidence from disputing parties, then renders a decision or an award. Arbitration may be binding or non-binding, with levels of procedural formality varying according to the parties' contractual agreement or court rule.

Mediation: Mediation is facilitated negotiation, whose object is the consensual resolution of a dispute on terms that the parties themselves agree upon. It is a form of alternative dispute resolution in which a neutral party (a mediator) selected by

<sup>88.</sup> See Stephanie Smith & Janet Martinez, An Analytic Framework for Dispute Systems Design, 14 Harv. Negot. L. Rev. 123, 126 (2009).

<sup>89.</sup> ADR Primer: An Introduction to ADR Terms and Processes, CPR International Institute for Conflict Prevention & Resolution (2012–2014), http://www.cpradr.org/Resources/ADRPrimer.aspx, archived at http://perma.cc/A5KA-DN X6.

the parties seeks to determine the interests of the parties, discover which of these interests may be shared, and alert them to a resolution that may further those interests. . . . If competent to do so, and if requested by both parties, the mediator may eventually (1) offer an opinion on the parties' likelihood of success in an adjudicated proceeding, and/or (2) offer a proposed 'best resolution' that the mediator considers is the fairest, most commercially rational outcome to the dispute. However, the mediator has no authority to impose an outcome on the parties and controls only the process of the mediation itself, not its result. 90

Using the typology created by Ury, Brett and Goldberg, Smith and Martinez separate various dispute resolution processes by how disputes are resolved, whether according to the interests of the parties, their rights, or their power. Interests are equated with the values of the parties. Where meeting the interests of parties is the purpose of resolution, negotiation or mediation is the process most often used. 91 Ury et al. claim that these approaches, while requiring significant investment, typically yield the highest satisfaction of the parties.92 On the other hand, dispute resolution based on rights requires that a neutral third-party apply commonly agreed upon rules to the facts to decide for a party. Examples of processes in which disputes are resolved based on rights include arbitration or court proceedings. Ury et al. characterize this approach as limited as it cannot address all of the parties' interests, particularly maintaining relationships.93 Disputes resolved according to power are based on the party with most leverage. Ury et al. do not recommend using dispute resolution processes based on power, such as conflict, as any relationship between the parties will be likely destroyed.<sup>94</sup> If the above processes were placed on a continuum from adjudication to mediation, there would be an increasing focus on interests as opposed to rights, with decreasing formality and control of a third party over the outcome.95

<sup>90.</sup> Annual Report on the OECD Guidelines for Multinational Enterprises 2012, supra note 52, at 47 (elaborating on mediation and conciliation, both found in the OECD guidelines, the Consensus Building Institute (CBI) introduced its NCP Mediation Manual, commissioned by the NCPs of the Netherlands, Norway, and the United Kingdom. The manual uses mediation as a catch-all term to refer to mediation and conciliation, although conciliation seems to include a more directed approach).

<sup>91.</sup> Smith, supra note 88, at 126-27.

<sup>92.</sup> WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 14 (1988).

<sup>93.</sup> *Id*.

<sup>94.</sup> Smith, supra note 88, at 127.

<sup>95.</sup> Id.

# B. Opposite Ends of the Spectrum: Canadian and UK NCPs

As detailed above, where specific instances merit further examination, the NCP should "offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, [... and] assist the parties in dealing with the issues."<sup>96</sup> At the close of the procedure, the NCPs are required to write a statement that describes "the issues raised, the reasons why the NCP decided that the issues raised merited further examination and the procedures the NCP initiated in assisting the parties" and includes recommendations on the implementation of the Guidelines. The differing interpretations of the requirements of the statement have led to a divergence of approach.

Leyla Davarnejad's survey on the practice of twenty-five NCPs indicates a range of approaches used in specific instances. Fifteen NCPs indicate that they generally offer the parties a forum for discussion, while three sometimes do so. Eleven state they generally offer access to consensual or non-adversarial practices such as mediation, whereas six state that they sometimes do so. Seven NCPs indicate that in general they provide parties with an assessment of the issues, while seven indicate that they do so sometimes. Nevertheless, two have indicated that they never provide parties with an assessment. This survey demonstrates that while there is a range of practice NCPs might undertake, there appears to be no general consensus on which process to use in resolving disputes. Nevertheless, they seem to cluster around the two approaches. 97 These approaches range from a two-stage process which involves both mediation and a second stage determining whether the rights of the complainants have been breached, as utilized by the UK NCP, to a process which involves only mediation, best explained by looking at the process of the Canadian NCP.

<sup>96.</sup> Leyla Davarnejad, In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises, J. Disp. Resol. 351, 371–72 (2011).

<sup>97.</sup> Id. at 371-72 (not all NCPs responded to this section of the survey).

The UK NCP uses the two stage process discussed above (mirrored in the practice of Norway, 98 Netherlands 99 and, to a lesser extent, Germany 100). When formulating their complaint, complainants are called upon to specify the chapters or paragraphs in the Guidelines they consider are being breached, which the NCP must decide are sufficient to found a complaint. 101 The UK NCP will mediate between the parties first on the basis of the complaint. If the mediation is successful, the UK NCP will close the complaint without an examination of the allegations. 102 Where mediation fails to achieve an agreement or is refused, the complaint will return to the NCP for examination in order to assess whether it is justified. 103 Accordingly, the NCP's determination of a complaint is necessarily evidence based. The NCP will set out the steps it intends to take to investigate by writing to both parties and notifying the parties of any additional

<sup>98.</sup> See, e.g., Nor. NCP, Final Statement: Complaint from the Future in Our Hands (FIOH) Against Intex Resources ASA and the Mindoro Nickel Project, available at http://www.oecd.org/daf/inv/mne/Norwegian%20NCP%20intex\_final.pdf, archived at http://perma.cc/5NZT-4HAQ?type=pdf.

<sup>99.</sup> See Neth. NCP, Final Statement of the Irish and Netherlands National Contact Points (NCPs) on the Notification Dated 21st August, 2008 Concerning the Corrib Gas project, Irish and Dutch NCPs, http://www.djei.ie/publications/trade/2010/NCP\_Final\_Statement\_Corrib\_Gas\_30\_July\_2010\_published.pdf, archived at http://perma.cc/A5G7-N7XF; Final Statement of the Dutch NCP on the "Complaint (15 May 2006) on the Violations of Pilipinas Shell Petroleum Corporation (PSPC), Pursuant to the OECD Guidelines for Multinational Enterprises (July 14, 2009), available at http://www.oecd.org/daf/inv/mne/43663730.pdf, archived at http://perma.cc/6RHX-U9LD?type=pdf; Davarnejad, supra note 96, at 381 (seeing Dutch approach as different, essentially classified as a "future oriented process" aiming at resolving current issues in an "amicable way," but the examination itself remains comprehensive).

