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# In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises

Leyla Davarnejad\*

## I. INTRODUCTION

In 2000 the OECD Guidelines for Multinational Enterprises (Guidelines) were thoroughly reviewed and transformed into one of today's most comprehensive Corporate Social Responsibility (CSR) initiatives.<sup>1</sup> The Guidelines' implementation mechanism sets them apart as the most developed governmental code of conduct for CSR.<sup>2</sup> The number of countries adhering to the Guidelines continues to grow. Of the forty-two countries that currently adhere to the guidelines, thirty-four are member countries of the Organization for Economic Co-operation and Development (OECD) and eight are non-member countries.<sup>3</sup> Hence, the

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\* The author is a Ph.D. candidate at the Ruhr-University Law School, Germany, where she has worked for five years as a teaching and research associate. This article is a shorter version of her master thesis, which she completed as a research fellow in the Stanford Program in International Legal Studies (SPILS) at Stanford Law School. The author would like to thank the NCP and OECD officials for participating in this study. Also, the author would like to thank the Stanford Law faculty who graciously offered their time and insights over the course of this study. In particular, the author is indebted to Professor Allen S. Weiner for his invaluable support.

1. This study is based on the 2000 Review of the OECD Guidelines for Multinational Enterprises. See Org. for Econ. Co-operation & Dev., *The OECD Guidelines for Multinational Enterprises* (2001), available at [http://www.oecd.org/document/25/0,3746,en\\_2649\\_34889\\_48024409\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/25/0,3746,en_2649_34889_48024409_1_1_1_1,00.html) [hereinafter OECD Guidelines]. In the original version enacted in 1976, the Guidelines represented a code of conduct that addressed multinational enterprises. See Daniel J. Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT'L L. J. 339-346 (1977) (for a comment on the original version). In the years 1984 and 1991, OECD released two more revisions on particular questions. See *The OECD Guidelines for Multinational Enterprises: Decision of the Council*, OECD, [http://www.oecd.org/document/39/0,3746,en\\_2649\\_34889\\_1933095\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,3746,en_2649_34889_1933095_1_1_1_1,00.html). The most recent update of the Guidelines was completed in May 2011 when this study was already completed. See *2011 Update of the OECD Guidelines for Multinational Enterprises*, OECD, [http://www.oecd.org/document/33/0,3746,en\\_2649\\_34889\\_44086753\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html). The 2011 revision is not comprehensive like the 2000 review of the Guidelines. Those changes are referred to in this article.

2. *Compare The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the ILO*, INTERNATIONAL LABOR ORGANIZATION, available at [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm\\_with\\_Ten\\_principles\\_of\\_the\\_U.N\\_Global\\_Compact](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm_with_Ten_principles_of_the_U.N_Global_Compact), UNITED NATIONS, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

3. The 34 OECD 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, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. The eight

Guidelines have raised high expectations due to their governmental character, number of participating countries, and implementation mechanism. Taking into account the voluntary or non-enforceable character of other CSR initiatives, the Guidelines seemed to have the potential of being more “effective” and “relevant.”<sup>4</sup>

But this early promise has dimmed somewhat in recent years. Some of the criticisms are coming from civil society and scholars who focus on the Guidelines’ multilateral dispute resolution mechanism known as *specific instances*.<sup>5</sup> *Specific instances* govern individual cases involving alleged corporate non-compliance with the Guidelines.<sup>6</sup> Many consider government observance of corporate compliance with the Guidelines as either ineffective<sup>7</sup> or “highly uneven.”<sup>8</sup> Their criticisms are based on the notion that CSR standards are not enforceable—“soft law,” as qualified in international law—and therefore regarded sceptically. For these kinds of norms, an implementation provision is crucial to promote compliance.

Although these criticisms are on point in principle; however, it is unclear how government agencies, known as National Contact Points (NCPs), actually handle CSR issues presented in *specific instances* because a comprehensive and systematic study of *specific instances* is missing. The purpose of this study is to fill this gap by analyzing the governmental handling of CSR disputes under the Guidelines.

The underlying assumption of this research is the Guidelines’ (1) ambiguous and vague content, (2) legal construction, (3) and legal commitment have led to uneven expectations and multiple approaches to this unique dispute resolution mechanism. There is not a consensus among NCPs on CSR commitments and how to apply CSR standards. In other words, *compliance* and *implementation* of the Guidelines have different meanings for NCPs because of the Guidelines’ soft law nature and CSR content. As a result, one NCP approaches companies considerably different than another NCP, which could ultimately undermine the impact of the Guidelines.

This socio-legal study undertakes a comprehensive analysis of the various practices NCPs apply to solve CSR disputes during *specific instances*. It does so in four parts, starting with an outline of the legal background of the CSR debate

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non-member countries that have adopted the OECD Guidelines are: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

4. See for a good reflection of these expectations, see Joris Oldenzien, *The 2000 review of the OECD guidelines for multinational enterprises: a new code of conduct?*, available at [http://oecdwatch.org/publications-en/Publication\\_1870/?searchterm=guidelines](http://oecdwatch.org/publications-en/Publication_1870/?searchterm=guidelines).

5. See OECD Guidelines, *supra* note 1, at 34.

6. *Id.*

7. OECD Watch’s September 2005 report, *Five Years On: A review of the OECD Guidelines and NCPs*, was critical of the NCPs’ haphazard approach to casework. See *Five Years On: A review of the OECD Guidelines and NCPs*, OECD WATCH, [http://oecdwatch.org/publications-en/Publication\\_2973/](http://oecdwatch.org/publications-en/Publication_2973/). In March 2007, the European Parliament’s Committee on Employment and Social Affairs called on the European Commission and Member States to: “[I]mprove the functioning of [NCPs] in particular in dealing with *specific instances* raised concerning alleged violations throughout operations and supply chains of European companies worldwide.” See *European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0062&language=EN>.

8. U.N. Secretary General’s Special Representative on Business and Human Rights, John Ruggie, *Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) at 15 ¶ 50.

and movement in Part II. Part III examines the construction and content of the Guidelines. Also, Part III explores the soft law nature debate and how it shapes the NCPs' commitment and implementation of the Guidelines.

In Part IV, the empirical findings of this study are presented to illuminate how the soft law nature of the Guidelines shapes the NCPs' commitment and implementation of the Guidelines. The empirical findings consist of a content analysis of fifty-seven published final statements of the NCPs reporting on *specific instances*. Also, the findings include twenty-five NCPs' responses to a survey, which was addressed to all forty-two NCPs, and interviews with five NCP officials, and one OECD official. The empirical methods were combined in order to collect and analyze data in terms of the procedural practices and outcomes of this dispute system. In addition, Part IV questions how NCPs understand their role and function in handling CSR disputes and the goals they aim to achieve.

Finally, Part V consists of concluding remarks about this dispute system while providing a brief update and forecast about the 2011 Guidelines.

## II. THE LEGAL BACKGROUND OF THE CORPORATE SOCIAL RESPONSIBILITY DEBATE AND MOVEMENT

The relevance of the Guidelines within the continually growing field of CSR initiatives can only be understood in the context of the minimal legal obligation requiring business entities to respect human rights, social norms, and environmental standards. This legal landscape has led to the rise of CSR, an international policy issue that calls on corporations to be profitable in a sustainable way by not harming human beings or the environment.<sup>9</sup> The United Nations (UN) defines sustainable development as a "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>10</sup>

In today's globalized world, multinational enterprises (MNEs)<sup>11</sup> are under almost no international legal obligation to respect human rights, core labor standards, or environmental norms.<sup>12</sup> These global players – who, can avoid controls and regulations imposed by domestic law due to their mobility – are not obliged to

9. This broad definition is chosen because it seems to bring the issue to a head. However, there is no generally accepted definition or concept of CSR. See CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS, 5-32 (2009) (for an overview of debates and issues).

10. U.N. General Assembly, *Report of the World Commission on Environment and Development: Our Common Future*, Mar. 20, 1987, A/RES/42/187, available at <http://www.un-documents.net/ocf-02.htm>. This is the most widely used definition for sustainability and sustainable development.

11. Synonyms for MNEs are multinational or transnational corporations. According to the most common working definition these enterprises engage in foreign direct investment and own or control in some way value-added activities in more than one country. See JOHN H. DUNNING & SARIANNA M. LUNDAN, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 3 (2008) (referring to OECD, UNCTAD, business, and scholars using this definition).

12. Core labor standards are the basic labor standards as classified by the International Labor Organization (ILO), like the elimination of forced and compulsory labor, the abolition of child labor, freedom of association and the right to collective bargaining. See *The ILO Declaration on Fundamental Principles and Rights at Work*, INTERNATIONAL LABOUR ORGANIZATION, available at <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>, and eight ILO core labor standard conventions, also known as the fundamental human rights conventions. *Conventions and Recommendations*, INTERNATIONAL LABOUR ORGANIZATION, available at <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

respect international law because they are not (or are only partial) subjects of international law.<sup>13</sup> Despite MNEs' increasing economic activities, they are not subject to sufficient international regulation and control—a legal situation that is often described as a “legal vacuum”<sup>14</sup> or an “accountability gap.”<sup>15</sup> While investment treaties and customary international law protect corporate assets, there are few legally binding obligations to respect human rights, the environment, and other societal concerns. In recent years, demands have been made to integrate investor obligations into investment treaties as a means of promoting the rights and the obligations of investors<sup>16</sup>— a demand that previously arose during the early 1970s.<sup>17</sup>

At that time, demands for the legal control of MNEs were made based on the concern that MNEs' growing economic and political power might pose a risk to developing countries and their sovereignty.<sup>18</sup> As such, the international community expressed a demand for a “new international economic order” to protect the interests of developing countries.<sup>19</sup> Since the 1990s, human rights concerns have predominantly led states, international organizations, non-governmental organizations (NGOs) and experts on international law to consider how to regulate MNEs. In addition to the human rights responsibility and accountability of MNEs, the need for a broader corporate responsibility has been a much discussed issue, which led to the rise of social corporate responsibility.<sup>20</sup> To date, there has not

13. The question of whether MNEs are obliged to respect international law is a controversial one. “In principle, corporations of municipal law do not have international legal personality.” See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 66 (2008); see generally MALCOLM N. SHAW, *INTERNATIONAL LAW*, 250 (2008) (characterizing this issue as an “open question”).

14. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L LAW 931, 935 (2004).

15. Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 54 (2002) (stating the concern about “the gap between the economic reality and the legal tools available to hold corporate groups accountable for their actions”).

16. Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, 54th Sess., U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003) ¶ 56 (noting that such an approach “examines what complementary measures are needed to ensure an appropriate balance of rights and obligations between States and towards investors, bearing in mind States responsibilities under human rights law”).

17. For a comparison of the initiatives of the ICC, OECD, ILO and the code of conduct debate of the 1970s, see generally A. Fatouros, *On the Implementation of International Codes of Conduct: an Analysis of Future Experience Symposium: Codes of Conduct for Transnational Corporations*, 30 AM. U. INT'L L. REV. 941 (1980); Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U. INT'L L. REV. 923 (1980); Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development Symposium: Codes of Conduct for Transnational Corporations*, 30 AM. U. INT'L L. REV. 903-922 (1980-1981); Timothy W. Stanley, *International Codes of Conduct for MNC's: A Skeptical View of the Process Symposium: Codes of Conduct for Transnational Corporations*, 30 AM. U. INT'L L. REV. 973-1008 (1980-1981).

18. See Peter Fischer, *Transnational Enterprises*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 921-926 (924) (R. Bernhardt ed. 2000); Karl P. Sauvant & Elton R. Lanier, *Host-Country Councils: Concept and Legal Aspects*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES*, 341 – 405 (Norbert Horn ed. 1980).

19. See U.N. Resolution on the Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/9556 (May 1, 1974), available at <http://www.un-documents.net/s6r3201.htm>.

20. See *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 1-15* (Menno T. Kamminga & Saman Zia-Zariel, eds., 2000); *CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY AND GOVERNANCE, GLOBAL PERSPECTIVES* (Istemi Demirag, ed. 2005).

been a consistent and generally accepted definition of the CSR concept because its content and legal forms are matters of debate.<sup>21</sup> In terms of content, the scope of CSR may comprise of any subject beyond human rights, labor, and environmental issues that have any relevance to the broader themes of sustainability, including issues as consumer protection and corruption.

Not only are the dimensions and subject matter of CSR manifold, there is also debate about whether CSR standards have or ought to have a hard law nature.<sup>22</sup> CSRs can be legally binding or voluntary, depending on whether MNEs are bound by domestic law or whether they respond to societal expectations. The normative quality and significance of internationally agreed CSR standards are often unclear, however.

