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„The OECD Complaint Mechanism :

An Analysis of the OECD Complaint Mechanism's Case Law with regard to Human Rights violations in developing Countries"

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Content

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(Angelika J. Watzl)

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Foreword

Normally, a master thesis that already includes summary, acknowledgements and an introduction does not need a "foreword".

In this case, however, I would like to dedicate the foreword to the explanation and, to a certain extent, also to the justification of my vocabulary, used in the present thesis.

I am convinced that the careful use of our words does not only shape our perception of the world to a great extent, but also reveals our inner conviction to the topic even before we have elaborated on it. In the discourse about international development in general, and in connection with studies on colonialism in particular, wording and the correct use of terms presents itself as essential. It seems to me therefore somehow problematic to talk in my master thesis about "developing countries" and "industrialized countries" without explaining why I do so. I use these terms for simplification, not out of ignorance of their somehow misleading connotation.

By **"industrialized countries"** I mean, what has elsewhere been called "Western countries" or which can be listed as the member states of the European Union, the G20 or ... and all overlapping compositions in this direction. The lines of distinction are blurred/ fluent as some of the former "developing countries" are increasingly becoming economically potent and are more and more involved on the level of decision making.

It is therefore easier to put the cart before the horse and define the **"least developed countries"**. Again, "development" in this sense refers to the stage of progress within the economic capitalist system and has no further significance as to the "development" in other areas or in terms of a moral judgement on this said economic system. As far as possible I will therefore refer to "**developing economies**", which is still not to a full extent free of bias, but it hints already with more clarity in the direction of economy, not insinuating that the whole country, with all its culture and diversity, "needs" development but that the country's economy is developing to a more complex stadium on the scale of the capitalist economy system.

Nevertheless, there is a quite clear/easy way to define "least developed countries", as the UN has established a framework of reference to classify a "least developed country" (LDC) as a country which, exhibits the lowest indicators of socioeconomic development, with the lowest Human Development Index ratings; these indicators being reviewed and updated every

three years by the Committee for Development Policy (CDP) of the UN Economic and Social Council (ECOSOC). A current list is to be found on the UN's website for Least Developed Countries: http://www.unohrlls.org/en/ldc/25/ .

These are the terms I will use and refer to in my thesis and I pray the reader not to think about the notions as "colonial" or provocative in any way, but simply as terms, used to abstract a vast number of otherwise very different countries.

Summary

Global economic inequality is one of the main problems that are in the focus of the studies "International Development". The field of economic relations is an especially sensitive one in this respect. To counter this development, a theorem has reached the attention of business and civil society at the same time and has in recent years gained increasing importance: the idea of corporate social responsibility (CSR).

It is a concept that was employed by few in the beginning but quickly spread as its advantages became known and consumers started to demand certain standards in the business conduct of companies; especially multi-national enterprises (MNE) operating abroad.

To develop a global standard in this area, efforts have been made by international organisations, amongst them by the OECD which developed the OECD Guidelines for Multinational Enterprises. These Guidelines are the only ones to foresee a complaint mechanism for breaches of its norms in the form of National Contact Points (NCP), situated in every adhering state.

To analyse the outcomes ("case law") and the procedures of these NCPs with respect to its human rights compatibility was therefore an attractive task for this master thesis, as it promised an interesting insight into the field of the effectiveness of global CSR.

The underlying question of this research was to see firstly, what the problems and issues are that arise between European MNEs doing business in least developed countries (LDCs) and secondly, if the existing complaint mechanism set up under the Guidelines of the OECD is a valid tool to assess the human rights impact of the MNEs actions in those countries.

I compared ten cases handled by four different NCPs, the British, the Belgian, the Finnish and the French NCPs, and found that although set up after the same rules, their procedures could in some points differ quite strongly from each other.
However, in an overall comparison with a tool called Human Rights Impact Assessments (HRIA) the NCPs did show - to an albeit different but still sufficient extent - that they fulfil they indicators set for an internationally recognized HRIA, and could therefore be qualified as a tool to effectively assess human rights (and CSR) impacts.

1. Introduction

Global economic inequality is one of the main problems that are in the focus of the studies "International Development". "Inequality" exists on various levels, the most commonly discussed being the economical, social, and cultural level which are tackled through different approaches – according to the adopted discipline and field – and by many actors, e.g. individuals, states, , international organisations, or other entities.

My personal background is in the field of legal studies and I am therefore interested in the way, inequality can be tackled by legal instruments. In the area of international law, it is not easy to find norms that are legally binding and that could therefore be an effective legal instrument to have an impact on the many layers of international inequality. But others[1] argue that a legally binding instrument would and could not even be the appropriate means to regulate a problem of such dimension; they argue change has to come through a transformation of the mindset. It is, however, a commonly recognized fact, that some regulations are especially effective *because* of their voluntary character. As this interrelation shows, international law is a quite complex phenomenon which is, in itself and also with regard to its effectiveness, influenced by a multitude of different factors - nearly all of them touching the domain of international development - , which is one of the reasons why the two disciplines of "law" and "international development" complement each other so well.

For this master thesis I have picked a topic, that has been widely discussed as part of the international (human rights) regime with a view to bring more justice to those, who can be easily exploited due to their weak economic position on the world market. I chose to treat the topic of "corporate social responsibility" with a view to internationally operating companies. This topic is, on the one hand, part of the international human rights regime, and, on the other hand, a means to identify and, ultimately, to end global exploitation and inequality by this contributing to international development.

"Corporate Social Responsibility" (CSR) is an ethical business concept that has become increasingly popular over the last decades. It intends to give companies rules and guidance as

[1] See for example: Kenneth W. Abbott and Duncan Snidal (2000): Hard and Soft Law in International Governance. International Organization 54: 421-456.

to a fair and socially sustainable way to conduct business. This concept has, for various reasons - pressure from civil society, measurable competitive advantage, philanthropy, etc. -, been adopted by an increasing number of business responsibles and big firms. This has added to the value and the importance of the concept and has motivated nearly all international organisations that deal with economic issues, to work on it.

This international linking-up is especially important as an increasing number of corporations establish sub-companies in other countries and it is vital to business connection as well as to the objective of combating inequality, that the same standards are guaranteed in every country. There is a looming danger to take advantage of economically weaker countries by forcing them to lower, breach or not even introduce standards of protection for their own population in favour of incoming investment. To prevent a development in this direction, international efforts have been made to establish common standards that shall be applicable in every country to provide a common basis.

As I am interested in (global) inequalities, the focus of this thesis lies on the effect, internationally operating companies have on societies in economically weak countries and how the thus created problems can be solved or at least be brought before a judicial forum to seek the right to a hearing. This phenomenon of inequality is obvious to observe but not easy to measure. As most international (human rights) treaties require the (binding) commitment of governments to add sanctions to the otherwise mere declarations of intent, there is no real "jurisdiction" for breaches in the framework of CSR-regulations. In fact, there is only one international agreement which provides a complaint mechanism and thereby at least a reporting system: the Guidelines for Multinational Enterprises by the OECD. The therein established complaint mechanism foresees a National Contact Points (NCPs) in each member state to file a complaint in case of a breach of the regulations of the Guidelines. This mechanism gives the persons wronged and those who fear for the environment a possibility to take action against a CSR violation.

As I am interested in the global inter-linked process creating inequalities and how they are dealt with, it will be interesting to investigate what the exact problems are, people in third world countries face through the involvement of MNEs in their economies, and subsequently, how the given complaint procedure works and if the outcomes have the aspired effect of bringing justice into the conflicts and finding a fair solution with the parties involved.

As can be gathered from scholars' and NGOs' contributions to the discourse on CSR and the NCPs of the OECD Guidelines the NCPs are not free of criticism. In order to be able to make an educated statement about the outcome of the NCPs' complaint procedures it would therefore be instructive to take a look at the procedures themselves. They are highly praised by some as a milestone in CSR development and an effective legal remedy against breaches of international CSR standards[2]. But, keeping in mind the criticism about inefficiency, lack of transparency, and ineffectiveness, the question remains if the NCPs really are a suited tool to assess breaches of international (human rights) obligations?

[2] Amongst them: the Secretary General of the OECD: Responsible Business Conduct Matters. 2013. Online: http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf [accessed: 2014-01-22]; BIAC on the Guidelines: http://www.biac.org/mne_guidelines.htm [accessed: 2014-01-22]; the OECD Observer: http://www.oecdobserver.org/news/archivestory.php/aid/2772/OECD_MNE_Guidelines:_A_responsible_business_choice.html [accessed: 2014-01-22]

2. Research Interest

To sum up my general ideas of the introductory chapter into a specific research question, I will divide the interest and handle it in two parts:

The first part will be about the violations of the Guidelines that occur in the relation between MNEs and the population of (economically) less developed countries. I want to carve out the problems arising from the expansion of MNEs of rich countries into the spheres of economies that are not on the same level. The array of disputes and (allegedly) breached norms will point to the issues and problems existing between MNEs of highly developed economies and the local communities of the countries they do business with. From the so developed list of (allegedly) breached norms we can see if a pattern can be found, a conclusion drawn from it or if they are in any other way interesting for the second part of the research interest.

This first part of the analysis is intended to provide informational background. It will take a look at the substantive problems of the NCPs' work before we move on to the more abstract level of its procedures.

The second part is on the question of effectiveness of the NCPs' procedures. Are they an appropriate tool for those who experience inequality and suffer under the effects of CSR and Guidelines' violation to pursue their rights and (re-) establish a fair and equal order to everybody's satisfaction?
Here the question of verifiability presents itself as it is rather difficult to assess, whether the decision of the NCP was correct with regards to content as this would request a substantive review of all the facts and those are often not available publicly. A profound research on the reasoning can therefore not be undertaken. The procedure itself, on the other hand, can be retraced and even the lack of publicising important documents or findings can be rated as an indicator towards the decision making process. Therefore, instead of trying to assess the justness of a specific instance it could be more useful to examine the effectiveness of the procedure undertaken.

The quality of the complaint procedure affects the impact of the whole complaint mechanism as a flawed investigative process cannot lead to a just result. This is the reason why the right to an effective legal remedy is an internationally recognized human right[3].

> *"A basic premise in human rights work is that a right without an effective remedy is not a right at all. Where there are violations of human rights, there must be remedies."*
>
> Basil Fernando, Director of the Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong[4]

In order to assess the human rights situation in developing countries it is therefore necessary to look at the possibilities for the people concerned to have access to an effective complaint procedure and to check the existing remedy if it works according to human rights standards or not.

[3] There are many internationally recognized human rights norms that state the human right to an effective remedy, amongst them are Art 2 (principle of non-discrimination), Art 6 (right to the recognition as a person before the law), Art 7 (the right to equal protection), and Art 8 (right to an effective remedy) of the ICCPR. Art 8 ICCPR quotes: "Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."

[4] quoted as on the webpage of the Asian Human Rights Commission: http://www.humanrights.asia/resources/journals-magazines/article2/0902/reflection-on-article-2-of-the-iccpr-the-role-of-human-rights-activists-in-diagnosing-the-lack-of-effective-remedies [latest access: 2014-01-15]

3. Corporate Social Responsibility (CSR)

CSR is the acronym for „Corporate Social Responsibility", a term, describing an ethic business concept that has its roots in the 19th century but has been more eloquently developed only since the 1950ies.

The importance of the CSR concept today is beyond dispute:

> "CSR is a concept that has attracted worldwide attention and acquired a new resonance in the global economy. Heightened interest in CSR in recent years has stemmed from the advent of globalization and international trade, which have reflected in increased business complexity and new demands for enhanced transparency and corporate citizenship. Moreover, while governments have traditionally assumed sole responsibility for the improvement of the living conditions of the population, society's needs have exceeded the capabilities of governments to fulfil them. In this context, the spotlight is increasingly turning to focus on the role of business in society and progressive companies are seeking to differentiate themselves through engagement in CSR."[5]

The term "CSR" however, is – as most terms that are used within more than one academic field and that have also found their way into the debate on international level – not clearly defined and lacks certain clarity. Especially as several stakeholders are involved, each one of them tends to give his very own interpretation to the term, as their interests differ in the way they would like CSR to be understood.

I will therefore, in the following chapter, outline the history and development of the "CSR" - concept and by this also sketch out the change in definition and meaning of the term. To round the picture and to bring the overview on an updated level, I will present several different approaches of the current discourse and try to retrace where CSR is heading in the next years.

[5] Jamali, Mirshak (2006), S. 2

3.1. CSR in general

3.1.1. The notion

The meaning of "CSR" is best grasped when translated literally – for all further definitions lead in different directions depending on the context and the speaker. CSR can therefore be discerned from the three words contained within it: 'corporate,' 'social,' and 'responsibility.' The common core to all definitions and interpretations of the term CSR is the idea of the entrepreneur being responsible to the community in which he lives about the conduct of his company and its effect on this very community.

The Bertelsmann Stiftung puts it in its explications on the term "CSR" as follows:

> "CSR are […] all activities and programmes of a company that incorporate the company's social responsibility into its business operations. These actions aim to turn the outcome of the company's business transactions more socially acceptable or to constitute an investment in the social, ecological or economic environment."[6]

Beyond this simplified definition, opinions about CSR, especially about its scope, differ to a great extent. Votaw hit to core of the problem in his commentary *"Genius Became Rare: A Comment on the Doctrine of Social Responsibility*", when he said about the current situation:

> "The term [social responsibility] is a brilliant one; it means something, but not always the same thing, to everybody. To some it conveys the idea of le-gal responsibility or liability; to others, it means socially responsible behavior in an ethical sense; to still others, the meaning transmitted is that of "responsible for", in a causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for "legitimacy," in the context of "belonging" or being proper or valid; a few see it as a sort of fiduciary duty imposing higher standards of behavior on businessmen than on citizens at large."[7]

[6] Bertelsmann Stiftung (year unknown), p. 1
[7] Votaw (1973), p.11

The Dilemma, Votaw was talking about in 1973, is, however, far from being solved as there is still a variety of different perceptions and interpretations of CSR and what is labelled "CSR" by some companies is far from what the academic discourse shaped over the years.
It is therefore, interesting to look into the historical development of the term CSR to get an overview of the different theories that have been evolving around the definition of this very commonly used word and its meaning.

3.1.2. Historical development

The above mentioned literal translation of the term CSR is the roughly formulated origin of the concept. The idea of socially responsible business existed since commerce began, although in different forms through time. Some academics see the tradesman from the sixteenth century as beginning of a socially responsible businessman who cannot but act in accordance with a certain code of honourableness that society dictates him[8]. There were, in the end of the 19th century, examples of lived social responsibility. Entrepreneurs like Henry Ford, Andrew Carnegie, and George Cadbury started to not only focus their efforts on the maximization of profits for their businesses but initiated projects to improve their workers' social life and well-being. They erected houses for their employees, provided free health care service and set up pension funds.[9] These were first steps in the direction of CSR, being made without the concept of "social responsibility" having emerged in the academic discourse yet.