<sup>100.</sup> See Ger. NCP, Joint Final Statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises, the European Center for Constitutional and Human Rights (ECCHR) and Otto Stadtlander GmbH Regarding a Complaint by the ECCHR Against Otto Stadtlander GmbH/Bremen (November 17, 2011), available at http://www.oecd.org/daf/inv/mne/17-09-11\_German\_NCP\_final\_statement\_Otto%20Stadtlander.pdf, archived at http://perma.cc/MNX3-ZK3J?type=pdf.

<sup>101.</sup> UK NATIONAL CONTACT POINT PROCEDURES FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, 2.4 (January 2014).

<sup>102.</sup> See e.g., U.K. NCP, Complaint from the LEAD Group Inc Against Xstrata PLC (in the UK) (May 31, 2012), available at http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/assets/biscore/business-sectors/docs/f/12-946-final-statement-ncp-lead-group-xstrata.pdf, archived at http://perma.cc/DYB4-TPS4.

<sup>103.</sup> UK NATIONAL CONTACT POINT PROCEDURES FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, *supra* note 101, at 4.6.

steps it deems necessary. $^{104}$  The NCP's final statement will include the results of the examination (if any) with an argued rationale and a clear statement as to whether or not the company is in breach of the Guidelines. $^{105}$ 

The UK NCP did not always have such a clear practice. In its early years, the NCP found that it was unable to form conclusions about the application of the Guidelines where there was no possibility of agreement between the parties. 106 The NCP's change in practice was evidenced in 2008<sup>107</sup> with a detailed examination of breaches in cases where agreement was not reached. For example, in 2012 in the complaint from Justica Ambiental et al. against BHP Billiton PLC regarding its aluminum smelter in Mozambique, the UK NCP analyzed each allegation in detail, examining the evidence relating to breaches of disclosure, environmental safeguards and obligations to consult local communities. 108 Although the NCP did not find any breaches on the part of the BHP Billiton PLC, it recommended that the corporation build upon its existing procedures to engage with local communities and continue with disclosure of information relating to environmental impacts and the health and safety of the communities affected by the smelter. 109

The UK process is somewhat difficult to define and the OECD has not provided any guidance on this approach. While the first stage of the UK process falls into the mediation category, the second stage, where the parties have not reached agreement or have refused to engage in mediation, is definitely closer on the continuum to an adjudicative process. After all, the UK NCP considers arguments and

<sup>104.</sup> Id. at 4.6.3.

<sup>105.</sup> *Id.* at 5.1.

<sup>106.</sup> See, e.g., U.K. NCP, NCP STATEMENT ON ORYX NATURAL RESOURCES (June 2005), available at http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/files/file47359.pdf, archived at http://perma.cc/4ABC-SAAG.

<sup>107.</sup> See, e.g., U.K. NCP, Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd. (Aug. 28, 2008), available at http://webarchive.nationalarchives.gov.uk/2012120515 0610/http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-de velopment/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements,  $archived\ at\ http://perma.cc/5PVQ-WPX5.$ 

<sup>108.</sup> See U.K. NCP, Final Statement by the Uk National Contact Point for the OECD Guidelines for Multinational Enterprises — Complaint from Justiça Ambiental et al. Against BHP Billiton PLC (on Mozal Sarl) in Mozambigue (Sept. 2012), available at http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/assets/biscore/business-sectors/docs/f/12-1204-final-statement-justica-ambiental-bhp-billiton.pdf, archived at http://perma.cc/QKC7-8ULU.

<sup>109.</sup> Id.

evidence of both parties, applying the Guidelines to the instance to see if the corporation's behavior has breached them.

Davarnejad argues that the examination cannot be considered adjudicative because it is not enforceable, as denoted in the above typology. 110 Nevertheless, a determination of a breach is not without reputational consequences. The loss of client confidence affects the shareholder perception of the corporation, resulting in potential shifts in share price. Moreover, while adjudication may require binding decisions, there are non-binding forms of dispute resolution that take a legalistic, even adversarial approach, determining whether particular rules have been violated. Even declaratory judgments do not offer an actionable judgment but merely provide a statement of the legality of the parties' actions. Therefore, the determinative approach falls somewhere closer to non-binding arbitration on the continuum. This Article asserts that the UK NCP uses such an approach, which can be distinguished from the approach practiced by the Canadian NCP outlined below. For ease of reference, this Article has referred to and will continue to refer to the method used at the second stage of the NCP process as determination.

The Canadian NCP uses the same practice as other NCPs such as the US¹¹¹¹ or Switzerland.¹¹² Where either the complainants or the corporation refuse to participate in mediation, the NCP does not continue further. For example, in 2002, the NCP reviewed a complaint from the Canadian Labour Congress ("CLC") concerning employment practices in the Ivanhoe Mines Ltd. in Burma.¹¹³ Although the NCP decided that the CLC submission merited further examination and a number of discussions were held between the parties, ultimately the NCP was not able to proceed with mediation as there was no agreement from the parties to proceed. There was no detailed statement

<sup>110.</sup> Davarnejad, supra note 96, at 383.

<sup>111.</sup> See Alan Yu, U.S. NCP, Statement by the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises: The LEAD Group and Innospec (Feb. 1, 2012), available at http://www.state.gov/e/eb/oecd/usncp/links/rls/183059.htm, archived at http://perma.cc/KN7D-XGGK.

<sup>112.</sup> See Berne, Switz. NCP, National Contact Point of Switzerland: Closing Statement: Specific Instance regarding Triumph in the Philippines and in Thailand (Jan.14, 2011), available athttp://mneguidelines.oecd.org/database/ncp/487559 89.pdf, archived at http://perma.cc/7ELL-57RE.

<sup>113.</sup> CAN. NCP, Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises Statement Concerning Ivanhoe Mines Ltd in Burma, available at http://www.oecd.org/investment/mne/37205653.pdf, archived at http://perma.cc/AZ3C-KYV8?type=pdf.

that included recommendations or reasons why the NCP decided that the issues raised merited further examination.<sup>114</sup>

Even in later specific instances, such as Goldcorp Inc.'s Marlin Mine in Guatemala in 2011, when the complainant declined to negotiate with confidentiality requirements, the NCP did not issue a detailed statement on why further examination was necessitated, citing "miscommunication" as a reason for some of the issues that the parties had, but not what about those issues required further examination. 115 There was certainly no detailed examination of how the Guidelines may have been breached. When asked to conduct a full investigation of the facts, including a field visit and robust final statement, the NCP declined by indicating that the Canadian NCP uses a mainly mediation-based approach. 116 The procedural guidance provided by the NCP indicates that the NCP will not include recommendations where it does not feel that recommendations are required. 117 The most recent statements on the Canadian NCP website predate the 2011 revision of the Guidelines, so it remains to be seen if its process has changed. However, as the revisions add no clarity on this point, it seems unlikely.