It is important to note that when discussing CSRs' international initiatives and their legal quality, a distinction should be made between governmental, non-governmental/private, and multi-stakeholder acts. The Guidelines represent a governmental initiative because only the adhering countries can determine how to change and implement the Guidelines. In addition, representatives on the part of civil society—in particular business, trade unions, and NGOs—are consulted concerning all aspects of the Guidelines, including their implementation. However, the Guidelines have to be distinguished from multi-stakeholder initiatives, which are very common in the context of CSR. In terms of these initiatives various private actors cooperate and determine their form and content, sometimes with and sometimes without the contribution of governments.<sup>23</sup>

### III. CONSTRUCTION, CONTENT, COMMITMENT, AND IMPLEMENTATION OF THE GUIDELINES

#### *A. The Content: A Broad CSR Scope and a Broad Definition of MNEs*

The Guidelines' personal, topical, and territorial scopes are quite comprehensive. During the review procedure, drafters exerted substantial effort to increase the relevance of the Guidelines while enlarging the applicable areas.

First, the Guidelines avoid the scholarly and practical debates surrounding the definition of MNEs by stating that a concrete definition is not necessary.<sup>24</sup> Included within this vague category are:

companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the en-

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21. Synonyms for CSR are corporate responsibility, corporate societal responsibility, and corporate citizenship.

22. Jennifer A. Zerk, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 32-33 (2006).

23. See PITTS, *supra* note 9, at 199.

24. See OECD Guidelines, *supra* note 1, at 12, ¶ 3.

terprise may vary widely from one multinational enterprise to another.

...<sup>25</sup>

This sweeping definition of MNEs includes ownership of private, state, and mixed natures. All entities within MNEs (parent companies and/or local entities) are addressees and “the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.”<sup>26</sup> As such, all kinds of corporations are addressees under the Guidelines.

Second, the Guidelines provide numerous topics that are considered CSR subjects. The range of areas comprises of diverse interests such as: (1) human rights,<sup>27</sup> (2) disclosure of information,<sup>28</sup> (3) labor and industrial relations, (4) environment, (5) anti-bribery, (6) consumer protection, (7) science and technology, (8) competition, (9) and taxation.<sup>29</sup> In this connection, fostering the principle of sustainability is necessary while highlighting the “links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development.”<sup>30</sup> Commentary in the Guidelines refers to international initiatives of other international organizations like the International Labor Organization (ILO), and other OECD initiatives in order to solidify the meaning of the chosen CSR topics.<sup>31</sup> Regarding corporations’ responsibility to respect human rights, the Guidelines explain that respecting human rights is primarily an obligation of states, but:

where corporate conduct and human rights intersect enterprises do play a role, and and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.<sup>32</sup>

Hence, the addressees and content of the Guidelines are extensive and – as will be explained further - underpinned by a universal territorial scope.

Third, the governments of the adhering countries address the Guidelines to MNEs operating in their country, but ask MNEs to respect human rights wherever they operate.<sup>33</sup> The Guidelines explain the necessity of this extension by simply referring to the worldwide business practice of MNEs. In the CSR context, this territorial extension is especially important because the most severe issues occur in developing countries—not in the territory of the industrialized OECD member

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25. *Id.*

26. *See* OECD Guidelines, *supra* note 1, at 12, ¶ 3.

27. *Id.* at 14.

28. *Id.* at 15. Disclosure of information means in this context that MNEs shall “ensure that timely, regular, reliable and relevant information” is disclosed regarding their activities. *Id.*

29. *See generally* OECD Guidelines, *supra* note 1, pt. 1.

30. *See id.* at 39.

31. *See id.* at 43 (for references to numerous ILO acts).

32. *See id.* at 39.

33. *See* OECD Guidelines, *supra* note 1, at 12, ¶ 2 (“Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate”).

countries. However, it is also highlighted in the Guidelines that compliance must take place while obeying the domestic law of host countries.<sup>34</sup>

In sum, the broad personal, topical, and territorial scopes assure that corporations have to respect the Guidelines.

### *B. The Legal Construction: Embedded In an “Investment Package”*

The Guidelines can only be understood in the context of other legal instruments, which taken together constitute a combined “package of investment measures.”<sup>35</sup> The Guidelines have been included in the OECD Declaration on International Investment and Multinational Enterprises (Declaration), which represents<sup>36</sup> one of the three “legal instruments” of the OECD on international investment and trade in services.<sup>37</sup> However, the Declaration is not among the legal acts of the OECD enumerated in Article 5 of the OECD Convention. The enumerated acts are: (1) binding decisions (lit. a); (2) recommendations (lit. b); and (3) agreements (lit. c).<sup>38</sup> The Declaration is considered to be one of the most important “legal instruments” of the OECD because it is considered a constitutional part of the OECD “acquis” and is thus non-negotiable—that is, the Declaration has to be accepted by a membership candidate in the accession process.<sup>39</sup>

The Declaration – only two pages long – is included in the opening pages of the Guidelines, followed by the CSR Code of Conduct. This Code of Conduct—which are essentially the Guidelines addressed to MNEs—is about seventeen pages long and organized as parts. In “Part II,” the implementation procedures of the Guidelines are explained in seven pages. The third and final part includes the commentaries on both the Guidelines and the implementation procedures, and is about twenty-five pages long. A note by the OECD Secretariat states that the commentaries shall provide information but they are neither a part of the Guidelines (Part I) nor their implementation procedure (Part II). Instead, the implementation procedures are issued as a decision of the OECD Council and are therefore binding on OECD members.<sup>40</sup>

Among the various elements that constitute and accompany the Guidelines, the implementation procedures are the only part whose legally binding quality is definite and incontestable. Regarding the meaning and interpretation of the Guide-

34. *Id.* at 12.

35. Leyla Davarnejad, *The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse?*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 52 (Math Noortmann & Cedric Ryngaert, eds. 2010).

36. *OECD Legal Instruments on International Investment and Trade in Services*, OECD, available at [http://www.oecd.org/document/34/0,3746,en\\_2649\\_34887\\_1932962\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/34/0,3746,en_2649_34887_1932962_1_1_1_1,00.html). The OECD is an International Organization known for its huge provision of soft law. This may be one explanation for the terminological confusion. Furthermore, the OECD Convention was never reviewed after 1960 and seems not to cover all kinds of “legally relevant” acts anymore.

37. *OECD Legal Instruments on International Investment and Trade in Services*, OECD, [http://www.oecd.org/document/34/0,3746,en\\_2649\\_34887\\_1932962\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/34/0,3746,en_2649_34887_1932962_1_1_1_1,00.html).

38. Convention on the Organisation for Economic Co-operation and Development (Dec. 14, 1960), [http://www.oecd.org/document/7/0,3343,en\\_2649\\_201185\\_1915847\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html).

39. OECD Council, *The Concept of the OECD “Acquis”* 30 (Mar. 15, 2007)(document on file with OECD).

40. *Convention on the Organisation for Economic Co-operation and Development*, OECD, art. 5(a), [http://www.oecd.org/document/7/0,3746,en\\_2649\\_201185\\_1915847\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3746,en_2649_201185_1915847_1_1_1_1,00.html).



lines as CSR standards, it is important to note that they were enacted as an annex to a Declaration, which aims to promote international investment. MNEs are the main providers of investment. The governments adhering to the Guidelines are the “source of most of the world’s direct investment flows and home to most multinational enterprises.”<sup>41</sup> Therefore, the Guidelines shall also “serve” the promotion of international investment. In sum, it is important to consider when thinking about the implementation of the Guidelines that the promotion of international investment is the broader context and policy framework of the CSR initiative.

### *C. The Legal Commitment: Debated Due To Soft Law Quality*

Because the Guidelines are not an enforceable governmental code of conduct, they are considered “soft law” from the international law point of view.<sup>42</sup> Soft law in general—and codes of conduct addressed to MNEs in particular—are often viewed with skepticism because of their assumed “voluntary” character and their alleged lack of (or ambiguous) effectiveness. According to the Guidelines’ own terminology, the Guidelines are “voluntary,”<sup>43</sup> “non-binding,”<sup>44</sup> and “not legally enforceable.”<sup>45</sup> This terminological confusion (legally non-binding/voluntary and legally enforceable) reflects the broader scholarly debate on the term and normative nature of soft law—which also invokes the disagreement about whether corporations should comply with the Guidelines.

Since the beginning of the soft law debate in the 1970s, scholars have engaged in lively debates about the nature of law, (*i.e.*, the sources of international law), and the elements which determine whether a norm is legally binding or not.<sup>46</sup> As one would expect, the majority of public international law experts deny that this group of norms has a legally binding nature.<sup>47</sup> The only point on which

41. *Implementation of the Guidelines for Multinational Enterprises*, OECD, available at [http://www.oecd.org/document/43/0,3746,en\\_2649\\_34889\\_2074731\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/43/0,3746,en_2649_34889_2074731_1_1_1_1,00.html).

42. Alternative terms used to refer to “soft law” are: nonbinding/non-legal/voluntary/political/administrative agreements, guidelines, resolutions, declarations or standards, gentlemen’s agreements. Though there are different kinds of and terms used for acts qualified as “soft law,” “soft law” is the most common one and is therefore used here. However, many scholars either do not use this term or expressly avoid the term “soft law” since they regard it as confusing. See, e.g. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 81-2 (2005) (arguing that the term is misleading because such acts are not legally binding).

43. See OECD Guidelines, *supra* note 1, at 12, ¶ 1.

44. *Id.* at 43, ¶ 20.

45. *Id.* at 12 ¶ 1.

46. Lord McNair was the first to use the term “soft law,” but he did not provide an explicit definition of the term. Consequently, there are mainly two positions on “soft law’s” definition in legal scholarship: 1) those who interpret the term “hard law” and “soft law” as synonyms for *lex lata* und *lex feranda* (e.g., Jan Klabbers, *The Redundancy of soft law*, 65 NOR. J. INT’L L. 173 n. 32 (1996)) 2) and those who believe Lord McNair intended to define “soft law” as the “principles” in public international law (see e.g., CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING, 76, 81 (Antonio Cassese & Joseph H. Weiler, eds. 1988). This reference to Lord McNair is made by Christine M. Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM, 21-42 (D. Shelton, ed. 2000).

47. Compare the soft law debate only: Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 300 (1977); IGNAZ SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC SOFT LAW*, 173-246 (1980); Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 11 NOR. J. INT’L L. 65-95 (1980); Chris Ingelse, *Soft Law?*, 20 POL. YB. INT’L L. 75, 77 (1993); Fritz Münch, *Non-Binding Agreements*, in

there is agreement is that soft law is not one of the sources of international law enumerated in Art. 38 para. 1 ICJ Statute. At its core, this debate in international law is one of general legal theory, which questions whether enforceability is an essential element of law. In this regard, the dispute seems classical or even antiquated.<sup>48</sup>

But this question of compliance with international law is a difficult one because an overarching "sovereign" does not exist to compel compliance with international norms. Furthermore, instead of trying to define soft law positively, it is generally defined negatively by reference to so-called "hard law" (a definition of "hard law" is also avoided by those using the term "soft law"). This is particularly counter-productive because the concept of "hard law" itself is problematic. That is, the term suggests an unrealistically pure and clear idea of law regarding its dimensions of precision, obligation, and delegation.<sup>49</sup>

The soft law debate has become confused and may have stagnated because the participants in the debate have a tendency to talk past each other. Because there is no generally accepted definition of soft law, the term is used as a catchall concept for a heterogeneous group of norms.<sup>50</sup> In other words, the acts included under the umbrella of "soft law" range from moral or political commitments to legal ones. The scholars criticizing soft law – while unfortunately categorically denying a normative quality without any differentiation among the regulations – are often afraid diluting international law and its credibility.<sup>51</sup> But despite these

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MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 608, 611 (Rudolf Bernhardt, ed., 1997); Alberto Székely, *Non-Binding Commitments: A Commentary on the Softening of International Law Evidenced in the Environmental Field*, in U.N., INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY – VIEWS FROM THE INTERNATIONAL LAW COMMISSION, 173, 191-192 (1997); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901-913 (1999); Hartmut Hilgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 511 (1999).