It is therefore difficult to put a finger to the starting point of the phenomenon of "social responsibility", luckily on the other hand, it is quite easy to distinguish the first mentioning of CSR as such and with it the beginning of the academic debate around it.
It was in 1953 that the American economist Howard R. Bowen, later called "the Father of CSR"[10], coined the term *corporate social responsibility* in his book *"Social Responsibilities of a Businessman"*. In his remarks on the subject, Bowen defines CSR for the first time as follows:

[8] Klink (2008), S. 61
[9] Bassen, Jastram, Meyer (2005), p.231
[10] Carroll (1999), p.270

> "It [the social responsibility of a businessman] refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."[11]

Bowen saw the social responsibility not as a means to solve all problems in economics or in the social system, but he distinguished SR as an important truth to be taken into account when planning future business action.

According to the overview Archie B. Carroll gives in this essay *"Corporate Social Responsibility. Evolution of a Definitional Construct"*, the decade of the 1960s marked a significant growth in attempts to state what CSR shall comprise. An important contribution to this task was the work of Keith Davis, who, in 1960 and later again in 1967 and 1973 added his perception of the problem to the discourse. He defined CSR as business action that go beyond a company's direct interests but are still carried out as the enterprise will, by acknowledging the social responsibility and acting according to it, profit from this social engagement in the long run. In the 1970s he formulated it this way:

> "Social responsibility begins, where the law ends."[12]

Davis also pointed out the correlation between the influence of a corporation and its social responsibility by stating that *"social responsibilities of businessmen need to be commensurate with their social power"*[13] - this maxim became known as the "*Iron Law of Responsibility*". Another important contribution by Davis that he made after over thinking his definition of CSR, was the shift from the focus on a firm's manager as a single person to the responsibility of the company as a whole and its (social) role in society.
Other important contributions have been made by academics such as William C. Frederick (1960), Joseph W. McGuire (1963) and Clarence C. Walton (1967).

I would like to mention just McGuire's contribution, as it is especially intriguing that he already lists specific areas, which are to be in a company's interest and should be attended to. They namely are politics, welfare of the community, education, "happiness" of his employees,

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[11] Bowen (1953), p.6
[12] Davis (1973), p.313
[13] Davis (1960), p.70

and the social world in general. From these interests a company has to have, McGuire deduces the obligation to act "justly, as a proper citizen should"[14]. With these elaborations he already hints at the notions of business ethics and corporate citizenship.[15]

In the 1970s Harold Johnson picked up on the already existing theories and concepts and proceeded to criticise and develop them. In one of these definitions, he called it "conventional wisdom", Johnson describes an approach that suggests to not only lead a company according to the interest of the firm's shareholders, but that employees, suppliers, dealers, local communities, and even the nation also have to be taken into account.[16] This proposition makes Johnson the first one to formulate what is today being discussed as "multi-stakeholder approach".

The 1960s and 1970s were years in which civil society started to discover their power to influence politics as well as economic processes and the conduct of business. In 1971 the Committee for Economic Development (CED), an organisation assembling business practitioners and academics, observed a change of the social contract between business and the civil society and drew up the following scheme to clarify business' role according to society's expectations. This definition of CSR consists of three concentric circles, describing as the inner circle the efficient economic functioning as the core duty of a company. The intermediate circle should be aware of society's changing needs and react to them, whereas the outer circle is supposed to take up newly emerging responsibilities for the improvement of the social environment in general.[17]

The next two decades were shaped by the development of the already existing CSR definitions with the outcome that a broader variation of concepts, similar to CSR, originated. Some of the more important ones being corporate social performance, public policy, business ethics, corporate citizenship, and multi-stakeholder approach. Having developed the concept of CSR, academic interest shifted now more to the question of cost-effectiveness when implementing CSR strategies.

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[14] McGuire (1963), p.44
[15] Carroll (1999), p.272
[16] Johnson (1971), p.50
[17] see CED (1971), p.15

It is worth mentioning that it was in the 1990s that Carroll revised his "four-part" definition of CSR to draw up the well-known pyramid of CSR. In this graphical explanation on how CSR is embedded in society, Carroll argues that society demands of the enterprises economic as well as legal obedience. In addition (consequently the next level of the pyramid) society expects ethical behaviour and as top of the ladder, philanthropic interests are to be shown by the enterprise. The three levels of the pyramid are interconnected and influence each other to form a coherent CSR strategy. [18]

All these academic contributions to the CSR development have been primarily made by the US-American field of writers. Indeed, there have not been many other academics, who, in a leading position influenced the shaping of the concept or contributed their definition of CSR. The part about the theoretical development of the concept has therefore to focus on US-academics. The applicability of CSR is however valid for all economically active regions in the world, as I will elaborate in chapter 3.2..

3.1.3. Contemporary Definitions

After the outline of CSR development and its - mostly American - history, I now want to cite some definitions used or respectively designed by essential stakeholders in the CSR world.

As economy has expanded worldwide and it has increasingly become a global issue and international organisations, especially those concerned with economic cooperation, had to give their attention to the newly rising and gradually more important issue of CSR, which provides us with some definitions form the "international" point of view.

UNIDO, the United Nations' Industrial Development Organisation, makes the following statement about CSR:

> "Corporate Social Responsibility can best be understood in terms of the changing relationship between business and society. Many people believe it is no longer enough for a company to say that their only concern is to make profits for their shareholders, when they are

[18] Carroll (1991)

> undertaking operations that can fundamentally affect (both negatively or positively) the lives of communities in countries throughout the world."[19]

Another important stakeholder on the international level is the World Business Council for Sustainable Development, which defines CSR as

> "[...] the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[20]

> "[...] the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life."[21]

Later than in the USA, the notion of CSR has found its way into the economical discussions in Europe. In 2001 the European Commission defines CSR in its green paper *"Promoting a European Framework for Corporate Social Responsibility"* as:

> "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[22]

A year later, as a follow-up to the above mentioned Green paper, the European Commission presented a Communication, titled *"CSR - A business contribution to Sustainable Development"* in which it states, that CSR is closely related to the concept of sustainable development and companies need to become aware of the economic, social, and ecological effects their actions have on society.[23]

Since the 1980s, the notion of CSR has indeed been developed in close connection to the concept of sustainability and CSR is often defined by a reference to sustainability, stating it as its main objective. This extension on the sustainability aspect has been advanced mainly through discussion in expert circles and international committees, the four most important of them being the Brundtland Commission (1987), the Conference in Rio (1992), the World

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[19] UNIDO (2002), p.5
[20] UNIDO (2002), p.5
[21] Holme/Watts (2000), p.10
[22] EU Commission 2002, p.3
[23] quoted after Schiebel (year unknown), p.5

Economic Forum in Davos (1999), and the Conference in Johannesburg (2002). Here is a short overview on the basis of teaching material of Prof. Schiebel, who put in a nutshell the essential changes, each of these international gatherings and discussions have produced.

Brundtland - Report 1987

Sustainable development means a development which corresponds to the needs of the modern generation to satisfy their needs, without endangering the possibilities of the next generation.

Conference in Rio 1992

The term "sustainable development" originally stems from the field of silviculture and describes a subsistency strategy that ensures the undiminished capacity of an ecosystem for future generations. Latest since the Rio Conference, the outcome of which has been signed by more than 170 states, has the term "sustainable development" become the most important general principle for global questions about environment and development.[24]

World Economic Forum in Davos 1999

At the World Economic Forum in Davos in 1999, UN General Secretary Kofi Annan called on the present managers to join a common pact to promote and implement human rights, labour standards, and environmental protection. In July 2000 this pact has been officially adopted as an UN-initiative, called "Global Impact".

Conference in Johannesburg 2002

The results of the Rio Conference have been reaffirmed in the follow-up Conference of Johannesburg.

A private initiative, albeit acting globally, is "Business for Social Responsibility". This organisation works with companies worldwide to develop sustainable business strategies and define the core of their daily works as

> "Operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business."

[24] stated so on the website of the city of Münster: www.muenster.de/stadt/agenda/thesen/glossar.htm [Zugriff: 24.09.2013]

As can be seen, most contemporary definitions are similar to each other, some only differing in the aspect they put special stress on upon. As Benjamin Thannesberger, sums it up in his master thesis " CSR is understood as an immensely wide concept. It comprises voluntary means of corporate self-regulation with regard to the economic, social and environmental impact of a company's operations".[25]

3.2. CSR in developing countries

3.2.1. Business in the context of developing economies

Business in countries with developing economies is and has to be - in some aspects - conducted differently than in the Western industrialized countries. Preconditions are not the same in both systems, although both belong to the same bigger system of global capitalism. This constellation does not contribute to an easier handling of the situation.

The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services. Another key development is the emergence of multinational enterprises based in developing countries as major international investors.[26]

The relationship between developing economies and Western economies has always been a tense one. During the period of colonialism, "Third World Countries" obviously served as resource stock, cheap place of production, and an area of partly legal vacuum, where one was not subordinated to the same strict legal norms as on "the old continent". Nevertheless, exploitation continued after de-colonisation albeit in different forms but with much the same result. In the last two decades - some countries since the 1980s, others only quite recently - these former colonies managed to free themselves a little from the firm economic grip of the "West" and have developed their own ways in the global system - depending on other countries as nearly every country does today. The fact that a lot of business from wealthy countries is done in developing economies still causes the question to remained the same:

[25] Thannesberger (2012), p.15
[26] OECD Guidelines: 14

Does a company that has, through its economic power, gained essential influence in a country, also have social responsibility for the society it is placed amidst?

3.2.2. Development of SR in today's Third World countries

There have been first uprisings against businessman's despotism, caused by excesses of the British East India Company in India during their "rule" and the question of accountability for a company's actions arose. At the same time - around 1800 - people acted the first time by boycotting a product because it was not socially agreeable produced. It was the boycott of slave-harvested sugar and one could say, that this event marked the beginning of civil society's engagement for fair trade. Over time this movement and the awareness for socially responsible production processes and products have increased and there is a remarkable rise in Western societies in the demand of transparency, fair traded products, and a environmentally and socially sustainable production.

How CSR is being dealt with in developing countries is therefore an especially interesting issue. Lenssen and Wassenhove observe in an article, published 2012 in Global Compact, "profound shifts in geopolitics and economic power around the world" during the last few decades and see as a consequence that "while more business is being done in developing countries, there is little agreement about the current and future responsibilities of business in development."[27]

3.2.3. CSR in developing economies

There is also not a lot of literature on this topic as much of the academic attention focuses on how to do business in developing countries and how this business affects or can even advance the country's economic development.[28] From what I imagine, CSR does not play *a role* in the considerations of business in Third World countries, because a certain connection to production in poor countries is *inherent* in the term CSR. CSR is about social responsibility in the community the company is embedded in, therefore has validity in Europe or North America as well as in the production plants in developing countries. It is especially important to note that companies, according to CSR understanding, have to fulfil their role of social

[27] Lenssen/ Wassenhove (2012), p.1
[28] Blaufield/ Murray (2011), p. 81

responsibility within every society they might act in. CSR does not mean generosity towards any good cause (this would be general philanthropy), but it means that the company, by operating in a society, is interfering with the livelihood of the people and has to take responsibility for the results this interaction might have. This idea is therefore consistent in the context of other societies than the one the company originally stems from and is therefore all the more true when it comes to doing business abroad.

This is the reason why CSR is often associated with "development" and discussed in the context of economic "developmental aid".[29] It is true that business, if conducted responsibly, can have a positive effect on an uprising economy. On the other hand, it is important to realize that also a lot of damage can be done this way. This is, why CSR is especially important and the business relations more delicate when doing business in a country with a weaker economy and lower human rights' protection standards.

Naturally, the steps taken will differ in each country or region, as the CSR measures have to respond to each society's needs in order to be effective. Therefore the only valuable orientation about CSR in developing countries, that is able to make a significant statement, are case examples. How this is working out in the CSR experience we will see later in chapter 5 to 8 on selected case studies.

3.2.4. Difficulties & Challenges

Nevertheless there are additional obstacles to a CSR approach in the context of a developing economy. According to Luetkenhorst, the general debate on CSR in developing countries is subject to two major suspicions:

> "Environmental standards are often seen as restraining growth while social standards are regarded as constraining trade. Both are sometimes conceived as attempts to deny developing countries access to a fast growth track."[30]

Another important factor are the SMEs, that are especially important in developing economies to achieve a certain ownership towards economy and not be fully dependent on foreign investment.[31]

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[29] Ibid, p.83
[30] Luetkenhorst (2008), p.53

The claim for companies to take serious their social role in society and carry (their) part of the responsibility, has yet another dimension in the context of developing economies. Big and influential companies often have (the potential to have) some influence on the conduct of state business, in a very different way than in "Western states". Blaufield and Murray point it out this way:

> "Companies have great wealth; by some measures greater than that of many poor nations. Companies have a significant, sometimes negative, impact on developing economies. Governments cannot always be trusted to deliver the social and economic benefits the poor and marginalized have a right to expect. Business activity is essential to economic growth. Certain types of enterprises are well suited to meet the needs of the poor."[32]

Accordingly, they conclude that "it could be argued companies have a responsibility not just for the harms they product but equally the ones they fail to prevent".[33]

It is therefore especially important to work on an agreement as regards the core elements of CSR and their implementation in economically weak countries.

3.3. CSR and Human Rights

From their content and objectives, it is obvious that the strategy of CSR and the concept of Human Rights are closely interconnected and are overlapping in some areas.

On the one hand, CSR consists - to a certain extent - of human rights' norms. On the other hand, it is different legal regimes they are coming from. CSR was one of the forms to bring human rights into business. The number of initiatives, private ones as well as government- and UN-guided ones, that are promoting human rights for business is increasing. Human rights are therefore a way for a company to show their interest in the society around them and to offer their willingness to engage in some useful action. Of course CSR only covers part of the human rights spectrum directly: labour standards, social rights, and the human rights related to environmental aspects.[34]

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[31] Ibid, p.50
[32] Blaufield/Murray (2011), p.81
[33] Blaufield/ Murray (2011), p.82
[34] Australian Human Rights Commission (2008)

With human rights norms, as well as with CSR standards, the problem is that they both are laid down in international documents that - at maximum - bind the thereto adhering governments, but can in no way obligate a company directly. It therefore strongly depends on how and to what extent the governments, who committed to implementing the rules, do so. Here also lies the crux of the matter, why companies are so keen on expanding to countries that might have a less solid net of human rights standards.