The Canadian archetype is easier to classify in the above typology. The Canadian NCP practices a process that is similar to mediation, where the NCP does not judge the dispute by assessing whether or not the corporation breached the Guidelines but instead is interest-based. The NCP assists in bringing about a mutually agreed upon solution to any disagreements, which may or may not involve a discussion of the rightness/wrongness of the party's conduct.

<sup>114.</sup> Id.

<sup>115.</sup> See Can. NCP, Final Statement of the Canadian National Contact Point on the Notification dated December 9, 2009, Concerning the Marlin mine in Guatemala, Pursuant to the OECD Guidelines for Multinational Enterprises (May 3, 2011), available at http://www.oecd.org/investment/mne/48754883.pdf, archived at http://perma.cc/M6XA-HCAH?type=pdf (this complaint was made prior to the 2011 revision so it only addresses the human rights provision in the general policies of the Guidelines).

<sup>116.</sup> Id.

<sup>117.</sup> See Foreign Affairs, Trade and Development Canada, Procedures Guide for Canada's National Contact Point for the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (July 31, 2014), available at, http://www.international.gc.ca/trade-agreements-ac cords-commerciaux/ncp-pcn/procedures\_guide\_de\_procedure.aspx?lang=eng, archived at http://perma.cc/C7PA-E8B3?type=source.

### C. Assessing the Two Approaches: Disputes System Design

In evaluating dispute resolution systems, the field of systems design has proposed many criteria, some focusing on fairness and efficiency, 118 others on transaction costs and the relationship between the parties. 119 Martinez and Smith synthesize these writings to offer five factors: goals, structure of process, stakeholder involvement, resources and evaluating success. 120 Nevertheless, as the purpose of the Article is to discuss the effect of the lack of clarity in the Guidelines on whether NCPs are mandated to determine breaches of the Guidelines or to mediate between parties, an exercise which focuses on the processes applied and their ability to meet the goals of the system, only the criteria of goals and structure of the process will be discussed below. 121

## 1. What Are the Goals of the System?

Goals, for Martinez and Smith, consist of two aspects: "to identify which types of conflicts the system seeks to address and what objectives the system intends to accomplish." <sup>122</sup> In identifying the objectives of the system, desired outcomes also need to be prioritized because tradeoff between objectives is almost unavoidable and can affect the nature of the system. <sup>123</sup>

In the case of the NCP system, the conflicts are those between corporations and parties who feel they are affected by the actions of corporations. In order to determine the objectives the NCP system intends to accomplish, Davarnejad asked that the NCPs rank the following goals: 124

to serve as neutral channels of communication;

to be mediators and actively try to resolve disputes;

to examine/clarify whether the practice of a corporation is consistent with Guidelines; and

to advance corporate responsibility where corporate practice is not consistent with Guidelines.

<sup>118.</sup> Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes, 21–32 (1987).

<sup>119.</sup> URY, *supra* note 92, at 11–13.

<sup>120.</sup> Smith, supra note 88, at 129.

<sup>121.</sup> The author encourages exploration of the other factors, stakeholder involvement, resources and evaluating success, as they relate to the NCP system, but has not been able to devote time to these factors in this Article.

<sup>122.</sup> Id.

<sup>123.</sup> Id. at 130.

<sup>124.</sup> Davarnejad, supra note 96, at 372-74.

While most NCPs ranked mediation and communication roles as the most important, three NCPs did not feel that mediation or communication were important at all. <sup>125</sup> This is curious given the importance placed on these roles in the Guidelines. Clarifying practice consistent with the Guidelines was ranked by fifteen NCPs as first or second most important while ten NCPs did not rank it as very important at all. <sup>126</sup> This split reflects the divergence in the approach of the NCPs as well, towards either mediation or determination. Advancing corporate responsibility did not rank very high, which Davarnejad suggests is owing to the skepticism of the NCPs as to the potential effect of the dispute resolution system. <sup>127</sup> Overall, this data indicates a lack of consensus as to the goals and their priority/importance in the NCP system.

This confusion is further reflected in the ranking of the following six possible objectives in conducting the specific instances by the NCPs:

Encouraging the business to comply with the Guidelines;

Strengthening mutual confidence between business and societies in which they operate;

Reaching an agreement between the parties on the substance of the issues raised;

Clarifying and examining whether the practice of a corporation is consistent with the Guidelines;

Following up on whether the NCP's consideration of the specific instance has helped to resolve the issue; and,

Publishing the NCP's findings as to whether the practice of a corporation is consistent with the Guidelines. 128

Again, the responses range. Reaching agreement was ranked first by eleven NCPs and second by four NCPs, while encouraging business to comply was ranked first by ten NCPs and second by seven NCPs. 129 Clarifying or examining whether the practice of a corporation was consistent was ranked first and second by four NCPs

<sup>125.</sup> *Id.* Eleven NCPs ranked serving as neutral channel of communication as their most important goal, while three ranked it as their second, five as their third, and three as their least important goal. Ten NCPs ranked their role as mediator and actively trying to resolve disputes as most important, while five ranked it as their second, four as their third and three as the least important.

<sup>126.</sup> Id.

<sup>127.</sup> *Id.* at 375 (advancing corporate responsibility: six did not rank this goal (in that it was not applicable to them), three ranked it as most important, six as second and third and four as their last priority).

<sup>128.</sup> Id. at 376.

<sup>129.</sup> Id. at 376–77.

each.<sup>130</sup> The difficulty in ranking was underscored by two NCPs ranking clarifying and reaching an agreement as equally important and four NCPs classifying all these goals on the same level.<sup>131</sup> As discussed by Martinez and Smith, the ability to rank goals is essential to a system's success.<sup>132</sup> Therefore, ranking these often-conflicting goals on the same level is problematic as there are tradeoffs between them.