48. See generally Immanuel Kant, *Methaphysik Der Sitten*, in IMMANUEL KANT: WERKE IN 12 BÄNDEN (1977); Georg Wilhelm Friedrich Hegel, *Grundlinien Der Philosophie Des Rechts*, in GEORG WILHELM FRIEDRICH HEGEL: WERKE (1979); Hans Kelsen, *Reine Rechtslehre, Einleitung in die Rechtswissenschaftliche Problematik*, in REINE RECHTSLEHRE, STUDIENAUSGABE DER 1. AUFLAGE (Matthias Jestaedt ed., 2008); Max Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, in STUDIENAUSGABE, (Johannes Winckelmann ed., 1980) (while Weber (written between 1909 and 1914 and published posthumous in 1921) and Kelsen (in 1934) argued that sanctions were constitutive elements for law, Kant (in 1797) and Hegel (in 1820) expounded, vice versa, the problems of legitimization of sanctions since sanctions limit freedom though law shall ensure freedom).

49. JOHN J. KIRTON & MICHAEL J. TREBILCOCK (eds.), *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 8-9 (2004) (arguing that the relationship is rather a "continuum" than a dichotomy) Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421-456 (2000) (providing a differentiation of the three dimensions (precision, obligation, and delegation which indicate whether an act can be qualified as *hard law*).

50. Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421-456 (2000) (providing a typology and general analysis of *soft law*).

51. Robert Jennings, *The Discipline of International Law*, speech at the 57<sup>th</sup> conference of the ILA, in 57 INT'L L. ASS'N REP. 622, 632 (1976) (warning that public international law would be "submerged under the rival empires of papers emanating from international assemblies"); Oscar Schachter, *Recent Trends in International Law Making*, 12 AUSTL. Y.B. INT'L L. 1, 12-13 (1989) (dating back the beginning of the majority of European and North American international law scholars in disfavour of soft law to Jennings speech while highlighting the historical circumstances: the soft law debate ignited due to the resolutions of the U.N. General Assembly claiming for a New International Economic Order).

understandable concerns, it has to be acknowledged that states prefer to enact measures qualified as soft law compared to treaties due to their flexibility.<sup>52</sup> Therefore, soft law can be found in any particular area of international law such as international environmental law,<sup>53</sup> human rights law,<sup>54</sup> international economic law,<sup>55</sup> and agreements regulating arms control.<sup>56</sup> Despite the somewhat ambiguous terminology<sup>57</sup> and the disadvantages of soft law when compared to treaties, there is a widespread consensus on the function of soft law that it may prove useful in developing, interpreting, and clarifying international law.<sup>58</sup>

Concerning the Guidelines, this function could be true because the CSR concept is a relatively new policy.<sup>59</sup> The meaning of the Guidelines' concrete obligations and binding force are debated and still in the process of development. Thorough examinations of soft law compliance are needed<sup>60</sup> although some recent soft law studies focus on soft law compliance.<sup>61</sup> In particular, effective implementation mechanisms are considered crucial and will also be discussed throughout this article. Due to their complex legal construction, these CSR standards represent a

52. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANAL. 171-225 (2010) (providing four explanations for why states use soft law: to coordinate "games in which the existence of a focal point is enough to generate compliance," "loss avoidance theory" while avoiding the higher sanctions of hard law, according to the "delegation theory" states use soft law when they are uncertain which rules may be desirable in the future and last but not least: according to the "concept of international common law" states give international institutions the authority to make non-binding interpretations of binding rules as a way around that states must consent on legal rules); see generally Kirton, *supra* note 49 (providing many contributions which explain how and why soft law can work in support of economically, ecologically, and socially sustainable global governance); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991) (highlighting the easier/quicker negotiation of informal agreements in comparison to legal ones, their higher flexibility, their lower requirement of information, their avoidance of publicity and lower commitment). The Federal Republic of Germany has e.g. regulated in its internal rules of procedure addressed to federal ministries that the agreement of soft law regulations in foreign affairs have priority with regard to treaties (Gemeinsame Geschäftsordnung der Bundesministerien, § 72 ¶ 1 (Sept. 1, 2000)).

53. See e.g. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (August 12, 1992).

54. See e.g. Universal Declaration of Human Rights, G.A. Res. 217A, at 71 U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

55. See e.g. Ignaz Seidl-Hohneveldern, *International Economic Soft Law*, 163 RECUEIL DES COUR 173, 195 (1979); see generally Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983); Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervisions*, 39 VA.J. INT'L L. 1 (1998).

56. See e.g., General Framework Agreement for Peace in Bosnia and Herzegovina, 35 I.L.M. 75, 110, art. 4, 5 (1996); see also Guido den Dekker, *The Law of Arms Control and Sub-Regional Arms Control in the Former Yugoslavia: "Hard" Law in a "Soft" Law Context*, 45 NETH. INT'L L. REV. 363 (1998).

57. Schachter, *supra* note 51, at 12.

58. See Guzman & Meyer, *supra* note 52, at 171-225; see generally HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (John J. Kirton. & Michael J. Trebilcock eds., 2004).

59. Leaving aside its predecessors, which could be tracked back to the early 18<sup>th</sup> century. See generally JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY, LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 15 (2006).

60. Schachter, *supra* note 51, at 13 (arguing "already" that studies based on empirical data in order to assess the compliance of soft law is missing).

61. See generally KIRTON & TREBILCOCK, *supra* note 52; Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647-688 (2002) (providing empirical evidence of many, especially democratic states complying with the Basle Accord, through its non-legally binding character).

specific kind of soft law whose elements include a multitude of legal qualities and binding force. Using Baade's terminology "zebra codes" seems appropriate inasmuch as the dark stripes could represent the legally binding nature of the CSR standards and the white strips, the non-legally binding parts.<sup>62</sup>

When discussing the implementation and compliance with the Guidelines, it is necessary to distinguish between two soft law addressees. The first addressees are the MNEs. The Guidelines are a code of conduct addressed to all kinds of corporations. Second, the adhering countries of the Guidelines, who – as will be explained below – are responsible for implementing the Guidelines.

#### *D. Implementation Mechanism and Institutions of the Guidelines*

##### *1. Overview of Actors and Actions to Promote the Guidelines*

To promote corporations' compliance with the Guidelines, adhering governments have obliged themselves by a legally binding decision to set up the NCPs.<sup>63</sup> The NCPs are government offices responsible for encouraging adherence to the Guidelines at the national level.<sup>64</sup> For the most part, the NCPs are structured like a single government department and are usually located in ministries of economics.<sup>65</sup> There are currently forty-two NCPs that correspond to the number of countries adhering to the Guidelines.<sup>66</sup>

The following additional actors are noteworthy in terms of the institutional set up: (1) the OECD Investment Committee (IC), (2) the advisory committees of business and labor federations, and (3) NGOs.<sup>67</sup> The IC meets periodically to exchange views, find decisions in accordance with the Guidelines, and provides clarifications.<sup>68</sup> Also, the IC is "responsible for overseeing the functioning of the Guidelines,"<sup>69</sup> "with a view to enhancing the effectiveness"<sup>70</sup> of them. However, sometimes a participating country is represented in the IC by the same governmental official, who represents their country even though they are already exercising the function of a NCP representative.<sup>71</sup>

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62. Hans W. Baade, *The Legal Effects of Codes of Conduct for MNEs*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, 14- 15 (Norbert Horn ed., 1980).

63. See Convention, *supra* note 40.

64. See OECD Guidelines, *supra* note 1, at 33-35.

65. *National Contact Points*, OECD Guidelines for Multinational Enterprises (Sept. 2011), <http://www.oecd.org/dataoecd/17/44/1900962.pdf>.

66. *Id.* The European Union is also involved in consultations on the Guidelines because the Commission of the EU takes part in the work of the OECD in general. A representative on the part of the EU participates in annual meetings of the NCP but there is no additional "EU NCP."

67. Not included and dealt with here is the important actor "in the background," the OECD Secretariat, in particular the Directorate for Financial and Enterprise Affairs, which does all the important preparatory, research, and coordination work related to the Guidelines but which does not play noteworthy role in the implementation of the Guidelines and is therefore not of relevance for this research.

68. See OECD Guidelines, *supra* note 1, at 30, ¶ 1, 3 & 4.

69. See *id.* at 55 ¶ 4.

70. See *id.* at 30, ¶ 5.

71. THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD, [www.biacc.org](http://www.biacc.org) (last visited Oct. 25, 2011); TRADE UNION ADVISORY COMMITTEE TO THE OECD, <http://www.tuac.org/en/public/index.phtml> (last visited Oct. 25, 2011); For more information about OECD watch, see About OECD Watch, OECD WATCH, <http://oecdwatch.org/about-us> (last visited Oct. 25, 2011).

The non-governmental participants included in the consultation and implementation procedure of the Guidelines are all three main actors of civil society, which are concerned with CSR issues: business, trade unions and NGOs.<sup>72</sup> In particular, they are represented by the Business and Industry Advisory Committee to the OECD (BIAC), the Trade Union Advisory Body to the OECD (TUAC), and by OECD Watch.<sup>73</sup> OECD Watch is an international network of about seventy civil society organizations that promote corporate accountability.<sup>74</sup> To sum up, the Guidelines are primarily a governmental CSR initiative but aim to integrate the input of various private actors as well.

## 2. *The National Contact Points: Role and Function of the Main Actors*

The NCPs' obligation consists primarily of promoting the Guidelines and handling cases concerning *specific instances*. The drafters placed significant focus on the implementation of the Guidelines because a control mechanism is crucial to ensure that the non-binding CSR standards matter. The Procedural Guidance section speaks of the "important role in enhancing the profile and effectiveness of the Guidelines," while referring to the implementation procedure and allocating this responsibility in large part to the NCPs.<sup>75</sup>

In terms of institutional arrangements, the NCPs must develop relationships with all interested parties, especially representatives of business and labor organizations as well as with NGOs. According to the Procedural Guidance, the NCPs' "leadership should be such that it retains the confidence of social partners and fosters the public profile of the Guidelines."<sup>76</sup> Furthermore, NCPs must be "proactive"<sup>77</sup> to ensure the Guidelines are well known and understood, especially by national business representatives. NCPs do so by collecting information on national experiences with the Guidelines, by responding to inquiries, and by discussing matters regarding the Guidelines. NCPs also handle issues concerning the implementation of the Guidelines in cases touching on *specific instances*.

## 3. *The Specific Instances: A Dispute Resolution Procedure with Variations*

### i. *Introduction of the Specific Instances and Their Criticism*

Any person or organization may approach the NCPs to inquire about whether the Guidelines apply to a particular conduct of business. If the Guidelines apply and a dispute arises, the disputes are handled by a grievance mechanism called the *specific instances*. The NCP located in the country where the conduct occurred will usually deal with the issue. If the alleged corporate violation took place in a

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72. *Id.*

73. *Id.*

74. *Id.*

75. See OECD Guidelines, *supra* note 1, at 56, ¶ 6.

76. *Id.* at 57, ¶ 9.

77. *Id.* at 57, ¶ 10.

country that does not adhere to the Guidelines, a NCP who has a less direct connection to the concerned company may deal with the issue.<sup>78</sup>

Since the revision of the Guidelines, NCPs have or are considering 160 *specific instances*. Many of these cases concern the respect of human rights and labor issues.<sup>79</sup> But how the NCPs handle *specific instances* is debated because critics speak of an ineffective or a “highly uneven” approach.<sup>80</sup> In particular, it is not clear what kind of procedure NCPs use for treating *specific instances*, or – to be more precise – what *are* the procedures as there are several. The procedural regulations of the Guidelines provide the NCPs with several options to handle CSR disputes. Nevertheless, using the phrase “*specific instances*” instead of a more concrete term of art for a dispute resolution mechanism seems to indicate vagueness – a phrase which might aim to avoid the conflict of interests characterizing CSR.<sup>81</sup>

### *ii. The Procedural Regulation in the Guidelines*

Part II of the Guidelines, which is the implementation procedures, explains how the NCPs are to handle cases of *specific instances*.<sup>82</sup> The following excerpts are of particular interest (the important terms are in italics):

The NCP will *contribute to the resolution of issues* that arise relating to implementation of the Guidelines in specific instances. The NCP will *offer a forum for discussion and assist* the business community, employee organisations and other parties concerned to deal with the issues raised in an *efficient and timely manner and in accordance with applicable law*.<sup>83</sup>

Furthermore, the Guidelines explain that the NCP will, where:

the issues raised merit further examination, *offer good offices to help the parties involved to resolve the issues*. For this purpose, the *NCP will consult with these parties* and where relevant: (...) 2. d. Offer, and with the agreement of the parties involved, *facilitate access to consensual and non-adversarial means, such as conciliation or mediation*, to assist in dealing with the issues.<sup>84</sup>

78. For example, an NCP from the country in which the company is registered may deal with the case. Such a scenario occurred in the case of UK NCP, Survival International against Vedanta Resources, which dealt with alleged corporate abuse in India by a mining company registered in UK.