So, while the primary responsibility for the enforcement of international human rights standards lies with national governments, there is a growing acceptance that corporations have an important role to play as well. Initiatives, like the UN's "Guiding Principles on Business and Human Rights"[35] or the European Commission's efforts to establish a "Business and Human Rights"- approach[36], show, that the importance of respecting human rights in a business context is being acknowledged more broadly and that the international community is willing to promote it further.

[35] OHCHR (2011).
[36] see so on their website: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/ [last access: 2013-09-30]

4. OECD and the "OECD Complaint Mechanism"

The OECD is an international organisation, created in 1961 in the course of the USA's and Canada's accession to the former OEEC (Organisation for European Economic Cooperation), originally established in 1948 to run the Marshall Plan, which thus had to be renamed. With its headquarter in Paris and an annual budget of 354 million Euros the 34 member states develop recommendations for policies and future economic development and aims at intensifying global cooperation.

The OECD's mission is described on their webpage as follows:

> *"[...] to promote policies that will improve the economic and social well-being of people around the world"*

and

> *"The common thread of our work is a shared commitment to market economies backed by democratic institutions and focused on the wellbeing of all citizens. Along the way, we also set out to make life harder for the terrorists, tax dodgers, crooked businessmen and others whose actions undermine a fair and open society."*[37]

To this end, the OECD provides a forum in which governments can work together to share experiences and exchange best practices or find cooperation partners. From the data the OECD draws from its member states, relevant reports and statistics are produced and published on their homepage.

As a part of their engagement for international business relations, the OECD has established an investment pillar which is designed to "promote direct investment and international economic development and growth"[38]. The work in these pillar's committees has produced two instruments to promote and facilitate transnational business conduct: the "Codes of Liberalization" (1961) and the "Declaration and Decisions on International Investment and Multinational Enterprises" (1976). The second document is the bigger

[37] OECD: About. Homepage: http://www.oecd.org/about/ [latest access: 2013-05-26]
[38] OECD (2009), p.252

body the OECD's Guidelines on MNE stem from, which are in the centre of this thesis. They will hence be discussed in more detail in the following chapters.

4.1. OECD Guidelines

The OECD Guidelines for Multinational Enterprises entered into force on 21st June 1976, as part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises. The OECD proudly declare on their webpage:

> *"The OECD Guidelines for Multinational Enterprises are the most comprehensive set of government-backed recommendations on responsible business conduct in existence today."*[39]

As the foreword of the Guidelines state, they are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.[40] The Guidelines also encompass three areas - science and technology, competition, and taxation - which are not as fully covered by any other international corporate responsibility instrument.[41]

The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976 and are presently signed by and therefore binding to the 34 OECD countries plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.[42]

The special position of the OECD Guidelines amongst other international document for CSR, is founded in the fact, that they are the only international treaty on CSR that has been drafted by government representatives and has thereafter been accepted by them. This adoption includes a commitment to promote the Guidelines in a global context. It is to be noticed that the Guidelines do not bind the governments themselves or commits them to implement certain standards. Each government is still very free to implement the Guidelines as they see fit.

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[39] OECD: Guidelines for MNE - Homepage
[40] OECD: Global Forum on Responsible Business Conduct.
[41] OECD (2013), p.2
[42] OECD: New OECD Guidelines to protect human rights and social development

What is quite singular about the OECD Guidelines is the complaint mechanism, which allows people or organizations involved, to report the breach of the Guidelines' principles to a so called national contact point (NCP).

To provide a theoretical basis for the following analysis I will firstly draw a wider picture of the legal embedment of the Guidelines to outline its context and the singularity of its position within the international legal framework. Then I will go on to describe the Guidelines themselves and sketch out the essential details of the actual regulations formulated in this text. In a third chapter, I will give an overview about who is affected by the binding character of the Guidelines.

4.1.1. The legal framework

The legal framework surrounding the OECD Guidelines is a complex one and shall be outlined only shortly to give an overview of the legal regime the Guidelines constitute a part of.

The attempts to give the joint CSR efforts an instrument or a written document in which all relevant norms are included, have been numerous and a variety of declarations and recommendations has been produced on this subject. There are, of course, efforts on all levels - on national, regional and international, private as well as governmental. As an excursion into each of these areas would go beyond the scope of this master thesis. I will therefore focus on the international framework, as it is there, where the OECD Guidelines for MNE are anchored.

The existing documents can be divided into three categories: international conventions and declarations, officially agreed-on or recognized standards, and privately developed principles.

Among the first category are documents which have been developed by international organizations, composed of international experts and partly even government representatives, who formulated the common basic understanding of how CSR should work. Examples are the UDHR, the UN Framework Convention on Climate Change, various ILO Conventions, the MDGs, etc. The here assembled principles reflect the status quo of international agreement about minimum standards in the field of CSR. Although they are directed to governments only to be implemented, they also constitute an interesting orientation for business.

Officially agreed on or recognized documents present a guidance for the implementation of the before described declarations and documents. However, they are not directed at governments but rather advise the companies on how to implement CSR strategies into their business conduct in a way that they can conform to the government-binding documents and to help them into their place in the international CSR framework. Such help is provided by, e.g. the ILO and OECD MNE Convention, the UN Global Compact Principles, the international Finance and Corporation Performance Standards, and the Extractive Industries Transparency Initiative Principles.

As mentioned before, there are also private initiatives that contribute to the international framework of CSR regulations. They are mostly developed by civil society organizations and formulate the prevailing ethic understanding on business conduct. Sometimes they can also be derived from already existing international norms and be put into a standardized frame. Amongst those documents are the ISO Standards, GRI Sustainability Reporting Guidelines, the Responsible Care Guidelines, the ICCM Sustainable Development Principles, and the Electronic Industry Code of Conduct.

Below you find a very useful table, as it is listed in the OECD brochure "Responsible Business Conduct Matters" and which I included in this chapter for an easy overview at one glance:

Instrument and Role	**Examples**
International Conventions and Declarations	
• Reflect agreed international normative principles. Directed mainly to government for domestic implementation. These can help business understand what to do.	Universal Declaration of Human Rights. UN Framework Convention on Climate Change. ILO Conventions. ILO Declaration on Fundamental Principles and Rights at Work. UN Millennium Development Goals. World Summit on Sustainable Development Plan of Implementation. OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

Officially-agreed or recognised guidance	
• Offer authoritative guidance to the business sector on expectations of behaviour. Also help understand what to do, and sometimes also how.	ILO MNE Declaration. OECD MNE Guidelines. UN Global Compact Principles. International Finance Corporation Performance Standards. Extractive Industries Transparency Initiative (EITI) Principles.
Privately developed principles	
• Offer business/civil society developed guidance on expectations of behaviour. These sometimes also provide guidance on how to implement such standards. These may or may not be derived from international norms.	ISO standards (e.g. 14000 series). GRI Sustainability Reporting Guidelines. Responsible Care Guidelines. ICMM Sustainable Development Principles. Electronic Industry Code of Conduct.

table 1: Role and Relationship of internationally recognized norms, government- recognized guidance, and privately developed principles relevant to CSR.

Table according to OECD (2009): http://www.oecd.org/daf/inv/mne/40889288.pdf, p. 240

These instruments and documents, although stemming from different sources and different levels of international responsibility, are intertwined and complement each other. The OECD Guidelines for MNE are embedded in this framework of international documents. Among other norms, they reference the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21, and the Copenhagen Declaration for Social Development. The Guidelines can readily be used in conjunction with other instruments. Explanatory materials have been developed to outline the Guidelines' relationship with the UN Global Compact, the Principles for Responsible Investment, and with the GRI Guidelines.

As already mentioned earlier and will be discussed later in more detail, the OECD Guidelines on MNE take up a special position amongst the presented documents being the only set of rules to have a complaint mechanism included. The Guidelines were expressly designed to strengthen the existing international normative framework.

4.1.2. Content & Aims

After the last revision of the Guidelines in 2011, they present themselves equipped for the new challenges ahead, the major topics identified for changes being competition, consumer policy, corporate governance, employment, labour and social affairs, environment policy, and fiscal affairs. In relation to the former version, the updated guidelines include a new human rights chapter, developed with a view to the UN's "Guiding Principles on Business and Human Rights", the long longed for more regulations on due diligence and supply chain management, new regulations concerning the NCPs to strengthen their role and contribute to their effectiveness, new provisions on internet freedom and stakeholder engagement, and some relevant changes in other fields.

Professor John G. Ruggie, Special Representative of the UN Secretary General for Business and Human Rights, said about the newly revised Guidelines:

> *"The revised OECD Guidelines are the first inter-governmental instrument to integrate the second pillar of the UN framework – the corporate responsibility to respect human rights. They are also the first to take the Guiding Principles' concept of risk-based due diligence for human rights impacts and extend it to all major areas of business ethics."*[43]

The adhering states agreed to a review of the Guidelines, as "new and more complex patterns of production and consumption had evolved. Non-OECD countries are attracting a larger share of world investment and multinational enterprises from non-adhering countries have grown in importance. At the same time, the financial and economic crisis and the loss in confidence in open markets, the need to address climate change, and reaffirmed international commitments to development goals have prompted renewed calls from governments, the private sector and social partners for high standards of responsible business conduct".[44]

The Guidelines are divided into eleven chapters, which shall be each summed up briefly in the following paragraphs:

Chapter 1 - Concepts and Principles

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[43] OECD (2013), p.5
[44] OECD (2011)

The first chapter of the Guidelines sets out concepts and principles that put into context all of the recommendations in the subsequent chapters. These concepts and principles (*e.g.* obeying domestic law is the first obligation of enterprises) are the backbone of the Guidelines and underline the fundamental ideas behind them.

Chapter 2 - General Policies

This chapter is the first to contain specific recommendations to enterprises in the form of general policies that set the tone and establish a framework of common principles for the subsequent chapters. It includes important provisions such as implementing due diligence, addressing adverse impacts, engaging stakeholders, and others.

Chapter 3 - Disclosure

This chapter calls on enterprises to be transparent in their operations and responsive to increasingly sophisticated public demands for information.

Chapter 4 - Human Rights

This chapter is new to the Guidelines and enlarges them in a very essential point. As enterprises can have an impact on the entire spectrum of internationally recognised human rights, it is important that they meet their responsibilities. This chapter of the Guidelines draws on and is aligned with the UN "Protect, Respect and Remedy"-framework and the *Guiding Principles on Business and Human Rights*.

Chapter 5 - Employment and Industrial Relations

The ILO is the competent body to set and deal with international labour standards and to promote fundamental rights at work as recognised in the ILO 1998 Declaration on Fundamental Principles and Rights at Work. This chapter focuses on the role the Guidelines have in promoting observance among MNEs of the international labour standards developed by the ILO.

Chapter 6 - Environment

The environment chapter provides a set of recommendations for MNEs to raise their environmental performance and help maximise their contribution to environmental protection

through improved internal management and better planning. It broadly reflects the principles and objectives of the Rio Declaration on Environment and Development and Agenda 21.

Chapter 7 - Combating Bribery, Bribe Solicitations and Extortion

Bribery and corruption are damaging to democratic institutions and the governance of corporations. Enterprises have an important role to play in combating these practices. The OECD is leading global efforts to level the playing field for international businesses by fighting to eliminate bribery. The recommendations in the *Guidelines* are based on the extensive work the OECD has already done in this field.

Chapter 8 - Consumer Interests

The *Guidelines* call on enterprises to apply fair business, marketing, and advertising practices and to ensure the quality and reliability of the products that they provide. This chapter draws on the work of the OECD Committee on Consumer Policy and the Committee on Financial Markets, and of other international organisations, including the International Chamber of Commerce, the International Organisation for Standardization and the UN.

Chapter 9 - Science and Technology

This chapter recognises that MNEs are the main conduit of technology transfer across borders. It aims to promote technology transfer to host countries and contribution to their innovative capacities.

Chapter 10 - Competition

This chapter focuses on the importance of MNEs carrying out their activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all jurisdictions in which their activities may have anti-competitive effects. Enterprises need to refrain from anti-competitive agreements, which undermine the efficient operation of both domestic and international markets.

Chapter 11 - Taxation

The *Guidelines* are the first international corporate responsibility instrument to cover taxation, contributing to and drawing upon a significant body of work on taxation, most notably the OECD Model Tax Convention and the UN Model Double Taxation Convention between

Developed and Developing Countries. This important chapter covers fundamental taxation recommendations.

The full text of the Guidelines is to be found on a webpage the OECD installed especially for the Guidelines: http://mneguidelines.oecd.org/.

4.1.3. Applicability/ ratione personae

As most international documents, the Guidelines are not a legal document that can be applied to national or transnational companies as they are. The character of the MNE Guidelines requires a transformation of the therein set norms to establish the Guidelines' objectives in the respective national legal framework. The Guidelines are therefore not binding towards the enterprises themselves, but it depends on the governments to implement the Guidelines' values according to the given commitment.

The Guidelines are addressed to all MNEs, private as well as state-owned companies, and to all the entities within a MNE, the parent companies as well as their local entities.

It is important to note that while the Guidelines are primarily addressed to MNEs, they are not aimed at introducing differences of treatment between multinational and domestic enterprises. In the language of the Guidelines these two types of enterprises are being referred to as "Foreign Controlled Enterprises" - enterprises operating in the adhering state's territories and owned or controlled directly or indirectly by nationals of another adhering government - and domestic enterprises under "National Treatment". Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both. Likewise, while SMEs may not have the same capacities as larger enterprises, they are invited to observe the Guidelines "to the fullest extent possible" [45].

There are important international bodies who constantly work on refining and advancing the Guidelines. Amongst them are the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), who were involved in their development and endorse the Guidelines. OECD Watch, a coalition of more than 65 civil society organisations, also supports the Guidelines.

[45] OECD (2009), p.252-253

4.2. OECD complaint mechanism

The fact that the Guidelines have an in-built mechanism for reporting breaches and foresee specialised agencies to help developing a solution with all parties involved, distinguishes them from other international CSR instruments.

4.2.1. NCP

Countries adhering to the Guidelines are obliged to set up National Contact Points (NCPs) that are tasked with furthering the effectiveness of the Guidelines by undertaking promotional activities, handling inquiries, and providing a mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the Guidelines. This makes the Guidelines the only international corporate responsibility instrument with a built-in grievance mechanism. The procedure for the implementation of the NCPs is laid down in Part II of the Guidelines.