Davarnejad argues that the NCPs should create common goals and common rankings, but common goals may necessitate common processes, which do not exist at the moment. After all, the goals and the structure of the systems interact. One highly-illustrative example provided is the World Trade Organization ("WTO") dispute resolution mechanism. Martinez and Smith differentiate between three phases of WTO activity as having distinctly different goals but operating as a unified system. 133 At the level of policy-making, negotiation at ministerial conferences takes place in order to create an agenda as well as an eventual agreement that can achieve consensus. The goal is therefore security and predictability in multilateral trade relations. 134 At the level of policy-implementation, where the WTO administration acts to ensure that the agreements are being met, the goal is to build capacity to ensure that trade measures committed to are already being met. This process is partially rights-based, as it depends on preexisting agreements. 135 At the level of policy-enforcement, the goal is to ensure that the rights and obligations of the members are met by the resolution of disputes. This process is heavily rights-driven and is based on a system under which the Dispute Settlement Body reviews complaints of violations of the trade agreements and makes a binding decision that can be appealed to an appellate body. 136 Although improvements could be made on the WTO system (i.e., using more negotiation or mediation at the enforcement phase), 137 the WTO system illustrates that different goals therefore lend themselves to different processes, which can be housed in one structure.

<sup>130.</sup> Id. at 378.

<sup>131.</sup> Id. at 377-78.

<sup>132.</sup> Smith, supra note 88, at 129-30.

<sup>133.</sup> Id. at 156-59.

<sup>134.</sup> Id. at 158–59.

<sup>135.</sup> Id.

<sup>136.</sup> Id. at 156-59.

<sup>137.</sup> Id. at 160.

## 2. What Is the Structure of the System?

In analyzing the structure of the system, Martinez and Smith look at the processes that make up the system and their interrelationship. Lisa Blomgren Bingham, in her discussion about designing dispute systems includes other useful elements, which can be incorporated under the structure of the system. Specifically, she uses Elinor Ostrom's seven categories of information used to analyze action situations, which include the control that an individual has over the situation and the costs and benefits of various actions and outcomes. Mediation lends itself to more control by the parties than determinative measures such as arbitration, where control is centered on the arbitrator.

In the NCP dispute resolution system, therefore, the Canadian NCP system would likely grant more control to the parties. However, if one party is expecting that the NCP will take control, this may mean that the party might not assert itself as much, which may lead to disappointment with the process. There are also costs and benefits associated with both processes. Mediation is technically more informal — where the parties have an asymmetry of information, the party with less information would not need to provide formal proof of certain actions. However, one party can choose not to participate, which would lead to expended costs on the part of the other. Determination would demarcate the rights of the parties in accordance with agreed upon rules. However, as discussed above, the determination may come with reputational consequences if the determination is adverse to one of the parties and adversely affects the relationships of the parties.

The different processes used when handling specific instances indicate that the NCP system is a multiple process system. <sup>140</sup> Davarnejad suggests that such diversity is unsurprising given the multi-lateral character of the NCP process. <sup>141</sup> However, while other systems, i.e. the WTO system, have a clear delineation between their functions and goals at each different process, it is unclear that all NCPs have such a tiered system. In fact, as discussed above, the Canadian, US and Swiss NCPs only undertake the mediation process.

<sup>138.</sup> Lisa Blomgren Bingham, Designing Justice: Legal Institutions and Other Systems for Managing Conflict, 24 Ohio St. J. Disp. Resol. 1, 5 (2008).

<sup>139.</sup> Id.

<sup>140.</sup> Smith, supra note 88, at 131.

<sup>141.</sup> Davarnejad, supra note 96, at 372.

### D. The Resulting Confusion in Specific Instances

This Article, as stated earlier, is not an evaluation of the two processes (determination and mediation). There are arguments for both. Both approaches have different goals and outcomes. It is the Guidelines' lack of clarity as to which of these approaches to use that creates confusion in the system and dissatisfaction amongst the participants, as will be outlined in the discussion of the parties' responses to the specific instances below, in the areas of evidence and confidentiality. This lack of clarity is demonstrated in the NCPs' divergence in ranking goals and objectives and the unclear structure of the NCP system as a whole.

Some, such as Davarnejad, have indicated that the soft law nature of the Guidelines shifts the choice in implementation to the NCPs. 142 While noting the downsides to this approach (which this Article suggests outweigh the positives), she recognizes that the flexibility allows creativity amongst the participants and allows for the necessary adaptability. Similarly, Ashley Santner has argued that as the choice of implementation and interpreting the Guidelines rests with the NCPs, this allows them to adapt to local circumstances. While NGOs and TUAC have called for consistency, she posits that the inconsistency may work for these entities in some instances. For example, she states that freedom of interpretation on substantive issues, such as responsibility of a corporation for the actions of its suppliers, has allowed each NCP to strike a balance based on its own prerogatives where there is no consensus, at times aligning with the interests of TUAC or certain NGOs. The flexibility created by the soft law nature of the Guidelines is a source of their strength. 143

However, as noted in the case studies below, the confusion relating to which process to use, rather than allowing creative solutions, leads NCPs to decline to further examine specific instances. Further, there is limited indication given to the parties of what type of procedure should be used, limiting the predictability of the dispute resolution system. Shirley van Buiren of Transparency International Germany notes that: "presently the NCPs do more or less as they please, report what they choose; the Investment Committee's Annual Report in its own words is 'based on the individual NCP reports'. No wonder the Committee can only ascertain but not interpret, much

<sup>142.</sup> Id. at 385.

<sup>143.</sup> Ashley L. Santner, A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future, 43 Geo. Wash. Int'l L. Rev. 375, 382–88 (2011) (the Guidelines have since been revised to include due diligence requirements respecting suppliers).

less overcome, the 'significant and unexplained differences in practice'." <sup>144</sup> The following case studies demonstrate these inconsistencies, particularly in the areas of evidence and confidentiality.

#### 1. Evidence

Recall that when a complaint is made, the Guidelines require that an NCP make an initial assessment of whether the Guidelines are engaged and whether this is an appropriate instance for the NCP to pursue. If the method to be used is solely determinative, then a high evidentiary bar at this stage and throughout the process is essential. The NCP would require evidence that the allegations were in fact true in order to indicate whether the Guidelines were violated. However, if the role of the NCP is mediating a dispute, the mere existence of a dispute within the scope of the Guidelines would be sufficient to trigger a specific instance, rather than being barred by a high evidentiary requirement.

In 2012, a group of communal landowners from the Ejido "La Sierrita de Galeana" (the Ejido) in Mexico, <sup>145</sup> brought a complaint against Excellon Resources, a mining company listed in Canada, for purportedly breaching the Guidelines, specifically alleging violations of the provisions on employment, human rights, disclosure and the environment. <sup>146</sup> In 2008, the Ejido and Excellon signed an agreement leasing a portion of the Ejido's land for the company's La Platosa poly-metallic (silver, lead, and zinc) mine. <sup>147</sup> However, the complainants alleged that the lease had been breached owing to exploration of areas outside the agreement and a failure to construct a promised water treatment plant. <sup>148</sup> In addition, the corporation allegedly intimidated workers to prevent them from joining a mining union and

<sup>144.</sup> Èerniè, supra note 65, at 91 (quoting Shirley van Buiren, Address at International OECD Watch Training and Strategy Seminar (Oct. 15, 2004)).