79. OECD, *Report by the Chair of the 2010 Meeting of the National Contact Points*, at 18, <http://www.oecd.org/dataoecd/15/23/46385752.pdf> (last visited Oct. 25, 2011). It should be noted that due to some double counting of cases the number of all *specific instances* will be less than 160. Double counting occurs when the same *specific instances* is handled by more than one NCP.

80. See Ruggie, *supra* note 8.

81. See *supra*, Part II (discussing the controversies and conflict of interest issues that arise in the Legal Background of the Corporate Social Responsibility Debate and Movement section).

82. See OECD Guidelines, *supra* note 1, at 29-36.

83. See *id.* at 34.

84. *Id.* (emphasis added).

Moreover, the NCPs will if “the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.”<sup>85</sup> If issues arise in non-adhering countries, the NCPs will “take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.”<sup>86</sup> These provisions are open to various kinds of interpretations and applications and delegate the “interpretative choice”<sup>87</sup> of how to handle *specific instances*. Among legal scholars the term “standards” – as opposed to strict/hard/tight rules<sup>88</sup> – is used for these kinds of norms.<sup>89</sup>

Thus, the terms of the Guidelines allow NCPs to engage in a range of activities without indicating a priority or specifying which obligation NCPs must perform. However, one of the many questions is whether the NCPs take the spirit and purpose of the Procedural Guidance into account. That is, do they consider that the “role of National Contact Points (NCP) is to further the effectiveness of the Guidelines”?<sup>90</sup>

### iii. Analyzing the Dispute Systems of the Specific Instances

The manifold ways in which NCPs handle *specific instances* must be analyzed in a systematic and comprehensive way in order to understand this kind of dispute systems. It is clear from the Guidelines’ soft law nature that the treatment of *specific instances* does not represent adjudication because NCPs lack the authority to issue awards or decisions to disputing parties.<sup>91</sup> Instead, NCPs use collaboration to resolve disputes.

Collaborative governance requires NCPs to use deliberative and consensual methods, rather than adversarial or adjudicative methods.<sup>92</sup> According to the Guidelines, the NCPs should “offer good offices to help the parties involved to resolve the issues.”<sup>93</sup> “Good offices” can be interpreted in many ways. Even

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85. *Id.* (emphasis added).

86. *Id.* at 35.

87. Adrian Vermeule, *Interpretative Choice*, 75 N.Y.U. L. Rev. 74 (2000).

88. See Kathleen M. Sullivan, *The Supreme Court 1991 Term. Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (pointing out the terminological debate of the rules vs. standards debate which is comparable to the hard law vs. soft law debate).

89. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557-629 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953-1026 (1995); Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303 (2003); Allen S. Weiner, *The Use Of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 426 (2006). In addition, some international law scholars use interchangeably the term “standards” for specific kinds of soft law. Compare John J. Kirton & Michael J. Trebilcock, *Introduction*, HARD CHOICES, SOFT LAW. VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (2004).

90. See OECD Guidelines, *supra* note 1, at 33.

91. See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 165 (2009) (providing definitions of adjudication).

92. Compare Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297 (2010) (discussing collaborative governance).

93. See OECD Guidelines, *supra* note 1, 34.

though NCPs use collaboration, the Guidelines' procedural regulations expressly mention mediation as a possible way to deal with disputes.<sup>94</sup>

Mediation is defined as facilitated negotiation tending to a consensual resolution of a dispute on terms that the parties themselves agree upon and which requires that the mediator seeks to determine the interests of the parties.<sup>95</sup> In addition to mediation as one form of alternative dispute resolution mechanisms (ADR), the NCPs apply hybrid procedures.

In hybrid procedures, elements from different processes are incorporated into a unified proceeding.<sup>96</sup> In regard to the treatment of *specific instances*, the following procedures could be practiced either alternatively or combined into hybrid processes: mediation, conciliation, fact finding, and facilitation.

Unlike mediation, conciliation in the international context is understood to be an impartial examination of the dispute, by which the commission set up by the Parties attempts "to define the terms of a settlement susceptible of being accepted by them."<sup>97</sup>

Furthermore, some NCPs could see their role as fact finders, which is an independent process by which a neutral arbiter determines the facts relevant to the controversy. This process of fact finding separates the function of defining the problem from developing a solution.<sup>98</sup> Alternatively, NCPs could see their role and function as facilitators. As facilitators, experts conduct meetings and coordinate discussions among parties to reach a goal or to complete a task that meets the participants' mutual satisfaction.<sup>99</sup> Hence, facilitation is comparable to mediation, though the interests of the parties are not determined.

But how do these procedures look like in the actual practice of the NCPs? In a survey, the NCPs were asked to rank the possible objectives they aim to achieve. To ask for the goal of a dispute system is inspired by the analytical framework for dispute systems design elaborated by Stephanie Smith and Janet Martinez.<sup>100</sup> These authors analyze ADR systems in terms of their possible goals, processes and structures, stakeholders, resources, success and accountability. With regard to accountability – indicating the "success" of a dispute system according to Smith and Martinez<sup>101</sup> – it is of particular interest whether the system is "transparent in terms of its operation, access to processes, and its results, and to whom."<sup>102</sup> Based on this analytical framework this socio-legal study attempts to clarify in particular the goals and the accountability of the dispute systems provided by the NCPs.

Another point of interest is whether the results of the NCPs' promotion of the Guidelines advance CSR. It is important to note that the promotion and advance-

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94. *Id.* at 59.

95. See Smith & Martinez, *supra* note 91, at 168.

96. CPR INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, <http://www.cpradr.org/Resources/ADRPrimer.aspx> (last visited Nov. 2, 2011).

97. J. G. MERRILLS, INTERNATIONAL DISPUTE RESOLUTION, 64 (2005) (referring to art. 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961); BARRY E. CARTER, PHILIP R. TRIMPLE, & ALLEN S. WEINER, INTERNATIONAL LAW, 290 (2007).

98. See Smith & Martinez, *supra* note 91, at 168.

99. *Id.* at 167.

100. *Id.* at 124.

101. *Id.* at 133.

102. *Id.* at 132.



ment of CSR can have various meanings. It can mean the change of corporate behaviour after noncompliance with the Guidelines was established in a *specific instance*. Alternatively, it can mean the clarification or concretization of the meaning of a CSR standard in a *specific instance*. Because CSR is a comparably young policy and people concerned with it are sometimes not sure about its meaning or appropriate application, further clarifications are necessary. *Specific instances* could be used to offer an understanding and concretization, comparable to case law. This would require a general practice of publishing final statements on the cases, however. Moreover, the final statements would need to provide sufficient information to enable the understanding of the issue as well as the procedure and outcomes.

#### IV. THE CSR DISPUTES UNDER THE OECD GUIDELINES: APPLIED ADR MECHANISMS

##### *A. The Handling of Specific Instances: Variations, Distinctions, and Common Grounds*

In this part of the article the results of the socio-legal study will be presented. First, the various NCP practices in terms of publishing statements will be highlighted. This aspect is important with regard to the transparency and accountability of this dispute resolution mechanism and to its impact of advancing CSR. Second, NCPs' reasons for determining whether a case merits a further examination or not, is also explored in this part of the article. The results of the initial assessments – the first phase of specific instances – are insightful because they shed light on an important aspect of this dispute system for which barely any other resource is available. Third, this part will also demonstrate: (1) what procedures and outcomes can be found in the second phase of the Guidelines' dispute system, when a specific instance merits a further examination; (2) how do the NCPs understand their roles and functions and what objectives do they aim to achieve under the Guidelines; (3) and after reviewing the NCPs' responses to their roles, functions, and objectives, this part of the article will assert the question of whether a non-adversarial procedure is compatible with the examination of the CSR-consistency of a corporate act. If so, why and how is a non-adversarial procedure compatible with the examination of the CSR-consistency of a corporate act?

##### *1. The Variations in Publishing Statements*

###### *i. The Varying Statement Policies*

By April 2011, 31 of 42 NCPs have handled specific instances and there are considerable variations in terms of the "workload" as well as the publication of statements. This study illustrates that: 14 of 31 NCPs have dealt or are dealing with between one and three cases; nine NCPs have four to seven cases; and the NCPs of the following countries are or have been concerned with nine (France, Switzerland), twelve (Brazil, Belgium), fourteen (Germany), twenty-three (Netherlands), twenty-four (UK) or twenty-six (US) cases.

The analysis of the cases bears some difficulties insofar as the NCPs have published final statements or reports<sup>103</sup> in no more than fifty-seven specific instances.<sup>104</sup> In many cases, these statements describe – or sometimes even outline briefly – the issue and the incidents. In particular, there are remarkable variations concerning the precision of the information on parties and issues provided in final statements. In the specific instances, it is often not possible to determine the factual influence or legal relationship<sup>105</sup> the company had in terms of the alleged corporate non-compliance with the Guidelines.<sup>106</sup> Furthermore, it is not possible to identify the issue in 11 of 57 final statements.<sup>107</sup> But in other cases the NCPs provide relevant details on the parties to enable readers to understand why and how the parties are concerned with the particular case.<sup>108</sup> In cases in which NCPs examined whether a corporation acted consistent or not with the Guidelines, the discrepancies in the quality and extent of reasoning are especially striking and important.<sup>109</sup> Besides collecting facts, the question of their evaluation is relevant.

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103. The Canadian NCP has published with regard to its four concluded cases reports but as of yet no “final statements” in the sense of the Guidelines. However, in terms of the amount of information provided in these reports a differentiation to the statements of some other NCP is not given. The Brazilian NCP has also published a “report” for one case.

104. Statements by National Contact Points for the OECD Guidelines for Multinational Enterprises, OECD, [http://www.oecd.org/document/59/0,3746,en\\_2649\\_34889\\_2489211\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/59/0,3746,en_2649_34889_2489211_1_1_1_1,00.html) (last visited Nov. 8, 2011). On this OECD website there is also a link to all governmental websites.

105. In terms of “legal relationship,” it has to be considered that in many *specific instances* multinational companies participated which were not immediately involved in the alleged abuses. The cases provided informative statements, which revealed that in some cases this relationship to the business directly involved one of ownership or one vaguely characterized by a “business relationship.” In other cases subsidiaries or supply chains were affected.

106. See the statements of the following cases which are only one page long and very limited with regard to the provided information: *Marks & Spencer: Communiqué Du Point De Contact National Français*, Dec. 13, 2001, available at <http://www.oecd.org/dataoecd/33/39/2489273.pdf> [hereinafter France NCP, Marks & Spencer]; see also *Recommandations du Point de Contact National Français à L'intention des Entreprises au Sujet de la Question du Travail Forcé en Birmanie*, Mar. 28, 2002, available at <http://www.oecd.org/dataoecd/33/40/2489266.pdf> [hereinafter France NCP on Forced labour in Burma].

107. See *Press Release, Swiss Contact Point Welcomes Korean Trade Union Delegation*, Nov. 21, 2003, available at <http://www.oecd.org/dataoecd/5/15/38033610.pdf> [hereinafter Swiss NCP, Nestlé]; *Canadian National Contact Point Statement Concerning Ivanhoe Mines Ltd in Burma*, available at <http://www.oecd.org/dataoecd/20/24/37205653.pdf> [hereinafter Canadian NCP, Ivanhoe Mines Ltd]; *Canadian National Contact Point Statement Concerning Ascendant Copper Corp. in Ecuador*, available at <http://www.oecd.org/dataoecd/20/24/37205653.pdf> [hereinafter Canadian NCP, Ascendant Copper Corp.]; *Statement from the Swedish National Contact Point with Reference to Specific Instances Received Concerning Atlas Copco and Sandvik*, June 2003, available at <http://www.oecd.org/dataoecd/16/34/15595948.pdf> [hereinafter Swedish NCP, Atlas Copco and Sandvik].

108. See all the *specific instances* of the UK NCP, available at [http://www.oecd.org/document/59/0,3746,en\\_2649\\_34889\\_2489211\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/59/0,3746,en_2649_34889_2489211_1_1_1_1,00.html); see also all the *specific instances* of the Austrian NCP, available at [http://www.oecd.org/document/59/0,3746,en\\_2649\\_34889\\_2489211\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/59/0,3746,en_2649_34889_2489211_1_1_1_1,00.html); see also *Record of Specific Instances: First Quantum Minerals Ltd and Oxfam Canada*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng&view=d> [hereinafter Canadian NCP, First Quantum Minerals]; *Closing Statement: Specific Instance Regarding Triumph in the Philippines and in Thailand*, Jan 14, 2011, available at <http://www.oecd.org/dataoecd/5/52/48755989.pdf> [hereinafter Swiss NCP, Triumph in Philippines and Thailand].