Adhering countries have flexibility in how they organise their NCPs as long as such arrangements provide an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government. To ensure that all NCPs operate in a comparable way, the concept of "functional equivalence" is used – the relevant core criteria will be explained below. NCPs report to the OECD Investment Committee and meet regularly to share their experiences. The NCPs are financed by the respective government and are also equipped with staff, especially appointed for this task.

NCPs rely on multi-stakeholder input and are committed to developing and maintaining relationships with representatives of the business community, worker organisations, NGOs and other interested parties that are able to contribute to the effective implementation of the Guidelines.[46]

The core criteria for NCPs are accessibility, accountability, transparency, and visibility.[47]

[46] OECD (2013), p.12
[47] OECD (2013), p. 12

4.2.1.1. Complaint Procedure in the NCPs

The general lines of procedure for any NCP are laid down in Article C of Part II of the Guidelines.

Firstly, as mentioned before, the NCPs can be called upon by any person or organisation that feels the norms of the Guidelines have been violated to his or its disadvantage. The parties to such a procedure can therefore be a business community, worker organisations, other non-governmental organisations, and other interested parties while on the other side there is the company that has to provide explanations and justification.

When a complaint is submitted to a NCP, the NCP will start the procedure with an initial assessment of whether the issues raised merit further examination. The complaint will only be accepted if mediation fails to find a solution to the presented problem. The parties involved will be informed about the decision of admittance.

If the complaint brought before the NCP is being taken into closer consideration, the NCP offers its help to arbitrate between the parties. It has various means to do so and the Guidelines list them as follows

> a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other nongovernmental organisations, and relevant experts;
>
> b) consult the NCP in the other country or countries concerned;
>
> c) seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;
>
> 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 the parties in dealing with the issues.

These methods of conflict solution can be applied alternatively or collectively.

After conducting the procedure and providing support and good offices, the results shall be published in a statement or a report. They will be made publicly available. These results or

statements are also issued if no conclusion has been reached or if the intermediation was not successful.

Also, the NCP has to inform the Committee about the outcome of the procedure "in a timely manner".

An essentially important point in this procedure is that the NCPs have a tight privacy policy and that no sensible business data is being published and confidentiality is, in the interest of all parties involved, maintained throughout the whole procedure.

4.2.1.2. Cases Overview

The OECD's 42 NCPs have, according to a statistic done by the NGO OECD Watch, received 174 cases filed with them by civil society organisations and individuals until November 2013. From these 174 cases, nearly one third (30 %) were rejected. Exactly the same number, namely 52 cases, were concluded. 35 cases have been filed of which 17 have been admitted and are today still pending. 16 cases have been closed without result and 12 cases, which makes 7 % of the total sum, were withdrawn by the applicant, before they could be decided on. Another 7 cases have been blocked.[48]

Looking at the last twelve years, the highest amount of cases filed was in 2011, 2012, and 2013, where 21 (2011, 2012) and 22 (2013) cases have been filed with all NCPs in total, these years closely followed by the caseload in 2004 (20 filed cases). All the other years have seen an average number of 10 cases filed per year.

Listing the cases filed by the chapters that have allegedly been violated, chapter II "General Policies" is by far the most called upon principle, reaching the mark of 140 cases. This might be due to the fact, that it is the most general one including a variety of rights, leaving wide room for interpretation and subsumption. "Employment and Industrial Relations" is the chapter with the second biggest amount of filed cases, followed by chapters III ("Disclosure") and VI ("Environment"). On fifth place are "Human Rights" before chapter I ("Concepts and Principles"), which leaves the rest of the filed cases dealing with "Combating Bribery" (chapter VII), Competition (chapter X), "Consumer Interest" (Chapter VIII), and "Taxation"

[48] OECD Watch Quarterly Update November 2012: 20.

(chapter XI). On chapter IX, "Science and Technology" no case seems to have been filed (yet).[49]

[49] The underlying statistics can be found on the OECD Watch webpage: http://oecdwatch.org/cases/statistics [latest access: 2013-10-14]

5. Analysis of the Case Law

5.1. Methodology & Aim

Regarding the methodological approach, a different method will have to be applied for the two parts of the analysis, as the question regarding the nature of the violations is in itself very different from the second question of how effective the remedy employed against the violations is from the point of view of human rights standards.
Additionally, the definition of the criteria to select cases for the analysis is a preliminary issue.

The first step must therefore be to identify a case sample on which to base the analysis. In the introductory chapter I have already hinted at the cornerstones of the framework for my analysis as they would span an interesting field due to the enormous difference of economic power between the proposed countries in question. I plan to draw on the complaints filed before NCPs of Member states of the European Union and to sort out and treat only those complaints that have been filed with regard to breaches in Third World Countries. Within these again, I will pick out only those countries that are listed amongst the "least developed countries" by the definition of the United Nations. Further explanations as to why this specific criteria will be employed will be set forth in sub-chapter 5.3..

The first part of the analysis is conducted in a quantitative method. The data I use is drawn from the database of OECD Watch, where summaries of all cases are published, including most of the documents publicly available, as well as from the NCPs' websites, where documents on the specific instances are published as well.
In the beginning of this part of the analysis I give an overview of the CSR-situation within the European Union's member states to embed the sample of the analysis in a holistic framework. Secondly, I will (quantitatively) display the details and outcomes of the selected cases to give an overview of the problems existing.

This part of the analysis will be rather short as it is merely intended to provide informational background. It will take a look at the substantive problems of the NCPs' work before we move on to the more abstract level of its procedures.

The second part will analyse the procedural aspects of the selected cases. Here the essential question is the definition of the benchmark criteria . How can the work of the NCPs impact the human rights situation for people concerned by CSR breaches under the OECD Guidelines?

Initially I intended to summarize the main points of criticism that have been held against the NCPs and probe them in the cases selected, to see if and to what extent the critics would apply to the case selection I had made. But the loose assembly of general critics was not a ground specific enough to base an analysis on and it lacked the systematic background. In search of a better model to measure the NCPs' processes, I came upon a paper of Raza and Baxewanos[50] which is rather interesting in this context. They introduce a tool for assessing the impacts of development policy on human rights and praise it as a "clear-cut tool based on binding human rights obligations" that will, although not perfectly developed yet, improve the quality of human rights policy assessments. This tool is called Human Rights Impact Assessments (HRIA).

HRIA are a "systematic process to measure the impact of policies, programs, projects or any other intervention on human rights"[51]. This assessment tool shows a new way to measure human rights compliance and would therefore be interesting to be applied on the NCPs and their procedure to test if the NCPs can be qualified as a human rights impact assessment tool. Although HRIA seem to be more drawn up for the (particularly ex ante) assessment of *policies and programmes*, I am going to alter the approach where necessary to apply the modified version of it on the processes conducted by the NCPs in their specific instance procedures. The crucial parallel is significant: the **NCPs'** role is to verify if a MNE has respected the international rules of CSR according to the OECD Guidelines. **HRIA** are designed to assess the compliance of states' practice/ policies/ etc. with their international human rights obligations. The difference between these two models is that HRIA is especially promoted due to the added value that consists in the application of binding human rights obligations. To apply the concept on NCPs, the topic of general human rights must be neglected to a certain extent as the NCPs have another primary foundation for their decisions,

[50] Raza/ Baxewanos: Human Rights Impact Assessments as a New Tool for Development Policy?. Wien: ÖFSE, 2013.
[51] Raza/Baxewanos: HRIA, 5.

namely the OECD Guidelines. Yet this fact does not render HRIA useless for the purpose of assessing the NCPs' procedures, as the NCPs examine the respect of international human rights law when allegations are made that human rights have been breached Technically, a separate chapter on human rights has only been introduced in the revision of the Guidelines in 2011, but the NCPs already referred to human rights under the regulations of Capter II paragraph 2. It reads:

> *"II.2 Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."*

Accordingly, the NCPs can be qualified as an institution assessing human rights and therefore lend themselves to an examination of their procedure under the HRIA tool.

Academics and NGOs have only started to apply HRIA in the late 1990ies[52] which is why it is not very established and coherent yet and still has some defining challenges ahead. Nevertheless I think HRIA can be helpful to determine if the NCPs are a human rights assessment tool that satisfies international standards.

Within the HRIA approach there are some indicators that can be assessed by the simple answers "yes" or "no". Others however have to be weighed as to the extent to which they fulfil the demanded criteria. To answer those questions, I have two main sources from which I will draw the grounds for my estimations. On the one hand I will rely on the data extracted from the cases examined. On the other hand I will draw upon a statistical evaluation conducted by the Trade Union Advisory Committee to the OECD (TUAC)[53], which has published a comparison of NCPs, listing the NCPs according to their performance in certain fields. These two sources will provide the substantial basis for my analysis in part two. As said before, some (minor) modifications will have to be made to the approach as HRIA are described in the paper of Raza and Baxewanos. To define which indicators are suited to be taken up for the assessment of NCPs, I will first outline the concept of HRIA in the following chapter and then, based on the general model, develop the indicators I will use for the purposes of my analysis.

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[52] Raza/Baxewanos 2013: 7.
[53] TUAC's website: http://www.tuac.org/en/public/tuac/index.phtml [latest access: 2014-01-24]

5.2. Human Rights Impact Assessment (HRIA)

Human Rights Impact Assessments (HRIA) are a relatively new tool that shall enable scholars and anybody adopting it, to make a substantiated statement about the human rights impacts of a certain policy, programme, or process. This tool is introduced by Raza and Baxewanos in the working paper "Human Rights Impact Assessments as a New Tool for Development Policy?". The two academics argue that the existing approaches are insufficient due to their legal status, methodology, an effectiveness[54] and describe their newly promoted tool as *" a systematic process to measure the impact of policies, programs, projects or any other intervention on human rights. [...] They are a mechanism to ensure that the human rights implications of a policy are considered when developing this policy (ex ante assessment) or to assess the impact of a certain policy on the situation of right holders after it has been implemented (ex post assessment) (Harrison/Stephenson 2010: 14)."*[55] They make it very clear that HRIA is not a new obligation for any state but that HRIA is designed to identify the already existing human rights obligations (in international treaties, etc.). They deem HRIA useful for both, ex-ante and ex-post evaluations; from a practical point of view however they hold it is better to conduct - if possible - an ex-ante assessment as it is easier to adapt a policy according to the outcomes of the HRIA when it is not yet in place.

HRIA has come most into use in the areas of trade and large scale development projects, although other fields of applications are not ruled out and even encouraged to be tested. Interesting for my intended approach is that in their paper, Raza and Baxewanos explicitly estimate that HRIA *"can be useful to assess if and how transnational corporations comply with their [...] human rights obligations."*[56]
With respect to the NCPs' work this means that HRIA *can* be drawn upon to assess if and how the MNEs comply with their (human rights - or CSR -) obligations. For this reason I deem the attempt worthy to apply this new approach to the questions at hand.

[54] Raza/ Baxewanos: HRIA, 4.
[55] ibid, 5.
[56] ibid, 9.

In chapter five Raza and Baxewanos go further into detail as to how conduct a HRIA. They identify a common consensus on three general features and four minimum conditions for the conduct of HRIA.

The three general features are:

- *fixed (human rights) basis*

Any HRIA should make explicit reference to the exact human rights obligations it is about to test. These human rights obligations have to be commonly agreed upon as to their interpretation and scope in order to be as substantiated as possible.

As the NCPs do not operate on the basis of an optionally chosen human rights norm but on the very clear ground of the OECD Guidelines, this factor will probably not play a very important role in the assessment respectively will the HRIA-rules be bent as the NCPs cannot be tested on their general consideration of human rights but have to stick to the regulations contained in the Guidelines.

- *process according to basic human rights*

It is self-evident that a concept, assessing the human rights compatibility of a chosen programme should follow basic human rights obligations in its own process as well. What sounds very obvious here can still be a challenge to many legal procedures undertaken as the principles of participation and inclusion as well as the right to equality and non-discrimination can easily be forgotten or breached; to a smaller or larger extent.

- *effective use of human rights indicators*

The use of human rights indicators is important as HRIA shall serve as basis for policy and decision makers and need to be as transparent as possible, providing a causal-chain explanation for the result. OHCHR has worked to develop such human rights indicators and has identified structural indicators, process indicators, and outcome indicators. The first one assesses whether the state in question has at all ratified human rights treaties and if they have been incorporated into domestic law; it looks at the state's commitment to human rights.
Process indicators say something about the ongoing endeavours to implement the incurred obligations. The outcome indicators estimate the results of the policies put in place in order to

implement human rights and examine the actual changes in the population's human rights situation.

Further minimum conditions, also developed by OHCHR, are independence, transparency, inclusive participation, and disciplinary variety and sufficient funding[57].

When it comes to the **actors** of HRIA, Raza and Baxewanos say that certain principles must be respected when deciding on the delicate question of who can conduct a HRIA without facing the reproach of being biased and therewith endangering the result of the whole process. Among these principles they identify "a participatory and inclusive assessment process and the use of clear and transparent indicators" as crucial to guarantee an independent and credible result[58].

By some institutions working on this subject, an 8-Step-Process has been developed according to which HRIA should be conducted. These steps are:

1. screening
2. scoping
3. gathering of evidence
4. consultation
5. analysis
6. conclusion & recommendations
7. publication
8. monitoring & review

This part of the HRIA-approach is especially interesting for my analysis as the process of the NCPs lends itself very well to a comparison with these eight steps of HRIA.

Furthermore there are some rules as to how HRIA should (not) be applied, which are also of some importance to the analysis in this thesis. Of those I especially want to emphasize the one stating that HRIA requires an interdisciplinary team of researchers. This point seems particularly important to me as it further ensures a reliable and independent result and can also

[57] Raza/Baxewanos: HRIA, 16.
[58] ibid, 9.

be applied to the NCP procedure. The other issues pointed out in the paper are the timing of the assessment, the appropriate level and the risk, that the results are politically utilized and possibly even abused.[59]

So overall, the HRIA indicators are to a large part applicable on the NCPs' procedure. Only the chapter on the effective use of human rights indicators seems to pose a problem, as the NCPs do not assess the status of an adhering states' CSR obligations, as the ratification of the OECD Guidelines is a prerequisite to have a NCP and to initiate proceedings with it in the first place.

The rest of the indicators is - for the purpose of this thesis - applicable to the NCPs' procedures and will be analysed firstly as to their parallels with the theoretical rules in the Guidelines and secondly in comparison with the case studies.
I will group the various indicators of HRIA into three categories: 1. preliminary conditions, 2. actors, and 3. procedure. The conclusion of the analysis will follow in chapter 8.