<sup>145.</sup> Communal landowners vs Excellon Resources, OECDWATCH (May 28, 2012), http://oecdwatch.org/cases/Case\_251, archived at http://perma.cc/F2FE-HFWH.

<sup>146.</sup> See Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana (SNTMMSSRM), Local 309 of the SNTMMSSRM, Proyecto de Derechos Económicos Sociales y Culturales, A.C., Canadian Labour Congress, United Steelworkers & MiningWatch Canada, Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Excellon Resources Inc. at the La Platosa Mine in the Ejido "La Sierrita," Durango State, México (2012), available at http://www.usw.ca/admin/community/submissions/files/OECDComplaint\_Excellon\_28May12.pdf, archived at http://perma.cc/5VW9-4UFF.

<sup>147.</sup> Id. at 6.

<sup>148.</sup> Id. at 7-9.

had been supporting a "rival union."<sup>149</sup> The Mexican NCP was responsible for the specific instance and indicated that it would consult with the Canadian NCP in ultimately providing a statement.<sup>150</sup>

In 2013, the Mexican NCP provided an initial assessment rejecting the specific instance.<sup>151</sup> The NCP found that a number of the issues raised were "material but not proven." This high threshold was not reached with respect to the breach of the lease and the anti-union allegations, although the complaint cited various interviews and provided water tests performed by an independent authority.<sup>152</sup> The NCP essentially addressed the merits of the case at the admissions phase by weighing evidence and not giving the parties an opportunity to respond.<sup>153</sup> For example, the NCP indicates that it was not given "relevant documentary evidence" on proceedings respecting the union intimidation allegations. It is not indicated whether the complainants were given sufficient opportunities to provide such evidence.<sup>154</sup>

Further, evidence provided by the Ejido was either not substantively addressed in the statement or dismissed in a cursory fashion. The assessment stated that the water test analysis was "inconclusive and unofficial," but did not address why the NCP found the study inconclusive or indicate that only official studies would be sufficient to meet the evidentiary threshold. If the proceeding were based on determination of breaches, such a discussion would be required in the statement. Overall, the evidentiary requirements appear to have caught the Ejido unaware. There was no guidance in the Guidelines or in the Mexican NCPs website to indicate such requirements. <sup>155</sup> By requiring the parties to meet a high evidentiary threshold but not addressing the evidence substantively in their assessment, the NCP created expectations in the complainants that they failed to meet.

<sup>149.</sup> Id. at 15-21.

<sup>150.</sup> Specific Instance Excellon Initial Valuation of the National Contact Point of Mexico Guidelines for Multinational Enterprises of the OECD, Office of the Sub-Secretary of Competition and Regulations, Foreign Investment General Direction, Ministry of the Economy, Mexico, Official Communication DGIE.315.12.137, Nov. 28, 2012 (Mex.), available at http://www.business-humanrights.org/media/documents/company\_responses/resultado\_evaluacion\_inicial\_excellon\_copia\_(2).pdf, archived at http://perma.cc/JS32-S977.

<sup>151.</sup> Id. at 9.

<sup>152.</sup> *Id.* at 6-7.

<sup>153.</sup> Id. at 9.

<sup>154.</sup> Id. at 7.

<sup>155.</sup> Trade Union Advisory Committee to the OECD, Assessment of Excellon Resources Inc. V Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana (SNTMMSSRM), 309 of the SNTMMSSRM, available at http://www.tuacoecdmneguidelines.org/CaseDescription.asp?id=163, archived at http://perma.cc/UK7J-K7YW.

The Canadian NCP created similar expectations in the complaint by OT Watch (an amalgam of NGOs monitoring the Oyu Tolgoi copper and gold mine in the South Gobi region of Mongolia) against the Canadian corporation, Ivanhoe Mines, and the UK-based Rio Tinto and their exploitation of the mine. There had been a great deal of controversy centered around allegations of gaps in environmental impact assessments and corresponding consultations, which led the US delegation to the World Bank in 2013 to criticize the operations and call for the World Bank to reexamine the environmental impact assessments or reconsider funding. 157

The complainant alleged the corporations breached the sections of the Guidelines which call on corporations to "contribute to economic, social and environmental progress with a view to achieving sustainable development" and to "assess, and address in decisionmaking, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle."158 The Canadian NCP made the decision to, as part of the initial assessment, undertake what OT Watch considered an "in-depth examination of the allegations in the complaint."159 OT Watch indicated that it did not provide the NCP with the wealth of evidence it could have nor did it have the opportunity to make additional claims supporting its complaint. 160 This state of affairs led to a perception of imbalance in the consideration of the evidence. OT Watch alleged that the Canadian NCP relied heavily on information provided by Ivanhoe Mines but did not address all the evidence provided by OT Watch. 161

In these two case studies, OT Watch and the Ejido were unpleasantly surprised by the evidentiary requirements at the initial phase of the procedure. While it is unclear which process the Mexican NCP

<sup>156.</sup> See OT Watch vs. Rio Tinto International Holdings Ltd., OECDWatch (Apr. 1, 2010), http://oecdwatch.org/cases/Case\_174, archived at http://perma.cc/KN4D-SK G8 (the text of the complaint); see also Foreign Affairs, Trade and Development Canada, National Contact Point Specific Instances (2012), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx#tenth, archived at http://perma.cc/5KTU-AR8K?type=source.

<sup>157.</sup> See U.S. Department of the Treasury, United States Position: Mongolia — Oyu Tolgoi Mining Project (2013), available at http://www.treasury.gov/resource-center/international/development-banks/Documents/OT%20Position%20for%20Web%20Posting%20Feb%2028.pdf, archived at http://perma.cc/MJ47-296L (on gaps in the ESIA).

<sup>158.</sup> OECDWATCH, supra note 156.

<sup>159.</sup> Id.

<sup>160.</sup> Id.

<sup>161.</sup> Id.

follows, the Canadian NCP clearly uses the mediation approach. Such high evidentiary requirements, without discussing the process with the parties, and without clarifying any gaps with the parties are contrary to such an approach and give the appearance of preference on the part of the NCPs. Further, such stringent evidentiary requirements create expectations of a determinative process, which would necessitate a fulsome exposition of the evidence in the statement. The confusion in the NCPs' approach to evidence is indicative of the confusion in choosing between the determinative and meditation-based approach.