109. To compare the different efforts and standards of the UK and the Swedish NCP, see *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD*, Aug. 28, 2008, available at <http://www.oecd.org/dataoecd/40/29/43750590.pdf>

NCPs' public statements lack uniformity, even though the Guidelines are exceptionally clear on issuing statements because they require the publication of statements for cases in which NCPs conduct a "further examination."<sup>110</sup> However, while doing so the NCPs are also asked to consider confidentiality, which might present a reason for not publishing a statement if this "would be in the best interests of effective implementation of the Guidelines."<sup>111</sup>

## ii. Conclusion on Statements and the Various Kinds of Their Publications

The NCPs have different practices and responses to whether published statements are necessary. For example, they also disagree on whether statements should provide detailed information. Because some NCPs have broadly interpreted the Guidelines' guidance on publishing statements, their approach to the matter raises transparency issues and it is questionable whether their kind of publishing statements advances CSR. Specific instances without detailed statements cannot provide lessons and documented experiences for all concerned parties. The lack of significant statements can be particularly harmful for NCPs that may be confronted with questions about whether they are issuing consistent statements for comparable cases or issues. Detailed statements in some published cases that have articulated NCPs' reasoning provide instructive insights and lessons. NCPs' proceedings are not transparent when NCPs do not issue significant statements. In these cases the general public is prevented from having access to information that is necessary to assess NCPs' proceedings—which is a fundamental issue for dispute resolution systems in general.<sup>112</sup>

## 2. First Phase: The Initial Assessment of Specific Instances

NCPs make initial assessments when they are presented with an alleged *special instance*. Under the Guidelines, the initial assessments consist of two inquiries: (1) "whether the issues raised merit further examination," (2) and whether the NCPs shall "offer good offices to help the parties involved to resolve the issues."<sup>113</sup> In terms of the initial assessment practice, information is particularly hard to come by since the majority of NCPs publish – if at all – final statements about cases that necessitated "further examination."<sup>114</sup> And even in cases with

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[hereinafter UK NCP, Afrimex]; *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, Sept. 25, 2009, available at <http://www.oecd.org/dataoecd/49/16/43884129.pdf> [hereinafter UK NCP, Vedanta Resources]; *Statement by the Swedish National Contact Point in connection with a complaint from CEDHA against Nordea*, Jan. 24, 2008, available at <http://www.oecd.org/dataoecd/39/23/40016775.pdf> [hereinafter Swedish NCP, CEDHA against Nordea]; Swedish NCP, Atlas Copco and Sandvick, *supra* note 104.

110. See OECD Guidelines, *supra* note 1, at 34 & 59.

111. See *id.* at 34.

112. Telephone interview with Swiss NCP (March 3<sup>rd</sup>, 2011) (affirming this argument and stating that Switzerland has the position with regard to the revision process of the Guidelines that all NCPs shall publish statements also in cases where no agreements could be achieved). For some interview citations, initials are used in lieu of names (NCP nationalities) in order to preserve source confidentiality; sources' real initials are used only with permission.

113. See OECD Guidelines, *supra* note 1, at 34.

114. The UK NCP is in this regard an exemption due to its publications of initial assessments. See Final Statements, BIS, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business->

published statements, in 22 of 57 such cases there is no indication about how the communication between the NCP and the parties looked like during the initial assessment. It would be of particular interest to know what factors influenced a NCP to close a case while concluding that it “merits no further examination.” Indeed, due to the vagueness of the expression “merit further examination” the evaluation of this question may present some challenges to NCPs.<sup>115</sup>

While a socio-legal study could clarify numerous aspects of the practical handling of initial assessments, this article will focus on the reasons why NCPs denied or would deny a further consideration of a *specific instance*. To do so, the NCPs were given a questionnaire and asked to identify reasons for which they deny a further procedure. The results are summarized in the following table:

Table 1: Reasons for which NCPs did or would deny a further consideration of a *specific instance*

Reasons	Number of NCPs
1. Raised issue is not within the scope of the Guidelines (misinterpretation of their content or meaning)	17
2. Raised issue is not <i>bona fide</i> (according to the commentaries of the Guidelines)	11
3. The party raising an issue does not provide <b>sufficient information</b> about its allegations	9
4. The party raising an issue does not provide <b>sufficient evidence</b> to support its allegations	8
5. Lacking <i>investment nexus</i>	8
6. There is already a parallel proceeding dealing with the same issue	5
7. The concerned corporation is unwilling to participate in a specific instance	2

opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements (while differentiating between initial assessments of cases under further examination, closed cases and last but not least withdrawn cases. Statements on withdrawn cases are most interesting because the statements lack information on this constellation).

115. Phone interview with L.B. (March 1<sup>st</sup> 2011) (initials used to preserve confidentiality).

The strong approval of the majority of responding NCPs with regard to the first two reasons is not surprising but was expected: these reasons are based on the text of the Guidelines.<sup>116</sup>

The responding NCPs' statements about the lack of sufficient information and lack of sufficient evidence are revealing. The responses highlight that collecting enough information is a central challenge for the parties raising issues as well as for the NCPs assessing cases. It also highlights that the involved corporation's cooperation and willingness to provide information is crucial. It is questionable whether it is the right decision to close a file still in the early stages—considering that this is the general obstacle for assessing CSR issues. In order to strengthen this dispute resolution mechanism NCPs should communicate to the parties that a statement will be published in cases where the corporation resists cooperation so that the public can assess and interpret the conduct of the corporation. The way in which the NCPs deal with companies failing to cooperate during this procedure affects the NCPs' credibility, public authority, and functionality of the ADR mechanism.

Furthermore, a lack of *investment nexus*<sup>117</sup> and *parallel proceedings*<sup>118</sup> were identified by eight and five NCPs respectively as reasons to deny further consideration. Both points have been debated for years both on the part of civil society and among the NCPs themselves. These points have been taken up in the pending update of the Guidelines, and shall therefore not be discussed in depth here.<sup>119</sup>

Finally, two NCPs responded that a case would not be considered further if the concerned corporation was unwilling to participate in the process. This answer is highly problematic even though – as already explained – it is not disputed how difficult it is to promote participation in a voluntary procedure. The NCPs should be aware of the consequences: if a NCP closes a file without any consequences – like publishing a statement and reporting the corporation's conduct – the corporate power will prevail over the public authority of the NCP, and this will harm the credibility of the procedure.

### 3. Second Phase: The Case “Merits a Further Examination”

The survey and interviews conducted for this article revealed that NCPs had different interpretations about how to carry out “merit a further examination.”<sup>120</sup> The study revealed that many NCPs themselves need more information in order to understand the practices of other NCPs.<sup>121</sup> In short, everyone has the impression

116. See OECD Guidelines, *supra* note 1, at 58.

117. See *Scope of the Guidelines and the Investment Nexus*, OECD, [http://www.oecd.org/document/3/0,3746,en\\_2649\\_34889\\_37356074\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,3746,en_2649_34889_37356074_1_1_1_1,00.html) (last visited May 24, 2011).

118. The term of art *parallel proceedings* means that a business conduct of a *specific instance* is already the subject of other proceedings at the sub-national, national or international levels. See for detailed discussions on this topic: *OECD Guidelines for Multinational Enterprises*, Annual Meeting of the National Contact Points Report by the Chair at 74- 78 (June 2006), available at <http://www.oecd.org/dataoecd/23/33/37439881.pdf>.

119. *Id.*

120. See OECD Guidelines, *supra* note 1, at 34.

121. Telephone interview with L.B. (March 1<sup>st</sup> 2011), telephone interview with Swiss NCP (March 3<sup>rd</sup>, 2011) (initials used to preserve confidentiality); telephone interview with UK NCP (March 4<sup>th</sup>, 2011). The need for more transparency and information about the practices of other NCPs was also

that there are differences but no one can identify them categorically and in depth. In terms of conceptual discrepancies, NCPs can essentially be divided into two camps: first, there are those who limit their efforts to providing services to facilitate a dialogue or mediate between the parties; and second, there are those who, in addition to facilitation, examine the corporate act in question and state whether it was consistent or inconsistent with the Guidelines.

As will be explained in more detail, the survey and interviews provide much needed information to identify and understand these conceptual differences, which have led not only to various *forms* of handling *specific instances* by the NCPs, but actually to different *kinds* of procedures.

### *i. Applied Procedures and Outcomes*

The NCPs apply different procedures when handling *specific instances*. When the NCPs were asked about the procedures they apply in *specific instances*, 23 of 25 cooperative NCPs responded to these particular questions of the survey. Five of the NCPs had stated that they had not handled a case yet. Hence, their responses are meant to elicit what practices they *would* apply. The NCPs were asked to select all practices they used when carrying out “merit a further examination.” The following table sums up the results.

Table 2: The procedures applied by NCPs for further consideration of a *specific instance*.

- The NCP offers both parties a forum for discussion to present their positions and to provide their information. in general: 15 NCPs    sometimes: 3 NCPs    never: 0 NCP
- In addition and if necessary the NCP conducts its own investigations. in general: 5 NCPs    sometimes: 12 NCPs    never: 0 NCP
- In addition and if necessary the NCP offers access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues. in general: 11 NCPs    sometimes: 6 NCPs    never: 0 NCP
- In addition the NCP analyzes the issue and provides the parties with its assessment and findings. in general: 7 NCPs    sometimes: 7 NCPs    never: 2 NCPs
- In addition and if necessary the NCP gives recommendations addressed to the parties about how to resolve the issue or how to change their practices. in general: 7 NCPs    sometimes: 8 NCPs    never: 1 NCP

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expressed by several of the twenty-five NCPs who have responded to the survey while expressing their interest in the outcome of this study.

These results highlight several points. First, they affirm the variations of applied processes. Second, they also expose NCPs' flexible approach to cases because the NCPs' responses to the various procedures outlined in the survey varied. Because each NCP selected different procedures, the CSR dispute system under the Guidelines must be categorized as an integration of different hybrid procedures including several procedures mentioned in Table 2.<sup>122</sup>

This study reveals the diversity of practices of only a subset of 23 of the 42 NCPs. Nevertheless, the twenty-three NCPs' responses illuminate why many criticize NCPs for not applying a uniform procedure to specific instances. The variations are not surprising, however, when one takes into account the multilateral character of the implementation of this dispute system and the standards established in the procedural guidance, which allow for variations. Further, the openness of this dispute system is advantageous because the CSR disputes are very different and require various procedures. In addition, the NCPs have the ability to try out different practices and share their experiences in a relatively new field of issues and a new dispute system.

However, the accountability of a dispute system requires transparency, especially during the processes of resolving a dispute.<sup>123</sup> Because many variations of procedures and outcomes of specific instances were identified by the NCPs, each of them should at least provide clarity in terms of its own procedures. Insofar as clarity is concerned, the governmental websites of most of the NCPs and the information provided on the OECD website needs improvement. Each NCP as well as the OECD should provide more clarity and information. The lack of transparency is the main issue of this dispute system.

## *ii. The Various Roles, Functions and Objectives of NCPs*

In addition to the questions about procedures and outcomes, the NCPs were asked in the survey to select and rank their roles, functions, and objectives when they approach new CSR disputes. The below results illuminate the differences in the NCP's practices.

### *a. The Variations Among the NCPs in Understanding their Roles and Function*

NCPs were asked to rank the following four roles and functions during *special instances*. Below are the roles and functions NCPs associate with their duty to handle *specific instances*:

- 1) To serve as a neutral channel of communication between parties;
- 2) To be a mediator and actively try to resolve disputes;
- 3) To examine and clarify whether the practice of a corporation was consistent with the Guidelines;
- 4) To advance corporate responsibility in concrete cases where corporate practice is not consistent with the Guidelines.

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122. The NCPs also had space to add remarks while filling in the questionnaire. However, no additional process was mentioned in the notes.