5.3. Case selection

Until November 2013, 148 cases of alleged violations of the OECD Guidelines have been filed with NCPs by NGOs and individuals.[60] The extent of case law is therefore overwhelming considering the scope of a master thesis and more specifications had to be made.

Preliminarily, I have to state that the selection of cases was finalized in November 2013 and therefore includes only such cases as qualified for the below mentioned criteria until that deadline. All cases that have been concluded at a later date are not contained in the present analysis.

The chosen cases manifest certain commonalities which I deem to be useful for answering the research question at hand. In the following sub-chapters I will explain my criteria for choosing the cases and why their choice is important for the outcome of this thesis.

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[59] ibid, 21.
[60] OECD Watch Quarterly Update November 2012, p. 20.

5.3.1. Developing Economies

As the relations between industrialized and developing countries are in the focus of the "International Development"- studies and as these relations, up to now, mainly consist of business relations, I think the way in which these business relations are shaped tells us a great deal about the relation of "rich" and "poor" countries in general.

It was therefore my concern to illuminate this unequal relationship a little further with this thesis, particularly in the context of the OECD complaint mechanism. Here the question of inequality between economically strong and weak countries is interesting to analyse as it is often said and observed that the economically weak countries are exploited by the economically strong countries' policies and enterprises. The OECD Guidelines however give those weaker countries a theoretical weapon: a complaint mechanism to fight back, to make themselves heard and to claim justice for the wrong that has been done to them. It remains to be seen in the course of this thesis if this mechanism lives up to its promise or if it fails its high goal and the disadvantaged are again underprivileged.

I have therefore picked countries with an already weak economy and narrowed it down further to only those countries that are on the UN's list of least developed countries (LDC)[61]. I intend to show the problems arising between big foreign multinational enterprises on the one hand and economically weak developing nations on the other.

5.3.2. EU Member States

The same motivation as I laid down in the precedent chapter as to why I picked only those cases from LDCs is valid for the choice on the "accused side". For the analysis I picked cases that were filed with an NCP in an EU member state.

The EU is one of the wealthiest regions in the world and constitutes a drastic contrast to the LDCs. My intention is to show just that divergence and to identify the problems that occur in this relationship. The NCPs are each located within the government of the state where the accused company is registered. It will be interesting to see what the EU governments deem a violation of the Guidelines and what not and how they lead the procedure to determine this.

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[61] To be found on the UN website: http://www.un.org/en/development/desa/policy/cdp/ldc/profile/ [accessed: 2014-01-27]

5.3.3. Concludes cases

Finally, I am only looking at those cases that were concluded at the time of the deadline for this thesis. I believe only the concluded cases will be sufficiently instructive for the purpose of this master thesis as it is not only the nature of the breached norms that are interesting but also the outcome of the procedures and the way the whole procedure was led.
It will be helpful to see what the result of the conducted specific instances was in order to get a comprehensive overview.

Nevertheless I will precede the analysis with a short allusion to all cases filed by NGOs for LDCs against MNEs of EU member states, as I wish to show the overall picture and the dimension of the caseload in this particular relationship.

6. Presentation of the Cases

In the following I will present the specific instances, grouped by the country in which the called upon NCP is situated. I will start by sketching out the NCPs' structure and working frame before I go on to lay down every case in detail.

For both these undertakings I have to point out in advance that I can only describe the NCPs and the specific instances handled by them in as much detail as is publicly available. The degree to which the NCPs share information about specific instances varies as the parties involved have the right to retain information and documents they do not wish to share publicly. Furthermore, information about the functioning of the NCPs is very inhomogeneous as there is no set rule or obligation as to the extent of how much information about the NCP's composition, working methods, etc. need to be shared.

A relevant number of cases that will be discussed here was initiated through an enquiry before a UN Panel of Experts. The background to this panel and the proceedings in course of the Panel's work will be sketched out in the following chapter prior to the first specific instance stemming from the Panel's work (chapter 6.1.).

6.1. UK

The British NCP is a bi-ministerial NCP involving the Department for Business, Innovation & Skills (BIS), and the Department for International Development (DID). The NCP is located in the BIS and hosts the Steering Board of the NCP, providing it with the secretariat. Presumably, the staff of the NCP is composed of officers of these two ministries, however no precise information on this subject could be found.

The Steering Board oversees the work of the NCP and, to this purpose consists of representatives from government departments (Foreign Office, DFID, the Attorney General's Office, the Export Credit Guarantees Department, the Department for Environment, Food and Rural Affairs, the Ministry of Justice, the Scottish Executive, the Department of Work and Pensions, and BIS legal Department), and four external members representing business, trade unions, NGOs, and one independent member who represents the All Parliamentary Group for the Great Lakes and the Prevention of Genocide. The external members are called to participate for a three years term with the possibility of a one-time renewal of the term. The

steering board is chaired by a senior official of BIS. In addition to the already existing experts, the steering board can draw on external experts if they deem it necessary to do so.

The Committee of the Steering Board meets on a quarterly basis or more often if required; the minutes of the meetings are published on the NCP's website[62].

The UN Panel of Experts on the Illicit Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo

In June 2000, The United Nations Security Council appointed an independent panel of experts to "follow up on reports and collect information on all activities on illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, including the violation of the sovereignty of that country" and to "research and analyse the links between the exploitation of the natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict."[63]

The Panel published its first report in April 2001 with the findings that the conflict in DRC was mainly about access to resources and that the exploitation of these resources has fallen to a large extent into the hands of foreign military powers. These external armies had international connections to support them and upheld their power. The Panel's conclusion was that these criminal networks "represent the next serious security problem in the region".[64] The second report, published in October 2002, still held that "the most important element in effectively halting the illegal exploitation of resources in the Democratic Republic of the Congo relates to the political will of those who support, protect and benefit from the networks."[65] The Annex III to this report included a list of 85 OECD-countries based companies that the Panel saw as established had breached the OECD Guidelines with their involvement in the DRC.

The UN Security Council, who had entrusted the Panel with its task, adopted its report in Resolution 1457 and extended the Panel's mandate to "verify, reinforce and, where necessary,

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[62] UK NCP's website.
[63] Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. Annex 1.
[64] Final Report of the UK NCP on RAID vs. DAS Air.
[65] UN Panel of Experts Report S/2002/1146, 16 October 2002, Paragraph 152.

update the Panel's findings, and/or clear parties named in the Panel's previous reports, with a view to adjusting accordingly the lists attached to these reports."[66] A communication between the Panel and the accused companies ensued to clarify the actual involvement of the respective companies in the allegations. The results of this process was published in an addendum to the afore mentioned report on 20th June, 2003. The Resolution also laid down rules of procedure for sharing information acquired by the Panel with the member states in order to facilitate national proceedings, which are strongly encouraged by the UN Security Council.

The final report of the Panel was published in October 2003, classifying all companies subject to the Panel's findings, in five categories: **Category I**: Resolved No Further Action Required; **Category II**: Resolved Cases Subject to NCP Monitoring Compliance; **Category III:** Unresolved Cases Referred to NCP for Updating or Investigation; **Category IV**: Pending Cases with Governments for Individuals and Companies; **Category V**: Parties that did not React to the Panel's Report. In a presidential statement by the Security Council, states were urged to conduct their own investigations.[67]

In most cases it was national NGOs who took up the task of bringing the cases in front of the respective NCPs.
Of the 85 accused companies, seven cases have been brought before the British NCP, four of which were concluded by the NCP and are discussed here under 6.1.1.; 6.1.2.; 6.1.3.; and 6.1.4.. Another case that fell under the "jurisdiction" of an EU-based NCP was treated by the Belgian NCP and is discussed here in 6.2.1..

6.1.1. RAID vs. Oryx (DR Congo)

This specific instance, RAID vs. Oryx, was originally initiated by the United Nations' Panel of Experts on the Illicit Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo due to the findings of an elaborated research on the subject. It has to be noted in this context that the procedure undertaken to determine breaches

[66] UN Security Council Resolution 1457, 24 January 2003, Paragraph 9.
[67] Security Council Presidential Statement S/PRST/2003/19, 19 November 2003.

of the Guidelines rules and principles deviated from the procedure described in the Guidelines as the Panel took the role of NCP and complainant in one "person".

In the case RAID vs. Oryx the formal specific instance was filed on 28th June, 2004 by the NGO "Rights and Accountability in Development" (RAID). As already hinted before, the NCP was already dealing with the topic of Oryx' activity in the DRC as the Panel had already called the NCP's attention to this topic and requested that the matter should be updated or investigated. Oryx was listed amongst the "companies on which the Panel recommends the placing of financial restrictions"[68]. The DTI had, in an inter-ministerial meeting in April 2004, decided to take 'a twin-track approach' to all DRC related cases. It was felt that the terms on which the UN Department of Legal Affairs provided 'additional restricted but non-confidential material' on category III companies precluded following the normal specific instance procedures of the OECD Guidelines' implementation procedures. It was agreed therefore that the NCP should examine the material and reach a resolution of the case solely through dialogue with the companies or their representatives. It was felt that by admitting the complainant or others into the dialogue – despite the fact that it would be part of a confidential procedure – would breach the conditions under which the UN agreed to release the documents.[69]

As it became clear that, for an actual valid procedure before the NCP a claimant was needed, RAID submitted a letter to the UK NCP, acting as complainant and asking the NCP to initiate a procedure for clarification, as the UN Panel had, raised "legal and ethical questions that require clear resolution"[70].

RAID lists the companies in question (Oryx Natural Resources Ltd, Avient, DAS Air, Tremalt / Kababankola (part of the Breco business group owned by John Bredenkamp), Alex Stewart (Assayers) Ltd. and Ridgepoint Overseas Developments Ltd), but at the same time makes clear that it does not accuse the named companies of any wrong-doing but that it merely desires a clarification in the interest of all parties involved.

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[68] Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. Annex 1.
[69] Statement by RAID et al on 1st February, 2005.
[70] Complaint filed by RAID on 28th June, 2004.

In the case of Oryx, the accusations involve illicit diamond trade. It had been alleged that a secret profit sharing agreement existed between Oryx and the Government of Zimbabwe, who were each to take 40% of the net cash inflow from Sengamines (one of the richest diamond concessions run by the Congolese state-owned diamond company MIBA). Oryx was, in this respect, used as a front for the Zimbabwean Defence Forces (ZDF) and its military company OSLEG. In its report, the UN Panel *spoke of* existing evidence of proposals made for a joint Zimbabwe-DRC company to be set up in Mauritius to disguise the continuing economic interests of ZDF in the DRC. There is also evidence that Sengamines served as a front for illegal foreign exchange transactions using several routes into and out of the DRC.

About the exact sequel of events and dates in the complaint procedure the sources are discordant. It seems, however that the case was first brought to the NCP's attention by the UN Panel, as it was foreseen in their procedure to leave certain cases that could not be brought to a finish or that still needed further action to the respective NCPs. The British NCP was therefore already involved in the case when RAID made their statement in the case and discussion with both parties had been undertaken, before RAID submitted the letter, dated 28th June 2004, in which it asks to be the complainant in this case. In the NCP's final statement of June 2005, the NCP holds that RAID has only submitted its complaint on 30th March 2005. On the website of OECD Watch the course of action is described as a two parts procedure, where RAID, its complaint seemingly being accepted in June 2004, was not allowed to take part in the procedure for the first year and was asked to re-submit a complaint a year later and was only then - and this also in a limited way - admitted to take part in the clearance of this special instance. Although both parties have published timelines of the events, the course of action in this case is quite difficult to follow.

The NCP's final findings were that of the six point submitted, four were already handled exhaustingly during the procedure in front of the UN Panel and were therefore not to be taken up by the NCP again. The two subjects remaining were the declaration of diamond exports by Oryx and the company's foreign exchange transactions. Oryx rejected the Panel's contention that it was involved in the smuggling of diamonds. Hence, the question raised in the specific instance was, if the company had anything to add, by way of public explanation, to its denial, especially in the light of additional information arising from Oryx’s libel action against The Independent (The issue with Oryx could not be resolved completely with the UN Panel

because at the time of the closing of the Panel the company had a libel action with the newspaper). The second issue regarded the foreign exchange and the question if Oryx would publish bank records and other documents to show that the foreign exchange brought into the DRC was spent on meeting the mining and labour costs of its operations in the DRC.

The two parties were far from reaching an agreement and the British NCP had to leave the case at this, stating its disappointment that the provision of good offices on their part had not fruited.

relevant norms:

The relevant norms of the OECD Guidelines - which were the Guidelines in its version from 2000 in this case - were of Chapter IX.1 (anti-competitive practices), Chapter III.3, III.4 (disclosure), Chapter VI.1, VI.5, and VI.6 (anti-bribery), Chapter II, 2 (human rights), and Chapter II.11 (political involvement).

6.1.2. RAID vs. Avient (DR Congo)

As mentioned before this specific instance too was brought to the UK NCP by the UN Panel of Experts on the Illicit Exploitation of Natural Resources and Other Forms of Wealth in the DRC. The official complaint in which the NGO RAID acted as complainant was submitted on June 28th, 2004, together with five other cases formerly treated by the UN Panel. Avient was considered by the Panel as of being in violation with the OECD Guidelines and had been listed in the final report as "unresolved cases referred to NCP for updating and investigation".

In the case of RAID vs. Avient, the Panel found that Avient had been involved in military activities in the DRC as the company negotiated with Congolese as well as Zimbabwean military groups and concluded business by providing crews for military aeroplanes and helicopters as well as brokered the sale of military helicopters to the DRC. Avient worked in cooperation with Oryx (see 6.1.1.) and carried out cargo transports for the company from South Africa and Zimbabwe to the DRC.

The referral letter from the Panel to the UK NCP from September 26th, 2003 does not state the exact articles of the Guidelines which have allegedly been breached but only explained that the UN Panel will not be able to close the case before the end of its mandate in October

2003. According to the NCP also very little evidence was provided by the panel that could have supported the allegations against Avient[71].

In the thereafter conducted procedure, Avient admitted to its economic involvement in the area and that it had undertaken supplying activities for the ZDF, at the same time underlining that, although ZDF is a military group, Avient's role in this context were purely supporting as to "carriage, re-supply and movement of personnel and equipment" and that these actions cannot be qualified as "tactical or military involvement".

Avient also provided engineering, training and crews for the FAC for a short period of time. The company claim certain issues within the DRC made such work ineffective which means that the crews supplied hardly ever flew and the contracts were dissolved shortly after. Their major support function was the airdropping of food and supplies to DRC Government forces who were cut off in places by rebel forces. Avient claim its staff respected all cease-fire agreements, a statement with which the NCP seemed to be contended.