# 2. Confidentiality

The second problem goes beyond the initial assessment stage to encompass the entire process. Mediation is often confidential. At times, mediators will even keep parties separate if it would promote a resolution. <sup>163</sup> In contrast, in a process by which breaches of the rules, i.e. the Guidelines, would be determined by a decision-maker, such as arbitration or a court proceeding, the decision-maker would not ordinarily keep information provided by one party from the other parties.

In 2012, a coalition of civil society organizations made a complaint to the Finnish NCP against an engineering company, Pöyry Group, for construction services provided to the Government of Lao PDR as a part of the preparation to construct the Xayaburi Dam. 164 The complainants expressed concerns about the severe environmental and social impacts that may be caused by the dam, such as displaced communities, loss of livelihood owing to the impact on freshwater fisheries and fertile lands in the area, as well as the extinction of certain species. 165 While other countries surrounding the Mekong Delta, such as Vietnam and Cambodia, have sought the deferral of construction until more information on these impacts is

<sup>162.</sup> CPR Mediation Process, CPR International Institute for Conflict Prevention and Resolution, available at http://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure.aspx, archived at http://perma.cc/R4UZ-2P93 (see rules of mediation which discourage onerous evidentiary requirements).

<sup>163.</sup> *Id.* The draft mediation agreement also indicates that separate meetings are permitted.

<sup>164.</sup> Siemenpuu et al vs Pöyry Group, OECDWATCH, http://oecdwatch.org/cases/Case\_259, archived at http://perma.cc/4SCL-E32U; see also Siemenpuu et al vs Pöyry Group, Finnish NCP, http://www.tem.fi/OECD-yksittaistapaukset, archived at http://perma.cc/5FLN-GPVE; Siemenpuu et al vs Pöyry Group, FinnWatch, http://finnwatch.org/images/poyry\_vastine\_final\_henkkoht.pdf, archived at http://perma.cc/A3R5-9 N2L (for the dissenting opinion).

<sup>165.</sup> Id.

available, Laos has attempted to continue with construction, according to the complainants, justified by Pöyry's reports. <sup>166</sup> The complainants alleged that the corporation was breaching the sustainable development and due diligence requirements in the Guidelines. <sup>167</sup>

The Finnish NCP undertook a two-tiered process similar to that of the UK in this specific instance, which was the first examination by the Finnish NCP. As part of the initial assessment, the NCP received comments from Pöyry confidentially at Pöyry's instance. Pöyry also provided a separate public response in which they rejected all allegations. The parties were invited to mediation, which Pöyry rejected. The Finnish NCP then issued a final statement.

While the Finnish NCP held that the Guidelines and requirements to conduct due diligence were applicable, it did not find a violation. The complainants were displeased with the NCP giving into what it considered "demands for an excessive degree of confidentiality." Without being able to rebut the confidential material, the complainants considered themselves at a significant disadvantage. The NCP also based part of its final statement on Pöyry's confidential response, which was never shared with the complainants.

The German NCP used a similar approach in 2004. Several NGOs, including Germanwatch, Coalition against Bayer Dangers and Global March against Child Labour, complained to the German NCP about child labour being used by Bayer's subsidiary ProAgra in India.<sup>174</sup> Bayer alleged that there was no basis for the complaint. After an exchange of submissions, the German NCP invited all parties to participate in a meeting.<sup>175</sup> However, when Bayer objected to one of the participants, the NCP decided to hold meetings separately with the complainants and with Bayer, in which Bayer detailed how it

<sup>166.</sup> Id.

<sup>167.</sup> Id.

<sup>168.</sup> Id.

<sup>169.</sup> *Id*.

<sup>170.</sup> PÖYRY PLC, Pöyry Plc's Statement to Business & Human Rights Resource Centre (Aug. 7, 2012), available at http://www.business-humanrights.org/media/poyry\_plc\_statement\_to\_business\_and\_human\_rights\_resource\_centre\_120807.pdf, archived at http://perma.cc/CDG7-2PFC.

<sup>171.</sup> Siemenpuu et al vs Pöyry Group, supra note 164.

<sup>172.</sup> Id.

<sup>173.</sup> Id.

<sup>174.</sup> GER. NCP, STATEMENT BY THE GERMAN NATIONAL CONTACT POINT FOR THE 'OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES" ON THE COMPLAINT FILED AGAINST BAYER CROPSCIENCE BY GERMAN WATCH, GLOBAL MARCH, AND COORDINATION GEGEN BAYER-GEFAHREN (Aug. 30, 2007), available at http://www.oecd.org/daf/inv/mne/39311489.pdf, archived at http://perma.cc/Q4UK-VHN6.

<sup>175.</sup> Id.

would remedy any issues.<sup>176</sup> The complainant continued to have issues with the implementation of the remedy, seeking responses from Bayer as child labour allegations persisted in 2006. The NCP issued a final statement in 2007.

These separate meetings created an imbalance of information. It made Bayer's implementation process unclear, and therefore, the complainants were unable to assess the success of the complaint. More importantly, the separate meetings called into question the independent nature of the NCP as the NCP was required to present the claims and arguments of one party to another. 177

The objection to confidentiality in these specific instances is understandable when looking at the procedure through an adjudicative lens. If the NCPs are expected to make determinations of breaches of the Guidelines, the parties should be aware of all communications between the decision-maker and one of the parties for fear of bias. Even if bias is not a concern, the parties should have an opportunity to respond to one another's contentions. However, if mediation is to be the chief objective, then the NCPs should be entitled to use whatever process necessary (within reason) in order to encourage resolution. Separating parties and keeping communications confidential would not be outside the realm of possibility in mediation. 178

The flexibility provided by the diversity in the NCP system does not counteract the loss of predictability faced by the parties. The differential and unclear evidentiary requirements and confidentiality procedures evidence a fundamental confusion around what process the system is meant to take. Is it meant to be determinative, therefore requiring a higher evidentiary threshold and stringent procedural requirements to avoid bias on the part of the decision-maker or is it meant to be conciliatory, with more focus on coming to an agreement to be achieved through processes discussed with the parties, such as confidentiality? The impact of the confusion on the parties in specific instances is evident; however, the absence of specific rules on this point has broader repercussions on the NCP system as a whole.

<sup>176.</sup>  $Germanwatch\ v.\ Bayer,\ OECDWatch,\ http://oecdwatch.org/cases/Case_50,\ archived\ at\ http://perma.cc/3QF6-ZL2F.$ 

<sup>177.</sup> Id.

<sup>178.</sup> *CPR Mediation Process*, *supra* note 162 (discussing rules of mediation which encourage separate meetings).