123. See Bingham, *supra* note 92, at 302.

The above roles and functions are not an exhaustive list, however.<sup>124</sup> Below are four charts that present the results of the survey, answered by 25 of a total of 42 NCPs:

Figure 1: Neutral channel of communication between parties

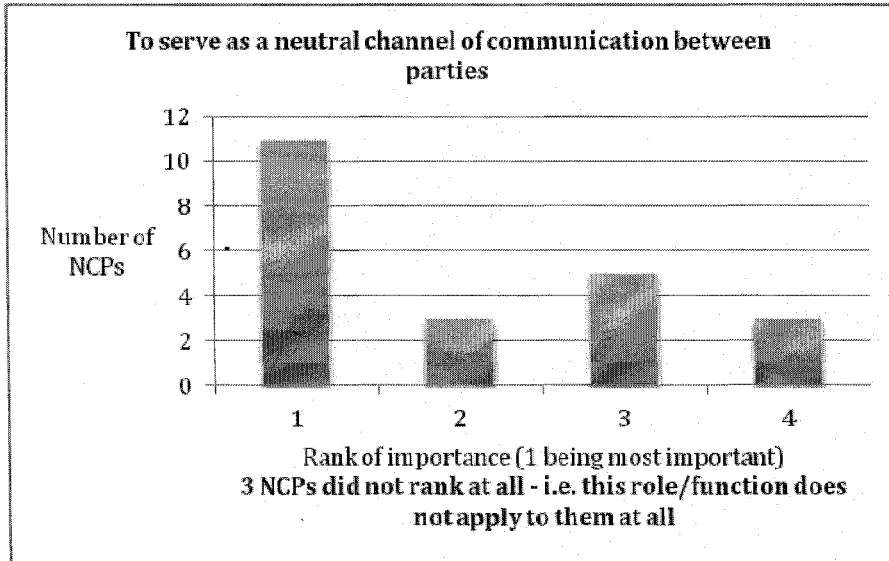
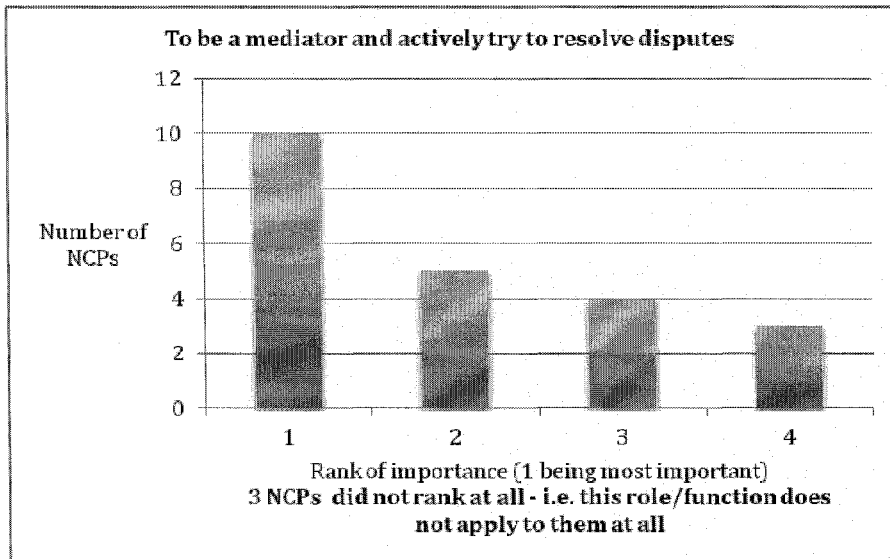


Figure 2: Mediator and actively resolve disputes



124. In addition, the NCPs could indicate other roles and functions that are important to them.



Figure 3: Examining and clarifying the consistency of a corporate action with the Guidelines

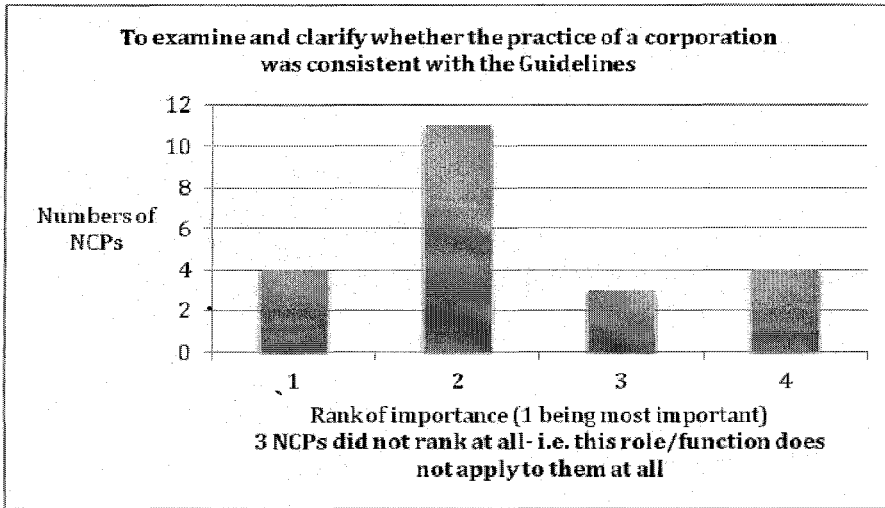
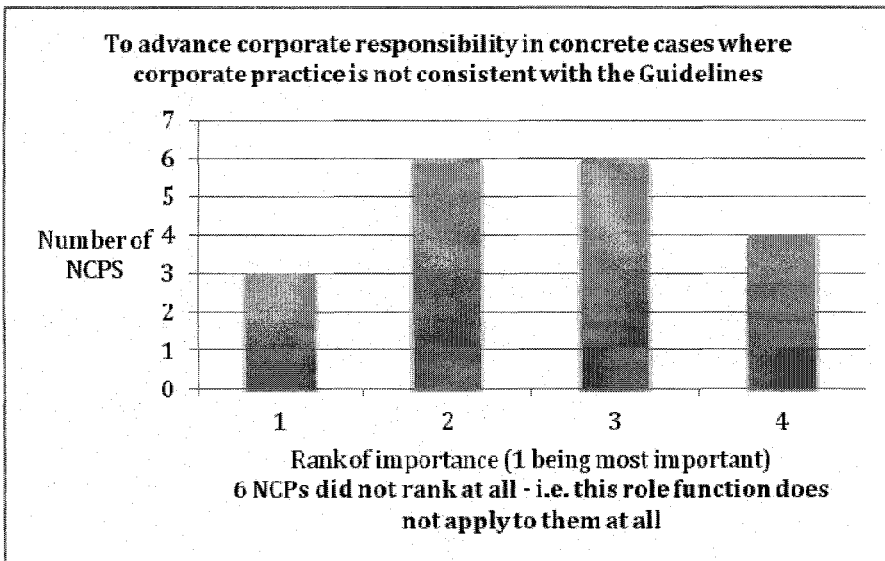


Figure 4: Advancing CSR in concrete cases where Guidelines are not respected



*aa. Serving as a Neutral Channel of Communication Between Parties and Trying to Actively Resolve Disputes as Mediators*

The first two roles and functions on the list were expected to receive high rankings because they touch on the content analysis of *specific instances*.<sup>125</sup> The surveyed NCPs did not seem to dispute the roles of neutral channels of communication or mediator. Accordingly, the NCPs ranked the two roles and functions as the most important in the list. However, it is remarkable that three NCPs believed acting as a neutral channel of communication or mediator was not important to them. Hence, even with regard to an aspect that does not seem to be debated, there is some discrepancy.

*bb. Examining and Clarifying Whether the Practice of a Corporation was Consistent with the Guidelines*

The NCPs understanding of their role in determining whether the corporate operations in question were consistent with the Guidelines is important because this issue represents the core debate among the NCPs. Fifteen NCPs ranked this function to be their first or second most important. This is a considerable number and this result is consistent with the results in table 2, where fourteen NCPs stated to generally analyze the CSR consistency of a corporate act. This suggests that a few NCPs do not examine corporate acts while four NCPs ranked this function as most important.<sup>126</sup>

*cc. Advancing Corporate Responsibility in Concrete Cases Where Corporate Practice is Not Consistent with the Guidelines*

Finally, the NCPs were asked to rank the importance of their role and function in the advancement of CSR in actual cases where corporations did not respect the Guidelines. Six NCPs did not rank this question, and this role and function has the lowest ranking. A low ranking could express many NCPs' scepticism and doubts concerning their potential impact on corporations. If so, this doubt would be understandable because of the difficulty of this task and the NCPs limited possibilities of influencing the parties. However, it is important to note that three NCPs stated that this function is their highest priority while six NCPs ranked it as their second most important function.

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125. This result was evident in the original version of this study in which the results of the content analysis of all fifty-seven statements published by May 2011 were included (original study on file with author).

126. See *ATTAC & FoE Sweden vs. Atlas Copco, Case Overview*, OECD WATCH, [http://oecdwatch.org/cases/Case\\_30/?searchterm=atlas%20copco](http://oecdwatch.org/cases/Case_30/?searchterm=atlas%20copco); see also *ATTAC & FoE Sweden v. Sandvic, Case Overview*, OECD WATCH, [http://oecdwatch.org/cases/Case\\_29/?searchterm=sandvik](http://oecdwatch.org/cases/Case_29/?searchterm=sandvik) (mediation procedure was interrupted as soon as examination was accomplished).

*dd. Final Remark*

Another interesting finding is that at least three NCPs viewed all functions and roles (different ones in each case) to be unimportant. This suggests there is not a consensus amongst the NCPs about their role and function when handling *specific instances*. Accordingly, the NCPs rank their objectives in *specific instances* differently, which is illustrated below.

*b. The Variations Among the NCPs in Defining Their Objectives*

The NCPs were also asked to rank the importance of the following six possible objectives they may seek to advance when considering *specific instances*:

- 1) Encouraging the business to comply with the Guidelines;
- 2) Strengthening mutual confidence between business and societies in which they operate;
- 3) Reaching an agreement between the parties on the substance of the issues raised;
- 4) Clarifying and examining whether the practice of a corporation is consistent with the Guidelines;
- 5) Following up on whether the NCP's consideration of the *specific instance* has helped to resolve the issue;
- 6) Publishing the NCP's findings as to whether the practice of a corporation is consistent with the Guidelines.

The NCPs could also indicate other objectives that were important to them.

Below are six charts that present 25 NCPs' answers.

Figure 5: Encouraging the business to comply with the Guidelines

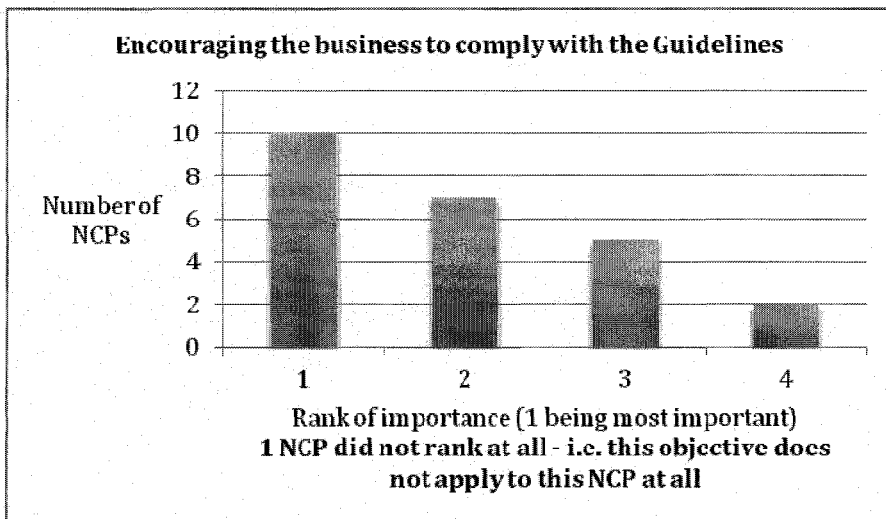


Figure 6: Strengthening mutual confidence between businesses and societies in which they operate

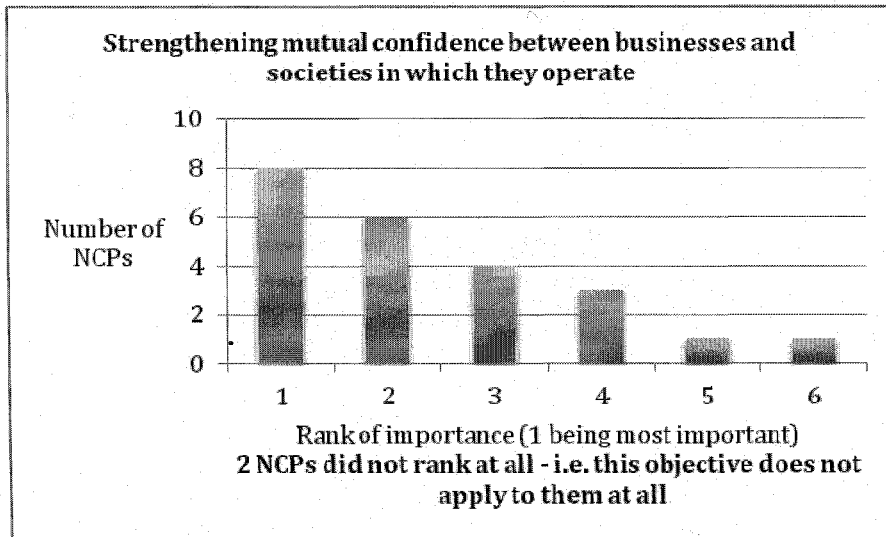


Figure 7: Reaching an agreement between the parties on the substance of the issues raised