As to the allegation of the brokering of six military helicopters, Avient air rigorously denies such a deal and neither the UN Panel nor the UK NCP had evidence for thinking otherwise.

The NCP's final statement of September 8th, 2004 concludes that Avient has been involved in business in the DRC and neighbouring countries, and accepted the confessions of Avient concerning the specific actions they listed. However, the NCP had no evidence that Avient was involved in any further actions which would be qualified as breaches of the Guidelines. Nevertheless it reminded Avient to carefully consider in the future the recommendations of the Guidelines, especially those under Chapter 2 treating the topic of human rights.

On 1st February 2005, RAID and other Congolese NGOs, namely ACIDH, NDS and CENADEP, submitted a request to the UK NCP, to take up the specific instance against Avient (again) as they were of the opinion that the first procedure had been conducted in a "parallel process" (as explained under 6.1.1.) and not according to the Procedural Guidance for NCPs, as a result the allegations against Avient and its involvement in military activities have not been assessed adequately.

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[71] Final statement of the UK NCP from September 8th, 2004.

The NGOs listed their reasons for believing in a breach of the Guidelines by Avient, substantiated by additional research and interpretation of the material at hand, pointing out that the NCP had not been (properly) considered certain items during the first procedure. The complainants do conclude, from the evidence given, that Avient was in fact charged with military functions and has therefore been in breach with the Guidelines. The NGOs also point out that the NCP has left some issues brought up by the UN Panel wholly untreated.

One and a half year later, the UK Sunday Times publish an article about Grahem Pelhem's undercover work for the UN and his discoveries about Avient's acitivities during the war. Thereupon RAID calls five days later, on 15th September 2006, on the UK NCP to re-open the case in light of the revelation of these information. There are no documents on this request publicly available, but according to OECD Watch, "RAID submitted extensive documentation to show that Avient was engaged in mercenary operations in the DRC, including bombing missions." But, instead of reopening the case of RAID vs. Avient, the NCP, due to the gravity of the allegations made, referred the NGO to the UK Attorney General for further investigations. It is not known if RAID proceeded with a complaint to the Attorney General's Office.

relevant norms:

The relevant norm of the OECD Guidelines - which was the Guidelines in its version from 2000 in this case - was of Chapter II Paragraph II.2.

6.1.3. RAID vs. DAS Air (DR Congo)

As mentioned before this specific instance is the third one brought to the UK NCP by the UN Panel of Experts on the Illicit Exploitation of Natural Resources and Other Forms of Wealth in the DRC. The official complaint in which the NGO RAID acted as complainant was submitted on June 28th, 2004, together with five other cases formerly treated by the UN Panel.

DAS Air was, as the other companies Oryx Naturals and Avient Air, listed in the Panel's final report under the third category which identified the listed companies' cases as matters to be updated or investigated. So the NCP took the case on and invited DAS Air for a statement. The company denied all allegations and refused to acknowledge any flaw in its actions of

behaviour. However, the complainant, again the NGO RAID, was able to provide extensive and quite incriminating material in this case. After the first report of the UN Panel, the Ugandan authorities set up a commission to investigate those allegations brought forward in the process of the Panel's work that had a connection with Uganda: the Porter Commission.

The Porter Commission investigated the use of the Military Air Base as a result of the original UN Panel's claims that it was being used during Operation "Safe Haven" to transport goods to and from the DRC. It found that, "trade through the Military Air Base was being hidden", which was especially insightful as the use of the air base for civilian purposes was a key consideration of this complaint.

The parties met with the mediation of the NCP in November 2006 but were not able reach an agreement on any terms.

The legal situation changed in October 2007 when DAS Air was forced into administration as the European Community had imposed a ban on its aircrafts. Still, the NCP tried to continue the process with the administrators but without success. Therefore the final statement of the NCP was issued in July 2008. It condemned the conduct of DAS Air and the role it played in the conflict in the DRC. It decided the Guidelines 2000 were applicable in this case although only three of the flights had taken place after June 2000, as these three actions fall under the relevant time and the behaviour of the company before the incidents can also be drawn upon as relevant in this case.
This case was the first specific instance to be decided in a way that the NCP concluded that the accused company was actually guilty of breaching the Guidelines. DAS Air, it stated, had breached the human rights provision by flying into a conflict zone despite international civil aviation regulations. It had also failed to conduct due diligence with regard to its supply chain, although it could have had some suspicions as to where the minerals they were transporting come from.

<u>relevant norms:</u>

The relevant norm of the OECD Guidelines - which was the Guidelines in its version from 2000 in this case - was of Chapter II Paragraph II.2 and II.10.

6.1.4. Global Witness vs. Afrimex (DR Congo)

In the case of Global Witness vs. Afrimex, the mineral trading company Afrimex was alleged to have contributed directly to the brutal conflict and large-scale human rights abuses in the DRC. Afrimex has been operating in the north and east of the DRC under the name *Société Kotecha* since the 1960ies. The company lists this fact to underline their long lasting and positive impact in the area. Global Witness, on the other hand, suggests that the company has, particularly due to its long-term involvement in the country, known about "the political and economical situation, the gravity of the conflict and the implications of illegal funds transfers to armed rebel groups (in this case, the RCD-Goma)"[72] and is therefore to be held accountable to an even higher degree. Afrimex, through its DRC-branch Société Kotecha, financed the war of the rebel group RCD-Goma, who controlled the northern and eastern parts of the DRC during the wars, by paying taxes to the RCD-Goma that were engaged in armed conflict against the Congolese government and was known to have committed several heavy human rights abuses. Due to the continuation of their mining exporting activity, Afrimex paid an export-fee of $ 10 per kilo of minerals to the rebel group, thereby (financially) contributing to the ongoing of the conflict. Furthermore the company was accused of employing forced labour and child labour in their mining activities.

Although the Panel had, in its report from October 2003 listed Afrimex under chapter I (resolved cases), Global Witness deemed it necessary to initiate a specific instance against Afrimex as they did not deem the Panel's investigations sufficient and the company had not stopped its export business and was still contributing to the armed conflict, breaching human rights. Global Witness based its complaint on evidence gathered itself, inter alia in a fact finding mission on-site in February 2005, as well as through the Afrimex director's statements in response to the report of the Panel and questioning by the UK Parliament's International Development Committee in July 2006.[73] The complaint was filed on 20th February, 2007.

In the initial assessment phase, the NCP conducted several meetings with both parties and decided in September 2007 to accept the complaint. Following the opening of the procedure, Global Witness and Afrimex started meetings mediated by the UK NCP at the end of the year

[72] Global Witness' complaint filed on 20th February, 2007.
[73] ibid, 9.

2007. Soon after this, in January 2008, Afrimex withdrew from the common negotiations. The NCP investigated the case and closed its research in May 2008, to which both parties were invited to give a last statement before the NCP issued its final report in August 2008. In it the NCP confirmed most of Global Witness' allegations and condemned Afrimex' role in the DRC conflict.

In this is one of the rare cases where the NCP actually declared the OECD Guidelines to have been broken, the result of the complaint procedure is especially interesting. At first the NCP's statement did not seem to have an impact on Afrimex' behaviour, but according to a letter it sent to the NCP and Global Witness in March 2009 in answer to Global Witness' question if it had stopped its trade in the DRC, Afrimex had shut down business in the DRC and had its last shipment of minerals in the first week of September 2008. Global Witness urged the UK government to verify this pronouncement and to put the company as well as its directors forward for the UN Sanctions Committee, but no such thing has happened yet.

relevant norms:

The relevant norms of the OECD Guidelines - which were the Guidelines in its version from 2000 in this case - were of Chapters II (General Policies), III (Disclosure), and V (Environment).

From the general principles these are the paragraphs II.2,.5; from the disclosure chapter paragraph III.1, .2; from chapter environment paragraph V.2, and .1 subparagraph A and B.

6.1.5. Justica Ambiental vs. BHP Billiton (Mozambique)

The NGO Justicia Ambiental (JA), representing itself and several Mozambican NGOs (Centro Terra Viva, Livaningo, Liga Moçambicana dos Direitos Humanos, Centro de Integridade Pública, and Kulima) filed the presently discussed complaint on 18th October 2010 with both the Australian and the UK NCP as the company in question (BHP Billiton PLC) is a dual listed company and registered at both countries' stock markets. Between the two NCPs it was decided that the UK NCP should handle the case as BHP Billiton PLC's alumina group is located in the United Kingdom.

On 2nd February, 2011 the UK NCP issued a statement, accepting the specific instance, except for the complaint of an alleged breach of Chapter II para 5. The procedure however was

suspended for some time in order to give the parties the opportunity for negotiations outside the UK NCP's procedure under the lead of the Compliance Advisor Ombudsman[74] on which outcomes the NCP was updated every two months.

The JA had filed the complaint against the activities of Mozal SARL (Mozal), a subsidiary of the UK registered mining company BHP Billiton PLC (with BHP Billiton holding the majority of the joint venture Mozal). The complainants were alerted by a project in the aluminium smelters of Mozal near Maputo that foresaw a bypass of its fume and gas treatment centres for 6 months in order to upgrade these centres. The bypass through which the exhaust fumes of the smelter should emanate were not provided with filters so that damage to the surrounding population and environment were suspected.
JA held seven specific allegations against BHPB, which can be listed as follows:

1. JA alleged that, while the bypass was in place, the smelter's exhaust fumes would be released into the air with likely negative effects on the environment and on the health and safety of the communities up to 40-100 km from the smelter;

2. Mozal presented different contradictory reasons for the need for the work which suggested that they had either used inappropriate material or had neglected to make adequate provision in their Environmental Impact Assessment;

3. Mozal based its bypass of the treatment centres on an inadequate basis. In particular, JA alleged that the Environmental Management Plan (EMP) did not sufficiently evaluate alternatives to bypassing the treatment centres;

4. Mozal refused to disclose to JA the special authorisation, issued by Mozambique's Ministry for Coordination of Environmental Affairs (MICOA) which granted Mozal permission to bypass the treatment centres, as well as annual environmental performance reports;

[74] The CAO is the independent recourse mechanism for IFC and MIGA, the private sector lending arms of the World Bank Group. The same complaint as filed with the NCPs had simultaneously been filed with the CAO and the EIBCO (European Investment Bank Complaints Office).
Parallel to the complaint procedures with the international bodies' mechanisms, JA had filed a national application for judicial review of MICAO's authorisation for the bypass as well as a petition to Mozambique's parliament requesting the immediate cancellation of the authorisation in question. However, these two bodies declared the authorisation valid.

5. The three consultation meetings with stakeholders organised by Mozal were little informative, left no room for an actual dialogue, and were not translated sufficiently for the persons involved to participate properly. Also, the conferences took place only *after* the company received the special authorisation from the MICOA;

6. Mozal did not issue the same health warning to the affected communities as Hillside Aluminium's (a subsidiary of BHPB in South Africa) smelter did in October 2004 when it bypassed the treatment centres for 72 hours;

7. JA also alledged that Mozal's actions breached Mozambique's 2004 Constitution, interpreted in the light of the United Nations (UN) Universal Declaration of Human Rights, and the African Charter on Human and People's Rights, and also breached the latter Charter.[75]

BHP Billiton denied these claims and justified its course of action as they had conducted extensive research and weighed other possibilities than the bypass, but came to the conclusion that there were no options and that it would be a far greater risk to the surrounding population not to repair the fume and gas treatment centres than to operate through the bypass for 6 months. BHP Billiton also feels that it had prewarned the population sufficiently.

The two parties, under the mediation of the CAO, held several meetings, established an agenda, and even reached agreement in some of the points identified. However it was not possible to resolve the issues fully in this mediation process and the UK NCP took up the case again in November 2011.
The NCP offered its good offices to the parties. BHP Billiton accepted the offer but JA declined it and so the NCP prepared its final statement.

In September 2012, the NCP issued the final statement determining that BHP Billiton had not breached the 2000 version of the OECD Guidelines.
Nevertheless, both BHP Billiton and Mozal were encouraged to improve procedures for engagement with local communities and to be more forthcoming in disclosing information related to the smelters impacts on the environment and the health and safety of adjacent communities.

[75] See the complaint of JA et al.

relevant norms:

The relevant norms of the OECD Guidelines - which were the Guidelines in its version from 2000 in this case - were of Chapters II(2), II(5), III(1), III(2), V(1)(a), V(1)(b) and V(2).

6.2. Belgium

The Belgian NCP is organised as a tripartite committee, consisting of the president of the NCP, the secretariat, one representative of the federal public service chosen from the Ministry of Economy, Labour, Justice, Finances, Environment, or Foreign Affairs, one representative of each regional government (Brussels, Flanders, and Wallonia), one representative of a list of three professional institutions representing the employers, and one representative of a list of three trade unions.[76] It is established within the Ministry of Economics and holds its sessions since 1980.

Since its establishment in 1980, the Belgian NCP has treated 14 cases or "specific instances", as they are called in technical terms.

6.2.1. 11.11.11 et al. vs. George Forrest International SA (DR Congo)

This case against George Forrest International was filed on 24th November 2004. The complaint was brought forward by 11.11.11., an organisation representing 15 other NGOs (namely Broederlijk Delen, Advocaten zonder Grenzen (under reserve), Attac Vlaanderen, CADTM, Cetri, FIDH (under reserve), Greenpeace, Gresea, KBA-FONCABA, Oxfam Solidariteit, Pax Christi, Proyecto Gato, RAID, Volens).

Originally the NGOs filed the same complaint against three other companies as well but those cases were rejected due to different reasons: ongoing legal procedures, lack of an investment nexus as well as current improvement of the situation.

The issue of these complaints brought to the Belgian NCP's attention arose due to a report of a United Nations' Panel of Experts that was released in October 2002, accusing 85 companies,

[76] More detailed information as to the composition of the NCP is to be found on its webpage: http://economie.fgov.be/fr/entreprises/vie_entreprise/responsabilite_societale_des_entreprises/Principes_directeurs_OCDE_entreprises_multinationales/Point_de_contact_national_OCDE_Belgique/#.UlkeO1CGqoM [latest access: 2013-10-12]

all based in OECD countries, of violating the Guidelines by, directly or indirectly contributing to the illicit exploitation of natural resources in the DRC.

In this specific case of 11.11.11. et al vs. George Forrest International SA, the latter was accused of not taking the necessary steps to ensure occupational health and safety when processing radioactive materials at their smelter in Lubumbashi. This is an especially precarious omission as the mines in question are adjacent to a hospital.