#### IV. THE IMPACT ON THE LEGITIMACY OF THE GUIDELINES

In designing systems of dispute or conflict resolution, as Bingham points out, lawyers are in fact designing justice. <sup>179</sup> As Kenneth M. Ehrenberg observes, quoting Hume:

". . . [J]ustice is not an appropriate standard in situations of abundance or enlarged affections. Rather, it is a concept that serves as a criterion by which we resolve conflicts over property distribution, over showing each other the proper amount of respect, and over the appropriate response to situations where others have been wronged. These and other conflicts define the scope of justice. As social constructions or organizations of people that seek to resolve interpersonal conflicts, conflict-resolving institutions obviously deal extensively with the concept of justice."

There are several different aspects to justice regarding the fairness of the outcomes of the process which arise from a dispute resolution process. For example, distributive justice addresses fair distribution of rights and resources, or corrective justice addresses compensation or punishment for wrongs. <sup>181</sup> In this case, the issues of justice raised relate to procedural justice and its ability to legitimize a system of dispute resolution.

## A. Procedural Justice: A Very Brief Overview

Procedural justice in this instance relates to the processes or procedures that create the outcomes of the dispute resolution procedure. There are several ways in which procedural justice can be conceived. The first has been the realm of the philosophers, mostly focused on the outcomes of the dispute resolution process; such that a process is considered just when it creates a fair outcome. Perhaps the most well-known conception of procedural justice is Rawls' discussion of perfect procedural justice, imperfect procedural justice and pure procedural justice. Perfect procedural justice consists of an independent criterion for a fair outcome and a procedure that guarantees such a fair outcome (an accurate outcome). An example of this is a

<sup>179.</sup> Bingham, supra note 138, at 1.

<sup>180.</sup> Kenneth Ehrenberg, Procedural Justice and Information in Conflict-Resolving Institutions, 67 Alb. L. Rev. 167, 175 (2003).

<sup>181.</sup> Ernest J. Weinrib, Corrective Justice in a Nutshell, 52(4), U. TORONTO L.J. 349, 349 (2002).

<sup>182.</sup> Lisa B. Bingham, When We Hold No Truths to Be Self-Evident: Truth, Belief Trust, and the Decline in Trials, 2006 J. DISP. RESOL. 131, 147 (2006).

<sup>183.</sup> John Rawls, A Theory of Justice, Chapter II, Section 14 (The Belknap Press 1999).

process for sharing cake by which the person who cuts the cake chooses their slice last.<sup>184</sup> "Equal shares for each" is the independent criterion for a fair division of cake while rule that the person who slices has the last pick is the procedure that guarantees that fair division.<sup>185</sup> Imperfect procedural justice includes the independent criteria for a fair outcome but no guarantee of a fair outcome.<sup>186</sup> An example of this is the trial system. Pure procedural justice only has a procedure, which in itself guarantees a fair outcome but no criteria for determining what would be a just outcome. An example of this would be the lottery, where there is no determination as to whether the person who won deserved the award or not.<sup>187</sup>

Other theories address this last point, whether a fair process in itself can be just, irrespective of the outcome. The social psychology field has extensively reviewed the satisfaction of the parties who have participated in the dispute resolution process. Surprisingly, research has indicated that factors other than the outcome of the dispute affect the party's perception of fairness. Is In fact, it seems that where parties are treated with dignity in accordance with the rules, they are more satisfied than obtaining outcomes that they view as fair to themselves. Is Tyler and Lind suggest that when a procedure accords with the fundamental values of the group, a sense of procedural justice and satisfaction results owing to the participation in the life of the group. Is Elaborating on this idea, Donna Shestowsky's research has indicated that faced with a choice prior to the dispute resolution process, the parties prefer the processes that they believe will advance their self-interest. After the process, when evaluating the

<sup>184.</sup> Id.

<sup>185.</sup> Id.

<sup>186.</sup> Id.

<sup>187.</sup> Id.

<sup>188.</sup> Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 Nev. L.J. 487 (2007).

<sup>189.</sup> See E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 7–40 (1988); John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 85–94 (1975); Steven Blader & Tom Tyler, A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process, Pers. Soc. Psychol. B 747(2003).

<sup>190.</sup> Mike Hough, Jonathan Jackson, Ben Bradford, Andy Myhill & Paul Quinton, Procedural Justice, Trust and Institutional Legitimacy, Policing: A Journal of Policy and Practice, (2010), available at http://intl-policing.oxfordjournals.org/content/4/3/203.full.pdf+html?sid=4a89b48a-cf92-4a5c-9783-40d76c3b26cd, archived at http://perma.cc/H6Z7-M5FP.

<sup>191.</sup> Lind & Tyler, supra note 189.

dispute resolution system, they focus on how they were treated in the process. Neither worries about the accuracy of outcomes. 192

Social psychology focuses on the individual participant perceptions of fairness of the processes. Jürgen Habermas, in advancing his theory of discourse ethics, indicated that an equal opportunity and ability to communicate for all parties was a condition of rational discourse that would produce truth. For Habermas, similar to a Rawlsian understanding of pure procedural justice, there could be no separation of the criteria for truth from the criteria for the argumentative settlement of claims about truth. This argumentative settlement would be based on a rational consensus, resulting from superior arguments, not on constraining communication. Therefore, an ideal communication situation could be structured, provided that the parties are motivated by a "co-operative" search for truth or right, to achieve truth. <sup>193</sup> Habermas linked discourse theory and rules of procedure stating:

. . . [L]egal procedures intertwine with processes of argumentation, and in such a way that the court procedures instituting legal discourses must not interfere with the logic or argument internal to such discourses. Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the way for* processes of communication governed by the logic of application discourses. <sup>194</sup>

For Habermas, creating this ideal communication situation by enabling participation is key to achieving procedural justice.

# B. Procedural Justice, Participation, and Legitimacy

The central issue in this Article is that the Guidelines lack of clarity over which process to apply in addressing specific instances and the ensuing effects. Fair procedures would require that cases with like facts are treated the same, rather than be differentiated based on inherent inconsistencies in a dispute system. The absence of clarity in which process NCPs should apply affects the participation

<sup>192.</sup> Shestowsky, supra note 188.

 $<sup>193.\,</sup>$  Thomas McCarthy, The Critical Theory of Jurgen Habermas  $291{\text -}310$  (The MIT Press, 1978).