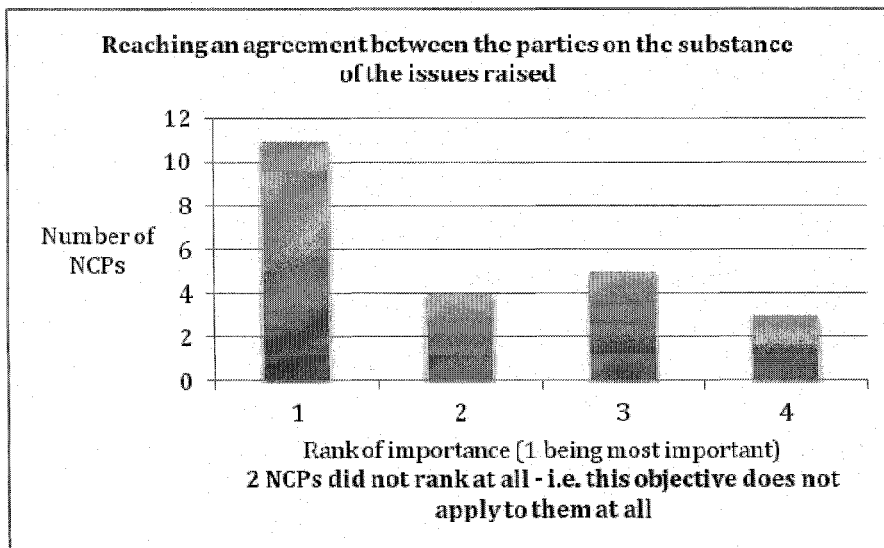


Figure 8: Clarifying and examining whether the practice of a corporation is consistent with the Guidelines

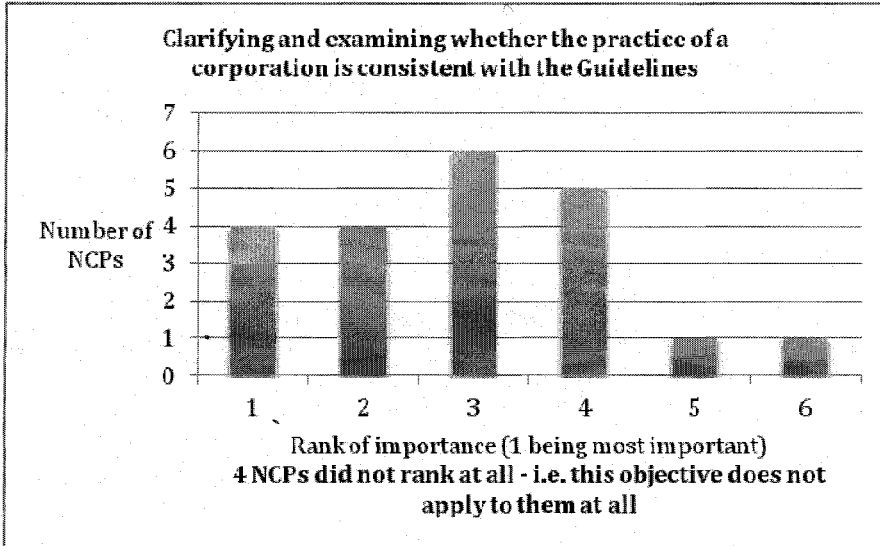


Figure 9: Publishing our NCP's findings as to whether the practice of a corporation is consistent with the Guidelines

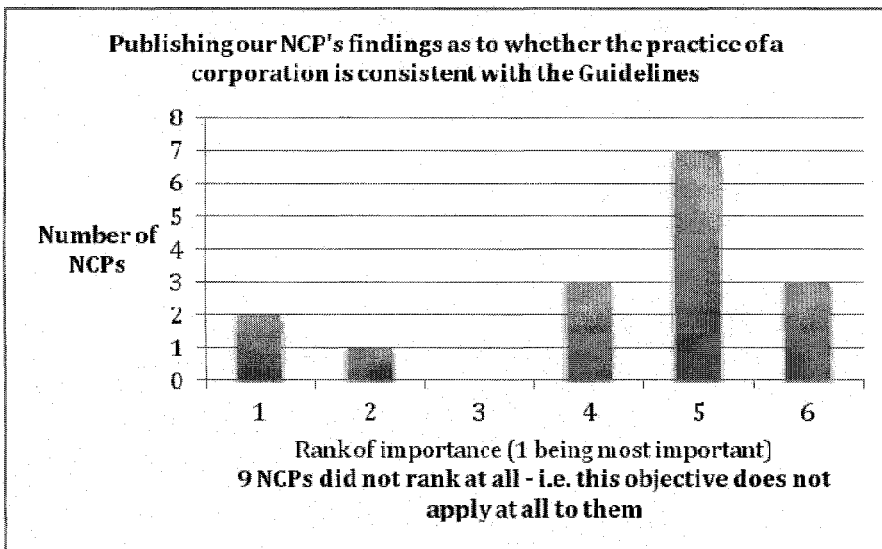
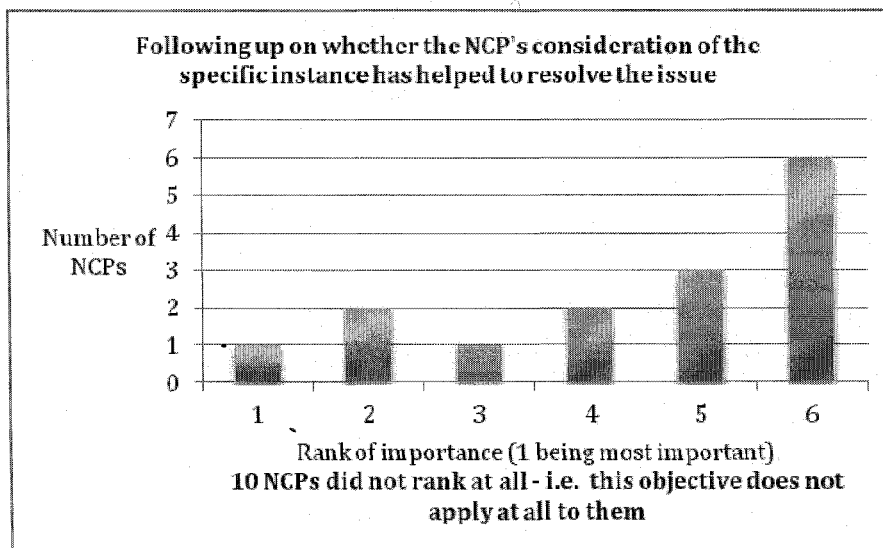


Figure 10: Following up on whether the NCP's consideration of the *specific instance* has helped to resolve the issue



#### aa. The Challenge of Ranking Goals

The first interesting observation is that some NCPs had difficulties in ranking their objectives in the sense that four of them classified some of their goals at the same level.<sup>127</sup> This might be telling. In order to illustrate the importance of prioritizing goals the focus shall be on the two functions, which represent the main debate among the NCPs: mediation/seeking an agreement vs. examination/clarifying the CSR consistency of corporate actions. “Reaching an agreement between the parties on the substance of the issues raised” (figure 7) was ranked most often as the most important goal, closely followed by “encouraging the business to comply with the Guidelines” (figure 6). In contrast, fewer NCPs ranked “clarifying and examining whether the practice of a corporation is consistent with the Guidelines” (figure 8) as most important or on lower degrees of importance. This result is not surprising but affirms the content analysis of the statements as well as the ranking in terms of the function and roles of NCPs. However, two NCPs ranked these two objectives as equally important. This leads to the question: if this is possible and meaningful in practice then what is the relationship between these two objectives? And is not rather necessary to prioritize one of these goals, which are according to some NCPs even opposite? This central question is further explored in the next subsection.

127. This becomes visible if one counts the total of the first rank of all six objectives, which are thirty-six.

*bb. The Relevance of Publishing Findings and Following Up on Disputes*

Furthermore it is remarkable that the objectives of publishing findings (figure 9) and following up on whether the NCPs' consideration has helped to resolve disputes (figure 10) are not ranked at all by 9 out of 10 NCPs. This suggests that a large number of NCPs are not aware of the relevance of these two aspects for their work. A follow up provision is crucial to promote compliance with the Guidelines and with the outcome of the procedure as far as an agreement or recommendations are given. However, some NCPs are aware of the importance of this step to strengthen the impact of this dispute resolution mechanism and ask both parties to report back to the NCP on the implementation of their recommendations.<sup>128</sup> Six NCPs declared to practice a follow up.<sup>129</sup> The attitude of many NCPs towards publishing outcomes of their procedures confirms the findings of their current practice of publishing statements, which is problematic and reduces the impact of this procedure.<sup>130</sup>

*cc. Final Remarks*

In sum, a complex task, such as providing a dispute resolution procedure to resolve CSR issues, requires identifying important goals and prioritizing them. Because the NCPs are in a permanent process of reflecting how to improve their dispute resolution mechanism, a discussion over or common approach of defining and ranking goals could be useful. While doing so, it is also important to be aware of the benefits of activities which might not be the main focus but are important to strengthen the impact of a dispute resolution mechanism (publication and follow up of the outcome). Hence, more reflection and debate about the goals and their prioritization are necessary in order to enhance the impact of this ADR procedure under the OECD Guidelines, especially because it lacks any possibility to enforce its outcomes.

*iii. The Main Debate: Collaborative Dispute Resolution vs. Examination*

The survey as well as the content analysis of the final statements highlighted the NCPs different opinions about how to carry out examinations. Interviews with NCP officials illuminated how such discrepancies are at the heart of the CSR dispute system debate. While some NCPs think that is not within their mandate to investigate whether corporations are compliant with the Guidelines,<sup>131</sup> other NCPs

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128. See *UK NCP – Complaints Procedures*, BIS, available at <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures>. The Dutch NCP also introduced a general follow up for all cases.

129. Beside a general practice (three NCPs), one NCP stated that it asked the parties to report back in “appropriate cases.” Another NCP explained to follow up a case if the parties have agreed upon this during the process. The follow up practice of another NCP is that the complaining party might be asked to report back upon the follow up of the case (statements on file with author).

130. Compare Part IV. A. 1.

131. Compare the Canadian and Swiss NCPs, while expressing their positions in the cases *Swiss NCP, Triumph in Philippines and Thailand*, *supra* note 108, and *Canadian NCP, Ascendant Copper Corp.*, *supra* note 107.

examine and evaluate corporate acts in particular cases. The reasons provided for a negative assessment of examinations are either that they are not regarded to be helpful for a collaborative approach of solving disputes or that the possibilities of the NCPs are too limited to investigate or to gain evidence.<sup>132</sup>

This debate among the NCPs requires a comprehensive analysis. Therefore the different kinds and constellations of examinations will be distinguished in the following. Afterwards it will be discussed whether following a non-adversarial procedure while examining the CSR consistency of corporate acts would represent conflicting goals or interests. Finally, it will be questioned whether this central debate is related to the soft law nature of the Guidelines and represent a legalistic approach to this dispute system.

### *a. Kinds and Variances of Examinations*

NCPs also have different approaches on how they carry out examinations. The UK NCP, for instance, views an examination as “the second phase”<sup>133</sup> of mediation and only examines corporate behavior in cases where a corporation did not cooperate in the “forum for discussion.”<sup>134</sup> This practice is based on the belief that such an examination is necessary and can be used as “leverage” to influence a corporation to respect CSR standards.<sup>135</sup> The Dutch NCP, on the other hand, classifies its procedure as a “future oriented process” aiming at resolving current issues in an “amicable way.”<sup>136</sup> It does so by taking alleged violations as a “starting point.”<sup>137</sup> During the “starting point” the Dutch NCP tries to verify the facts while organizing interactions between the parties.<sup>138</sup> Even though the tone of the Dutch NCP is “amicable” by primarily aiming to publish a *joint* statement<sup>139</sup> in connection with the parties’ agreement, the examination is comprehensive and proves subject matter expertise of this NCP in CSR.

Examinations can be distinguished in terms of the comprehensiveness of their reasoning and regarding their relationship to non-adversarial procedures. The Dutch and the UK NCPs are the two most significant NCPs who practice comprehensive examinations while prioritizing non-adversarial procedures. However,

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132. Telephone interview with L.B. (March 1<sup>st</sup> 2011) (initials used to preserve confidentiality); Telephone interview with Swiss NCP (March 3<sup>rd</sup>, 2011).