As a second point of complaint, GFI was alleged to have benefited from the new contractual arrangements with "Gecamines" while its head, George Forrest was its Chairman. Gecamines is a state-owned copper mines in the DRC and was at that time, together with George Forrest International (which held 60%) stakeholder of the Compangie Minière de Sud Katanga (CMSK). A loss of revenue for Gecamines was the outcome. There was also a conflict of interest and improper interference in political affairs. Additionally, the company has failed to disclose information regarding its activities, structure, financial situation and performance and failed to publish environmental and social performance reports.

The NCP states in its concluding report of 5th November, 2005 that it decided about this case in five sessions, three of them with participation of the parties involved. The NCP concluded in this case that Forrest Group had complied to the best of its abilities with the OECD Guidelines both in its direct investments in DRC and in its indirect investments. The NCP recognized, much to the annoyance of the complainants, George Forrest's determination, on behalf of his group, to continue promoting and upholding the OECD Guidelines in all firms in which he owned a minority interest and/or sat on the board of directors. The NCP recommended in this respect that the Forrest Group adopt a similar policy vis-à-vis its suppliers and customers.

The final statement also included the following recommendations:

1. The Forrest Group should regularly disclose reliable and relevant information regarding its activities, structure, financial situation and performance (consistent with Chapter III of the OECD Guidelines).
2. The Forrest Group should disclose employment-related information within the framework of applicable laws and prevailing labour relations and employment practices (Chapter IV of the OECD Guidelines).

3. The Forrest Group should provide reliable, relevant, and regular information on its activities and the steps taken to comply with environmental provisions (Chapter V).

4. The Forrest Group is a major player in the market, but not the only one; as such, the Forrest Group should assist international institutions and DR Congo government in implementing appropriate economic and industrial mechanisms given the problems of communities living in the vicinity of industrial sites.[77]

The NCP believes that these recommendations, with support from NGOs and trade unions, would encourage transparency and thus complement the efforts already made by the Forrest Group to foster a climate of trust vis-à-vis the local population.

The parties expressed a determination to continue their dialogue and asked international bodies, such as the WHO, to conduct independent studies.

The relevant norms

The relevant norms of the OECD Guidelines - which were the Guidelines in its version from 2000 in this case - were of Chapters II (General Policies), III (Disclosure), IV (Employment and Industrial Relations), V (Environment) , and IX (Competition).

From the general principles these are the paragraphs II.1, .2, .3, .4, .6. .7, .11; from the disclosure chapter paragraph III.1, .2, .4. .5; from the chapter employment and industrial relations paragraph IV.5; from chapter environment paragraph V.3, .7,. 1,. 2; and from chapter competition paragraph IX.2.

6.2.2. ACIDH et al vs. Compagnie de Minière de Sud Katanga (DR Congo)

This claim was filed by the NGOs *Action Against Impunity for Human Rights*, *Fédération International de Ligues de Droits de l'Homme*, and *Rights and Accountability in Development* on 4th april 2012. The coalition acted in representation of the inhabitants of Kawama village, which is situated at the outskirts of Lubumbashi in the Democratic Republic of Congo (DRC). The underlying incident of the complaint was the demolition of 500 homes, a dispensary, and some business premises in Kawama in the course of which people were wounded as well,

[77] Access-website.

conducted by *Entreprise Générale Malta Forrest* (EGMF), a subsidiary of *George Forrest International* (GFI) with the support of the Congolese police. The name of the case is explained by the constellation outlined in the explanation of the above described case, as EGMF is the subsidiary through which GFI held the 60% stakes of CMSK, and could therefore be made liable in front of the Belgian NCP.

The attempts of the NCP were to bring the two parties involved on a table. There were two mediation meetings scheduled at the end of 2012, which resulted in a draft statement that offered investments in the Kawama community work by George Forrest International's charitable arm, the Foundation Rachel Forrest. More precisely, the offer included repairing wells to provide access to drinking water; improving maternity services in Kawama; and the construction of a dispensary/pharmacy for the benefit of the village. However the proposal did not foresee any individual compensation, although reference was made to possible additional, unspecified measures that the Belgian Government might take to help the people living in Kawama. This offer, however, was declined by a council of citizens affected, as they did not trust the firm and the offer. An according statement was met by a press release from George Forrest International, that expressed sorrow for the fate of the citizens involved, but at the same time declined all direct or indirect responsibility with the taken course of action.

Thus the final statement of the NCP, which was issued on 12th February 2013, held that it was still preoccupied with the incidents in Kawama and the Lukuni-Gare. It mentions that the DRC authorities have failed to recover the harms done. The NCP argues that Forrest International is no longer a stakeholder in the exploration activities of the Compagnie de Minière de Sud Katanga. As mentioned before, the offer of remediation by Forrest International through its Foundation Rachel Forrest has been refused by the affected communities. The NCP therefore recommends Forrest International to still execute the proposed remediation measures and regrets that the NCP process has not further contributed to an improvement of the situation for the residents of Kawama and Lukuni-Gare.

The relevant norms

The relevant norms of the OECD Guidelines in this case were of Chapters II (General Principles) and IV (Human Rights).

From the general principles these are the paragraphs A2, A5 A11, and A12; from the human rights section paragraphs 2, 4, and 6.

They state that the enterprises should "respect the internationally recognised human rights of those affected by their activities", "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues", "avoid causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur", and "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship ".

With respect to human rights the Guidelines state that enterprises should "within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur", "have a policy commitment to respect human rights", and "provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts".

6.2.3. Proyeto Gato vs. Tractebel (PDR Laos)

The case was filed on 15th April, 2004 by the NGO Proyeto Gato. The accused company was Tractebel, an engineering company acting worldwide, and which has, in this specific case, been involved in the construction of the Houay Ho dam, situated in the southern province of PDR Laos, in Champassak.

The allegations against Tractebel were aimed at circumstances surrounding the project of the Houay Ho dam and the negative consequences of conducting the project in the way it was carried out, not taking into account the negative impact on the environmental, biological, and social consequences.

Proyeto Gato listed as points of accusation 1. the neglect to complete the necessary environmental impact assessment (EIA) before the beginning of the works, 2. the neglect to

assess the project's impact on endangered species, 3. the non-existence of plans for the effect, the logging necessary for the dam will have on indigenous people, and 4. the failure to avert the negative impacts on health, the social system and environment, which are all caused by forced eviction. For the project of the Houay Ho dam, 3 000 people - this is the content of 12 villages - had to leave their homes and had to be forcibly evicted, as they lived in the watershed area and were not willing to leave.

The process of evaluation lasted a year in which the NCP met with Proyeto Gato in June 2004 and later, in September 2004, had a meeting with the Laotian Minister of Industry. According to the source of OECD-Watch, the result of the meeting with the minister was, that he recognized the problems, requested a copy of the complaint and promised that measures will be taken accordingly. Two further meetings with the parties involved followed in October 2004 and in February 2005. The accused company, Tractebel, refused to grant Proyeto Gato access to the documents it had submitted to the NCP in this case, not willing to share even the environmental impact assessment or its presentation to the NCP. After another six months, in September 2005, the Belgian NCP concluded that no breaches of the Guidelines have occurred and Tractebel was not at fault.Proyeto Gato, very unsatisfied with this result and the lack of transparency as to which facts led to this decision, sent, together with other NGOs, a letter of complaint to the OECD Committee, requiring a clarifying statement in respect to the interpretation of the relevant norms of the Guidelines. The group of NGOs felt that the complaint has not been taken seriously by the NCP and has not been treated according to OECD rules.

The OECD's reaction was to send this letter to all NCPs, but to state in general that "[u]nder the Procedural Guidance for the Guidelines, the Investment Committee is not mandated to act as an appellate body on individual NCPs' decisions, nor is it asked to accept requests for clarification and submission on an NCP's handling of specific instances from parties other than advisory bodies (see the text in parts II.3.c and b in the Procedural Guidance to the 2000 Council Decision). However, in addressing generic issues before the committee that may have been revealed by individual specific instances, the authority in II.4 of the procedural guidance

provides that the Committee may seek expert advice in relation to its work on the Guidelines and the Committee has sought much advice in the past."[78]

As the complaint against the Guidelines' violation was herewith definitely closed unsuccessfully within the possibilities of the OECD-framework, Proyeto Gato turned to the Belgian Ombudsman and claimed that the NCP failed to communicate its interpretatoin of the Guidelines and that the specific instance had been closed with an unsatisfying result. The Ombudsman accepted this complaint, but until today, no decision is known.

relevant norms:

The relevant norms of the OECD Guidelines in its 2000 version in this case were of Chapters II (General Policies), III (Disclosure), and V (Environment).

From the general policies these are the paragraphs II.1, .2; from the disclosure section paragraph III.1; and the chapter on environment includes paragraph V.1.C.

6.3. France

The French NCP[79] is located in the Ministry of Economics and is organized as a committee, composed of envoys of three relevant groups in a procedure before an NCP: the syndicates, the enterprises and the administration (here several ministries can be called upon, e.g. the Ministries of Finance and Industry, Foreign Affairs, Environment, Work, Social Affairs). If considered necessary, the NCP-council can punctually call upon other participants, deemed relevant to a specific instance. This extraordinary enlargement has to be agreed upon by all members of the NCP. The directorate of the fiscal authority is in charge of coordinating the NCP's activities.
The NCP can only take decisions in an unanimous vote, should this not be possible, the presidency is called to decide by taking into account all submitted opinions - this way of decision making has to be indicated in the document of the final decision.[80]

[78] OECD Committee in OECD Watch case 35.
[79] For the webpage of the French NCP: see reference list.
[80] For all further information on the internal regulation, see: https://www.tresor.economie.gouv.fr/File/374625 [latest access: 2013-10-31]

6.3.1. Proyeto Gato vs. Electricité de France (PDR Laos)

The French NCP has so far only dealt with one case where the alleged violation of the Guidelines took place in a LDC. This case has been brought before the NCP in November 2004 by the NGO Proyeto Gato and five other NGOs[81] and is aimed at the practices the company *Electricité de France* supported as main shareholder in the Nam Theun 2 Power Company's (TNCP) the construction of a hydroelectric power dam in the People's Democratic Republic of Laos.

The NGOs criticised that the TNCP, of which EdF holds the majority with 35%, has

- failed to identify, respond to, and consider potentially serious impacts for tens of thousands of people and an ecosystem known for its endangered biodiversity;
- not engaged in adequate and timely consultation with affected communities failing to comply with the Lao government's international labour rights obligations and commitments;
- awarded the Head Construction Contract for the project to Electricité de France without International Competitive Bidding.[82]

The complaint was filed in November 2004 with an urgent note to undertake steps as soon as possible, as the financing for the project depended to a large extent on the development bank's support which was about to be decided in the beginning of 2005. The French NCP reacted promptly and invited the NGOs in December 2004 to a consultation meeting. After a statement by EdF was promised for mid-January the NCP admitted the complaint in February 2005. In April 2005 the NCP issued its statement that no breaches of the Guidelines could be attributed to EdF and that the company had even committed beyond their obligations to good conditions during the project.

According to OECD-Watch's recite of the events[83], the NGOs sent a letter of complaint to the OECD's Investment Committee to blame the NCP of an non-transparent procedure and an ill-

[81] Proyeto Gato was the contact organisation, the other signatory NGOs were Amis de la Terre (France), World Rainforest Movement (Uruguay), Finnish Asiatic Society (Finland), CRBM (Italy), and International Rivers Network (USA).
[82] Press Release by the NGOs on November 25th, 2004 (OECD Watch, Case 55)

founded decision without proper consultation with the complainants; the NCP had also omitted to provide good offices or support the dialogue between the two parties. The request to reopen the procedure was declined by the NCP.

relevant norms:

The relevant norms of the OECD Guidelines in this case were Chapter II, para 2, Chapter V, para 1a), Chapter V, para 2a), Chapter V, para 2b), Chapter V, para 3, Chapter IX, para 1b) and Chapter IX, para 2.

6.4. Finland

The Finnish NCP is a joint consortium, composed of the Finnish Committee on Corporate Social Responsibility and the Ministry of Economy and Employment. The Committee was expressly founded in 2008 to foster national and international efforts on CSR, in this function it also is part of the Finnish NCP. The Committee comprises 14 members, a vice-president and the president. The members recruit themselves from public authorities, representatives of business and labour, NGOs, and other expert groups.The vice-president and president however are chosen by the Ministry of Economics and Foreign Affairs.[84]

6.4.1. Siemenpuu et al. vs. Pöyry Group (PDR Laos)

The underlying situation that lead to the complaint of Siemenpuu and 13 other NGOs against Pöyry Group, a globally active consulting and engineering company, was the Pöyry Energy AG's part in the construction of the Xayaburi hydroelectric dam in PDR of Laos. The complaint was lodged in June 2012. In May 2011 Pöyry Group had been called upon by the government of PDR Laos as technical consultant to "conduct a study on the compliance of the current technical design of the Xayaburi hydropower project with the Mekong River Committee guidelines"[85]. The scope of the work was to establish

- Xayaburi Power Company (Owner) has complied with and satisfied the Mekong River Commission (MRC) Design Guidelines

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[83] OECD-Watch provides a summary of this special instance on its webpage under Case 55.
[84] For the webpage of the Finnish NCP: see reference list.
[85] Pöyry's presentation of its work in the Xayaburi dam project (in OECD Watch: Case 259)

- GOL and the Owner have taken into consideration the comments submitted by the MRC member countries during the Prior Consultation Process
- GOL and owner have complied with the terms of "Prior Consultation Project Review Report on Xayaburi Project", dated 24 March 2011
- Issues relating to development, construction and implementation of Xayaburi or any discrepancies, conflicts and needs for changes arise in connection with comments given by the riparian countries.[86]

As critique arose from many sides against building the dam on the Mekong river, e.g. from neighbouring countries accessing the Mekong River, scientists, experts, and NGOs, PDR Laos continued the project under reference to the Pöyry Group which deemed the continuation of the constructions unproblematic and stated that the called for research could be undertaken parallel to the construction work.

The Mekong River Commission for Sustainable Development's Secretariat reviewed the report Pöyry had brought forward on this subject and refutes this estimate.

The NGOs see in this sufficient proof that Pöyry has herewith violated the Guidelines as it had, with its approval of the continuation of the dam, undermined the cooperative regional process between the various stakeholders that are affected by the situation on the Mekong river. Pöyry is also accused of not conducting responsible due diligence before issuing their recommendations to the Laotian government. The complainants state that Pöyry's actions had negative impacts on the whole Mekong River Basin, such as displacement of villagers and loss of fertile land, income, livelihoods and food security due to alterations of productive freshwater fisheries.