<sup>194.</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 34–35 (The MIT Press, 1996), as quoted in Solum, *infra* note 195, at 192–224 (emphasis added).

of the parties, which Lawrence Solum, conducting an intensive review of theories of procedural justice, has posited as a fundamental principle of procedural justice. 195

Solum's theory prioritizes participation as it answers the hard problem of procedural justice: Given that the judicial system may not have accurate outcomes, as in a trial process, why should people comply with dispute resolution processes? The answer he suggests is that participation provides the legitimacy that is required for voluntary compliance and social stability. In his words, "procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate." Legitimacy in this instance refers to social credibility and acceptability: "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, and definitions." <sup>196</sup>

Participation grants legitimacy to bind an individual, and to create "content-independent obligations of political morality, to obey judicial decrees, and to respect the finality of judgments." As a matter of political morality, similar to legislation, it is unjust to coerce obedience to decisions that are not perceived by ordinary citizens as legitimate. Rawls' cake-slicer example is therefore telling: "Maybe we believe that the slicer gets a fair share because the slicer was the one who did the cutting; the slicer's participation in the cutting validates the outcome, even if the slicer ends up with a smaller slice." 199

Habermas places participation in a similar position (although as discussed above, participation must be on very idealized terms). In looking at legislation, he found that legitimacy must be tied to robust processes of public discourse that sway formal decision-making.<sup>200</sup>

<sup>195.</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181, 192–224 (2004). Although discussing adjudicative and binding civil procedures, his analysis can be applied to mediation processes as well. He posits accuracy and participation as fundamental principles of procedural justice. His principle of accuracy attempts to strike a fair balance between accuracy and costs of the procedure. The participation principle involves meaningful participation for all who have a substantial interest in the proceeding, including notice, the opportunity to be heard, and representation (including lawyer's fees) even for absentees.

<sup>196.</sup> Mark Suchman, Managing Legitimacy: Strategic and Institutional Approaches, 20 Academy of Management Review 571, 574(1995).

<sup>197.</sup> Solum, *supra* note 195, at 278.

<sup>198.</sup> Id.

<sup>199.</sup> Id.

<sup>200.</sup> James Bohman & William Rehg, *Jürgen Habermas*, in The Stanford Encyclopedia of Philosophy, (Edward N. Zalta, ed., Winter 2011).

Legitimate laws must have their aspects reconciled, not just through arguments of validity, which cannot necessarily be achieved because of varying interests, but through a fair bargaining process. Habermas is not seeking consensus, but rather, he argues that the 'truth' is arrived at through an inclusive deliberative process.<sup>201</sup>

# C. Participation and Its Application to the NCP System

Owing to the inconsistencies and confusion relating to what process to apply, the NCP process is procedurally unjust. It stifles the abilities of the parties to participate in the process, affecting the legitimacy of the enterprise.

In the instances of Excellon and the Ejido and in the Oyu Tyogi mines, the specific instance did not pass the assessment phase because of a high evidentiary threshold. If the approach taken is to be mediation, then such stringent evidentiary requirements are unnecessary. Further, evidence was not sought from the parties, limiting their ability to participate. In the case of Bayer and the NGO complainants, it has been argued that confidentiality between one of the parties and the NCP would not be acceptable in the context of a determination proceeding. By separating the parties and receiving different information from each, the complainants' ability to participate and respond to Bayer's defences/assertions was removed. Further, in the case of Pyröy, the confidentiality of the proceedings led to a similar outcome.

The parties in this case were dissatisfied with the outcome, Solcum would argue, because their ability to participate was limited by the confusion about which process would apply. This legitimacy is crucial to the continuation of the dispute resolution mechanism. If the NCP system is not viewed as legitimate, it will run the real risk that NGOs will not use their often scarce resources to help bring complaints against corporations, or that corporations will not participate in the process nor implement any recommendations. As Black notes, unlike state-based regulators, non-state regulators, such as the OECD, cannot rely on the force of law or on their position in the broader legal order to coerce compliance or to motivate actors to change. Non-state regulators must rely on their legitimacy to promote change in the actors they seek to influence.<sup>202</sup> In order for the parties to use the NCP system and adhere to NCP recommendations,

<sup>201.</sup> Id.

<sup>202.</sup> Black, supra note 15 at 138, 148.

continued legitimacy is vital. This fundamental confusion may cripple the NCP system, thus limiting the efficacy of one of the only multilateral dispute resolution system in the area of corporate responsibility.

#### V. Conclusion

As of July 2013, the Ejido has asked that Excellon return all lands leased to them in the agreement, including the lands on which Excellon operates their mine.<sup>203</sup> The breakdown of the relationship between the Ejido and the mine cannot be laid at the feet of the Mexican NCP, but failure to allow the parties to participate fulsomely in the process limited the Guidelines' potential to resolve the dispute. Clear guidelines on the process to be followed, whether mediation or determination, would either have altered the NCPs' decision on high evidentiary requirements or telegraphed to the parties that such an evidentiary bar would be the norm. The confusion in the system has led to missed opportunities for dispute resolution which, in the regime of corporate responsibility, are few and far between.

The Guidelines are at a pivotal moment in their history. As one of the only multilaterally endorsed codes promoting corporate responsibility with a dispute resolution mechanism, clarity on the point of whether NCPs are empowered to determine when a corporation has breached the Guidelines, as with the UK NCP, or to mediate between the parties, as with the Canadian NCP, is essential to the continued legitimacy of the system.

To this end, the next update of the Guidelines should clarify what the goals of the dispute resolution process are and prioritize them. If there are multiple goals of equal importance, it should be determined whether these goals can be achieved by having multiple processes, such as mediation and determination, working in tandem. The adhering countries should also resolve whether it is acceptable for each NCP to opt for a one-stage or two-stage process or if uniformity across NCPs is preferred. The conflicting goals of the NCP dispute resolution system can be accommodated in an agreed upon structure, incorporating one or both of mediation and determination. Any update, however, would have to clearly delineate the goals of each process and the procedures which would accompany each, such as directions on the use of evidence or on confidentiality.

<sup>203.</sup> Letter from the Ejido La Sierrita to the Canadian Mining Company Excellon, "Our Land Is Not for Sale" (July 21, 2013), available at http://www.prodesc.org.mx/en/?p=641, archived at http://perma.cc/ZF3T-BDX4.

A clearly structured dispute resolution mechanism would ensure that the complainants and corporations clearly understand the goals and procedures of the dispute resolution mechanism and therefore generate reasonable expectations. Such a mechanism would ensure fulsome participation and lend legitimacy to the NCP process.

Until then, NCPs will approach specific instances inconsistently, and resulting decisions on evidence and confidentiality will limit participation to the dissatisfaction of the parties. Procedural justice requires participation to be perceived as legitimate. Without legitimacy, the parties will not have a reason to respect the outcomes of the NCP process, and the Guidelines cannot hope to achieve change.<sup>204</sup>