133. Telephone interview with UK NCP (March 4<sup>th</sup>, 2011).

134. See OECD Guidelines, *supra* note 1, at 13. A “forum for discussion” is another expression used by the Guidelines in order to express what the NCPs provide to promote the Guidelines.

135. *Id.*

136. See *Final Statement of the Dutch NCP on the Specific Instance Raised by Shehri-CBE Concerning Makro-Habib Pakistan Limited*, Oct. 9, 2008, available at <http://www.oecd.org/dataoecd/11/45/46085466.pdf> [hereinafter Dutch NCP, Makro-Habib]; See also *Final Statement of the Dutch NCP on the Complaint on the Violations of Pilipinas Shell Petroleum Corp.*, Dec. 20, 2010, available at <http://www.oecd.org/dataoecd/2/12/43663730.pdf> [hereinafter Dutch NCP, Shell].

137. Telephone interview with Dutch NCP (March 17th, 2011).

138. See Dutch NCP, Makro-Habib, *supra* note 136, at 3.

139. Compare Joint Statement by the Netherlands National Contact Point, Adidas and the India Committee of the Netherlands, Dec. 12, 2002, available at <http://www.oecd.org/dataoecd/33/43/2489243.pdf> [hereinafter Netherlands NCP, Adidas] and Joint Statement by the NCP, FNV, CNV, and IHC Caland, July 2004, available at <http://www.oecd.org/dataoecd/5/2/38031193.pdf> [hereinafter Joint Statement].



other NCPs issue opinions about whether corporations are compliant with the CSR standards are analytically similar to legal opinions.<sup>140</sup>

Yet, some NCPs practice a different approach. Some NCPs conduct an examination during the mediation process and then stop the mediation process after they have concluded that a questionable corporate act did not violate the CSR standards.<sup>141</sup> In this approach, an examination preserves the efforts of conducting mediation but runs the risk of not being transparent if the NCPs' determination is not detailed and comprehensible.<sup>142</sup>

*b. Non-adversarial Procedure and Examination: Conflicting Interests or Goals?*

Is the examination of whether a corporation's action is consistent with CSR standards in the framework of a *specific instance*, necessary or disadvantageous to the mediation procedure? The NCPs are not in agreement in their responses to such a question. NCPs simultaneously or subsequently collect information, prepare mediation procedures and examine corporate actions. Opponents of NCPs examining corporate conduct argue that such a process hinders mediation efforts. Nevertheless, such an argument is moot as long as NCPs conduct an examination after mediation efforts have failed. This would allow NCPs' examination to act as the "second phase of mediation."<sup>143</sup>

In general, it can be stated that combined forms of ADR mechanisms in a unified procedure, called hybrid processes, exist—especially regarding mediations.<sup>144</sup> When dealing with *specific instances*, corporations, at times, fail to cooperate in mediation procedures. When mediation is not possible in such a scenario, an examination is no longer harmful. When this happens, trust and respect in the dispute resolution procedure is at stake especially when a NCP does not impose a consequence on the uncooperative company. The uncooperative company would prevail over the public authority of the NCPs. In such a scenario, it is advisable for a NCP to publish a statement to report the company's lack of cooperation. The statement should explain the CSR issue and why the corporation's cooperation is necessary. Because a public statement could require a company to explain its action, such a company would likely be more motivated to cooperate in the mediation procedures.

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140. Compare *Final Assessment by the UK National Contact Point (PSA Peugeot)*, Feb. 1, 2008, available at <http://www.oecd.org/dataoecd/39/50/43750215.pdf> [hereinafter UK NCP, PSA Peugeot] and UK NCP, *Afrimex (UK) Ltd.*, *supra* note 109.

In terms of a clear structured and convincing kind of reasoning see also Report of National Contact Points (Norway), June 2006, available at [http://www.regjeringen.no/upload/UD/Vedlegg/Naeringsliv/2006\\_NCP\\_Report\\_Norway.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Naeringsliv/2006_NCP_Report_Norway.pdf). However, the last case was very debated in terms of the jurisdiction of the Norwegian NCP.

141. See Swedish NCP, CEDHA against Nordea, *supra* note 109; see also Swedish NCP, Atlas Copco and Sandvik, *supra* note 107.

142. *Id.*

143. Telephone interview with UK NCP (March 4, 2011) (where this metaphor was used, indicating the practice of an examination if mediation efforts fail).

144. See CPR INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, *supra* note 96 (referring to the definition of hybrid procedures in which elements from different processes are incorporated into a unified proceeding).

Regarding the Dutch NCP approach, an examination in such a situation is the basis for a “future focused” approach. This approach requires an analysis of the company’s past or present conduct in order to discover whether a company should change its conduct to respect CSR standards in the future. Under this method, it is important to communicate the necessity of such an examination as a learning process without any risk of sanction.

The third possible benefit of a good examination of the CSR issue and its publication is that this could be used as lessons for anyone interested in or concerned with CSR. Indeed, the final statements, which are characterized with a comprehensive analysis of the CSR issue and subject matter expertise, are instructive and could be valuable for a broader public.<sup>145</sup> This could also be qualified as an advancement of CSR because such an analysis of a concrete case helps the public understand how CSR is applied in practice. But such an examination has to be professional and should provide sufficient information and explanation in order to be convincing and understandable. This would, again, strengthen the trust and respect in the work of the NCPs.

### *c. Examinations: Legalistic Approaches in the Shadow of Soft Law?*

Could this debate be linked to the Guidelines’ soft law nature? The opponents of the examination approach believe that this approach would be too legalistic—some even equate an examination with adjudication.<sup>146</sup> But the *specific instances* procedures cannot lead to adjudication because NCPs lack the authority to obligate a corporation to comply with the terms of its decision. Examination and adjudication must be separated in the same way that soft law and enforceable law must be distinguished. It is possible – and, as explained, beneficial for several reasons – to analyse whether a corporate act is consistent with CSR standards. This does not mean or require that such an examination – with the finding that a corporate act is inconsistent with CSR – must be enforced. To analyze whether a corporate act is consistent with CSR standards, a NCP would have to collect relevant information and analyze the information in relation to unenforceable norms. Hence, such an examination is in essence a “legalistic approach.”<sup>147</sup> One NCP official stressed the relevance of the rule of law in their NCP’s work, especially when explaining the

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145. Compare UK NCP, PSA Peugeot, *supra* note 140; UK NCP, Afrimex, *supra* note 109; UK NCP, Vedanta Resources, *supra* note 109; Dutch NCP, Shell, *supra* note 136; and Report of the National Contact Point of Chile on the Case of Marine Harvest, Nov. 6, 2003, available at <http://www.oecd.org/dataoecd/42/13/32429072.pdf>; In terms of a clear, structured, and convincing kind of reasoning see also Statement by the Norwegian National Contact Point, Enquiry on Aker Kværner’s activities at Guantanamo Bay, Nov. 29, 2005, available at <http://www.oecd.org/dataoecd/5/48/38038283.pdf>. However, the last case was very debated in terms of the jurisdiction of the Norwegian NCP.

146. Telephone interview with Swiss NCP (Mar. 3, 2011).

147. This expression was used in a phone interview with the Dutch NCP on the part of an NCP official (while stating that this legalistic approach and the handling of the CSR disputes is a “tough” task). The *handwriting* of some statements is that of lawyers. Telephone interview with Dutch NCP (Mar. 17, 2011) and telephone interview with UK NCP (Mar. 4, 2011). Both interviewees confirmed that in their NCPs the people handling *specific instances* have accomplished a legal formation.

practice of examining corporate behavior, the reasoning of the examinations, and their publications.<sup>148</sup>

It is also important to note that examining corporate behavior is different than adjudication. These two actions are blurred at times and create confusion when the NCPs deal with parallel proceedings, for example. Parallel proceedings occur when a business conduct of a *specific instance* is already the subject of other proceedings at the sub-national, national, or international levels.<sup>149</sup> If the Guidelines regulate CSR in a different way than a legal norm of corporate responsibility, their implementation procedure must be different than a legal procedure. Accordingly, parallel legal proceedings should not affect the handling of *specific instances*.<sup>150</sup> Hence, this debated question also exemplifies the NCPs' insecurities and confusion with regard to the commitment and implementation of the Guidelines.

The debate among NCPs about whether examining corporate compliance with the Guidelines reflects core debates about soft law in general and the nature of CSR norms in particular. The core dispute in the CSR debate is whether these standards are – or ought to be – mandatory and/or legally enforceable. In the soft law debate, the core dispute is whether soft law initiatives constitute “law” – usually where “law” is understood to mean only legally enforceable norms. As in these broader debates, the dispute about the propriety of the NCPs engaging in examinations is in principle misleading, not only because of an overly formalistic understanding of “law,” but also because of the assumption that a choice of implementation is limited to either pure enforcement or pure collaboration. But in CSR disputes – as seen in this study – a purely collaborative approach on the part of NCPs may prove ineffective, particularly in cases where one party refuses to participate in the procedure. Instead of focusing on whether the examination process is formally compatible with the legal character of the Guidelines, states should rather focus on how to promote compliance with the norms they have agreed upon. In terms of the Guidelines, forty-two governments have agreed upon the establishment of these CSR standards due to the public interest of their societies in social responsible business operations worldwide. And these governments have obliged themselves, through legally binding norms, to conduct a dispute resolution process intended to promote compliance with the Guidelines. In order to promote compliance, an examination can be necessary under certain conditions, and should then be carried out in a professional way based on sufficient information and comprehensible reasoning.

## V. CONCLUSION: 2011 UPDATE OF THE GUIDELINES AND FORECAST

This article reveals considerable variations of interpretations and applications of the Guidelines, their implementation, and their compliance. The different understandings of this soft law initiative are reflected in the parties' different approaches to this procedure, especially those of the NCPs. Located in the “twilight

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148. Telephone interview with UK NCP (Mar. 4, 2011). The Dutch NCP official also mentioned the interest of the parliament and to which the NCP has to respond.

149. See *supra* note 118 with further reference to this debate among the NCPs.

150. This consequent position is given on the part of the Dutch NCP. Telephone interview with Dutch NCP (March 17th, 2011) and interview with Dr. Rainer Geiger, OECD official, in Washington D.C. (Mar. 23, 2011).

of law and politics,”<sup>151</sup> the soft law nature of the Guidelines shifts the choice of appropriate implementation to the NCPs. And the NCPs are divided in their opinions on whether to evaluate and determine a noncompliance with the Guidelines. The flexibility of soft law that makes it sometimes more preferable to states than treaties<sup>152</sup> leads to a broader range of interpretations and applications. Consequently, this becomes more visible in an institutionalized multilateral grievance mechanism.

This flexibility has its upsides and its downsides, however. On the one hand, it causes confusion for participants inside and outside of the procedure, and this confusion may diminish its impact. On the other hand, this flexibility allows the participants to try out their own approaches and this is in principle, a creative and dynamic process, which could be beneficial in terms of elaborating a dispute mechanism for a relatively new field like CSR. Further, the multifaceted characteristics of the CSR disputes handled by the NCPs require the adaptability to the various kinds of parties and issues. After more than a decade of practice, however, the main problem of this dispute resolution mechanism is evident: the lack of transparency due to the variations and limited practice of publishing final statements with sufficient information to help the public understand the CSR issue and the assessment of the NCP.

The NCPs are aware of this issue. In the 2011 updated version of the Guidelines—which is by no means comparable to the comprehensive review of the year 2000—the aspect of publishing statements was reinforced.<sup>153</sup> Now, initial assessments—which the NCPs do not regard as meriting further consideration—require publication and the “statement should at a minimum describe the issues raised and the reasons for the NCP’s decision.”<sup>154</sup> However, because NCPs must continue to take into account “the need to protect sensitive business and other stakeholder information,” the general public must wait to see whether there will be a change in the NCPs’ practice.

Furthermore, it is clear that the main challenge of this dispute system is achieving the cooperation of the participants. In order to increase the interest and willingness to participate in the collaborative implementation mechanism of the Guidelines, the NCPs have to communicate to the participants that cooperation is in the interest of all parties. In order to achieve this interest, the parties must believe that the NCPs’ procedure is fair and transparent. In the end, it is necessary to understand that this dispute system can lead to different kinds of valuable outcomes like clarification, information exchange with the other party, an agreement, and eventually the change of a corporate practice.

The *specific instances* procedure is still in a testing phase. The NCPs have to enhance the trust and respect in this unique dispute resolution mechanism—which is a promising one that has proven in several *specific instances* that it can advance CSR.

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151. See Schachter, *supra* note 47.

152. See Guzman & Meyer, *supra* note 52.

153. See Guidelines for Multinational Enterprises, *supra* note 1.

154. *Id.*