The Finnish NCP requested - as part of the initial assessment - information and comments on the complaint from the Pöyry Group, which Pöyry complied with under the condition that its statement to the NCP remained confidential. In its public statement, Pöyry Group dismisses every accusation against its energy-branch's actions and describes the claim as "completely

[86] ibd. slide 11.

unfounded"[87], as the allegations rested mainly on different scientific views and the assessment report submitted to the Laotian government had been "confirmed and verified in a peer review performed by *Compagnie Nationale du Rhône* as to the adequacy and suitability of the measures proposed"[88].

The complaint was thereafter accepted in October 2012 and a first meeting between the parties was mediated by the NCP in December 2012. At this conference, Pöyry stated that it had no further interest to continue the dialogue with the complainants and withdrew itself from the complaint process. The NCP accordingly issued its final judgement in this case, concluding that Pöyry was responsible under the OECD Guidelines for MNE, but that it could not be held responsible in this case. Finwatch, an NGO that advised the NCP with technical expertise in this case, issued a deviant statement.

relevant norms:

The relevant norms of the OECD Guidelines in this case were of Chapters II (General Policies), IV (Human Rights), and VI (Environment).

[87] Pöyry Group's statement from August 7th, 2012, p. 1.
[88] ibd. p. 2

7. Analysis

7.1.General Remarks

As described above, the analysis is divided into two parts: one part laying down the statistical overview of the selected cases and the second part analysing the NCPs' procedures in the case sample as to their human rights compatibility.

7.2.Statistical Overview of the Case Selection

A small overview of the cases filed under the OECD Guidelines has already been given in chapter 4.2.1.2.. From the global status of complaint procedures I will now zoom in on the situation in Europe to embed the ten cases that were selected for the analysis in a broader picture of the whole European Union.

Of the 174 cases filed globally, 152 were filed in member states of the European Union. The country with most cases filed and dealt with of all member states of the EU is the UK with 40 cases, followed by Germany with 22 cases, the Netherlands with 20 cases, and France with 15 cases.
Of all EU member states, only four countries have cases where the alleged breach of the Guidelines occurred in a LDC; namely the UK, Belgium, France, and Finland. The UK NCP had, as already mentioned, 40 specific instances to deal with, 5 of which with a LDC-connection. Belgium had a total of 14 cases, 3 of them were concluded which means that all cases concluded have an LDC-connection. In France, 15 cases were filed, half of which (7) concluded and one of them with an LDC-connection. With the Finnish NCP 4 cases have been filed of which one of the three concluded had a LDC-connection.

Taking the ten cases selected for the research, it is quite instructive to look at the norms that are alleged to have been breached by the companies in question.

It is not very surprisingly that no violation of Chapter I has been invoked. This chapter consists in both versions mainly of - as the name states - general concepts and principal declarations that are too vague to formulate actual rights or obligations.

The subsequent Chapter II, dealing with General Policies, on the other hand is the one most relied upon as it has been called upon in all the cases of the sample. This is due to the fact that

in the 2000 version of the Guidelines, the only explicit mention of human rights is contained in paragraph 2 of chapter II, which has been invoked by all complainants filing their cases under the 2000 version of the Guidelines[89]. It reads as follows:

> *"Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*
> *[...]*
> *2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."*

The other subparagraphs have only been mentioned by some of the claims, so that a general claim for human rights' breaches can be identified.

In the new version of the Guidelines a separate chapter on human rights has been introduced. It expands much more on the duties of states and also MNEs to protect and respect human rights:

> *"States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations."*[90]

Both cases that were filed under the new version of the Guidelines have been invoking this chapter. It is therefore clear that human rights were an issue in all cases dealt with - in the 2000 version as well as in the version of 2011.

Second on the list of the most invoked subjects are environmental issues, that have been a matter of dispute in six of the ten cases in the sample.

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[89] A more detailed list of the norms breached can be found in the respective chapters dealing with each case and a more elaborate overview of all invoked norms, including subparagraphs and other specifications, has been added to this research in Annex 1.

[90] Of the three most invoked chapters I quote the first paragraph of each chapter to give an impression of its content. For the whole chapter please refer to the Guidelines in their full version.

> *"Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development."* (same text in version 2000 and 2011)

It was invoked in five specific instances under the 2000 version of the Guidelines and in one of the two cases in the 2011 version. Environmental aspects account therefore for more than half of the complaints.

Disclosure has been a problem in four of the cases the NCPs were dealing with under the 2000 version of the Guidelines, whereas it does not come up in the two cases dealt with under the regulations of the new version, where unfair disclosure policies would also have to be invoked under chapter III.

> *"Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns."*
> (version of 2000)

In descending order the following issues were made an issue: unfair competition in three cases, employment and industrial relations in two cases, and the accusation of bribery in one case.

From this listing it can be seen that it is **human rights**, issues on the **environment**, and **disclosure** that are straining the relationship between the MNEs operating from the European Union and the population of some of the LDCs they operate in.

2000 version of the OECD Guidelines			
Chapter	Norm	Cases[91]	Total
Chapter I	Concepts & Principles	--	
Chapter II	General Policies	1, 2, 3, 4, 5, 6, 8, 9	**8**
Chapter III	Disclosure	1, 5, 6, 8	**4**
Chapter IV	Employment & Industrial Relations	6	**1**
Chapter V	Environment	1, 5, 6, 8, 9	**5**
Chapter VI	Combating Bribery	1	**1**
Chapter IX	Competition	1, 6, 9	**3**

2011 version of the OECD Guidelines			
Chapter	Norm	Cases	Total
Chapter I	Concepts & Principles	--	
Chapter II	General Policies	7, 10	**2**
Chapter IV	Human Rights	7, 10	**2**
Chapter V	Employment & Industrial Relations	10	**1**
Chapter VI	Environment	10	**1**

Table 2: Overview of allegedly breached norms under the OECD Guidelines

7.3. Analysis according to HRIA

For the analysis of the specific instances I have decided to employ the standards set for HRIA in the paper of Raza and Baxewanos[92].

For the display of the analysis I have grouped the indicators in three dimensions: "Preliminary Conditions", "Actors", and "Procedure"; each dimension divided into further specifications.

The NCPs are all constructed after a set of rules specified in the OECD Guidelines. They should therefore all fulfil the same criteria and theoretically an analysis of the provisions in the Guidelines would be sufficient to assess the NCPs' HRIA qualities. Yet the fact that the NCPs are organised according to each adherent state's discretion leads to the suspicion that the conducted procedures can still differ from each other in substantial ways. In the following analysis I will therefore not only compare the requirements for HRIA with the general framework of NCPs according to the institutional rules set out in the Guidelines but also draw

[91] The cases are numbered according to their listing in chapter 6; the case discussed under 6.1.1. is number 1, 6.1.2. is case number 2, and so forth.
[92] See the mentioning already in chapter 5.2.

upon the cases of the sample to verify if the requirements and theoretical standards have been fulfilled by the respective NCPs in the particular context.

7.3.1. Preliminary Conditions

The preliminary conditions for HRIA are going to be screened in this first part of the analysis. However, not much analysis of the specific instances will take place at this point as the following indicators merely test the conditions that lead to the process rather than setting rules for the procedure itself. Nevertheless it is an important pre-examination of the procedure and delimits the grounds the NCPs' decisions are based on, which is a vital indicator of the accurateness of their outcomes.

Three general features have been developed with the participation of various stakeholders, taking the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements[93] as a starting point to find a first consensus on minimum conditions for the conduct of HRIA. I will now specify each of these criteria and compare the NCPs' process to it.

The first principle is the demand, HRIA should make an **explicit reference to the relevant human rights obligation**. This claim is being made in order to avoid unspecific grounds which make the result of the assessment more contestable and prone to attacks. Here the NCPs have a solid standing as they operate on the basis of the OECD Guidelines. The Guidelines are internationally recognized and signed by all adhering member states. There is no dispute as to their integrity and they form a very clear-cut and valid framework for the NCPs to work upon.

As to an explicit reference to a human rights basis, the NCPs are also called to investigate human rights breaches if they are alleged in the claim of the specific instance. As pointed out before, all specific instances in the sample have a human rights connection, either under Chapter II paragraph 2 of the 2000 version or under Chapter IV of the 2011 version. Therefore the NCPs have to refer for their examination to an international human rights framework.

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[93] UN, Human Rights Council 2011a, drafted by Special Rapporteur on the Right to Food, Olivier de Schutter

We can see in some cases that the NCPs made explicit reference to very specific human rights obligations, e.g. the UK NCP in the cases of Global Witness vs. Afrimex and JA vs. BHPB:

Global Witness vs. Afrimex:

> "*41. The NCP's consideration is centred on the level of "due diligence" applied to the supply chain by Afrimex. Professor Ruggie[8], defines due diligence as "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities"[9]*."

JA vs. BHPB:

> *"[It is to be examined if] Mozal's actions described above breached Mozambique's 2004 Constitution, interpreted in the light of the United Nations (UN) Universal Declaration of Human Rights, and the African Charter on Human and People's Rights, and also breached the latter Charter."*

In both cases the identified human rights were found to have been violated through the MNEs' actions. It can therefore be said that albeit not all NCPs, but the UK NCP even in the sample of five cases, *does* make explicit reference to the relevant human rights obligations and assesses the accused companies' actions according to those norms.

Secondly, the **process of conducting the HRIA has to be consistent with basic human rights principles**, as those shall not only be the benchmarks to evaluate the outcome but also a standard for the process itself. It is difficult to assess whether the NCPs operate according to human rights standards as the rules they are built upon are certainly human rights approved but make no explicit reference to human rights. Raza and Baxewanos point to the need that special attention should be paid to the principles of participation and inclusion as well as equality and non-discrimination during the procedure[94]. These are principles, however, that are to be found in the OECD Guidelines for the setting up of an NCP. In Part II of the Guidelines (2011) under the title "Procedural Guidance, I. National Contact Points, section C "Implementation in Specific Instances" the text states:

[94] Raza/Baxewanos:HRIA, 15.

> *"The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is* ***impartial, predictable, equitable*** *and compatible with the principles and standards of the Guidelines."*

Furthermore, the inclusiveness of the NCPs' procedures is underpinned by the objective that NCPs are requested to "[seek] the active support of social partners, including the business community, worker organisations, other nongovernmental organisations, and other interested parties"[95].

If human rights based standards are respected in the daily work of the NCPs is however exactly the question that is at the basis of this research thesis. It will be answered in the course of the analysis of the following chapters, which is why an analysis of the specific instances can be omitted at this stage.

The third feature of a properly conducted HRIA is the **effective use of human rights indicators**. Indicators increase the effectiveness and credibility of the conducted assessment as they provide data in quantifiable terms. They are being described as "quantitative or qualitative statements that can be used to describe human rights in situations and contexts and to measure changes or trends over a period of time. (Andreassen/Sano 2004: 15)"[96]

Here as well, the NCPs have a clear pre-setting as they have the regulations and norms in the Guidelines to follow in their assessment. The Commentaries to each chapter elaborating on the content of the norms and their background can be used as benchmarks and indicators for the assessment of the specific instances.

In this context, a comparison of the theoretical concept with the actual process in the sample cases is not adequate for the research goal as it would look at the substantial decisions, assessing whether the indicators have been properly followed by the NCPs or not. For now it is quite sufficient to establish that indicators exist, according to which the NCPs can work.

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[95] OECD Guidelines version 2011, Procedural Guidance, I., A.: 71
[96] Raza/Baxewanos HRIA: 17.

The for HRIA suggested dimension of human rights indicators aims at assessing if and to what extent states have made (binding) commitments to human rights and how the process of implementation is proceeding. This is a part of HRIA that is not adaptable for the topic of this thesis as this dimension exceeds the NCPs role which is why a correspondent indicator can thus not be applied to their procedures.

7.3.2. Actors

The actors involved in the procedure before an NCP are the complainant, the accused company, and the NCP office that takes a neutral position as third party, acting as a mediator and has a partly judicial role when it comes to the decision whether a breach of the Guidelines has occurred.

Until now HRIA have been mostly conducted by NGOs with their subject being states and their political activities. As Raza and Baxewanos point out in their paper this is not the only possible field of application. They encourage other entities to go beyond this point and ask for other international organisations, national human rights bodies or parliamentarian institutions to take up the possibility of conducting a HRIA. Also, the field of the research subject can be broadened and should go on to include not only state policies but also human rights due diligence, government programmes, the actions of MNEs and even individuals.[97] To broaden the scope of application of HRIA and including new actors is what I intend to do for the present analysis.

Of the chapter "How (not) to apply HRIA" I picked one aspect that seemed rather important to me and that can be applied to NCPs as well as to developmental policies: the requirement of an interdisciplinary team to conduct the assessment. Raza and Baxewanos repeat this request when they list the minimum conditions HRIA should fulfil (see also chapter 7.3.3.1.), but include there the aspect of sufficient funding as a necessary prerequisite.

As for the Guidelines, the composition of the "teams" - or NCPs in this case - is left to the adhering states; the directions as to the institutional arrangements are rather general. The

[97] The broadening of the field of application and the possible scope of applicability were especially encouraged by the two authors during a speech at "ie.talks - Human Rights Impact Assessments (HRIA): a New Tool for Development Policy?" on 22nd January, 2014.

NCPs shall be "composed and organised [in a way] that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government"[98]. Some recommendations are made in the Guidelines as to the composition of the NCP, suggesting rather government-close officers, or independent experts with the possibility of including representatives of the business community, worker organisations, and other NGOs.

If we look now at the actual composition of the NCPs in question - the UK, the French, the Belgian and the Finnish NCP - we can see that three of them, UK, French, Belgian NCPs are situated within a ministry whereas the Finnish NCP is the only one structured a little different as a committee of experts was created especially for the purpose of the promotion of CSR and to function as part of the Finnish NCP. The ministry-based NCPs are all situated in the Ministry of Economics and also the Finnish NCP is a joint consortium with the Ministry of Economics and Employment.

As to their composition, the NCPs are all organised as committees, composed of a representative of the administration/ the government, the enterprises and the labour organisations; the Finnish and the British NCP also including independent experts in their NCPs, whereas the Belgian and French NCPs envisage the consultation of external experts only in case of special need. The afore mentioned TUAC also lists the four NCPs in question under those that involve a broad range of government departments in its structure.[99] It is to be noticed positively that all NCPs, except for the British NCP, are categorized as tripartite or quadripartite NCP that involve social partners, NGOs, etc. The British NCP however having an "mulit-stakeholder Independent Board" as second part of the NCP, which should also guarantee the independence and broader horizon of the NCP. TUAC also notes that all four NCPs hold regular consultations with external stakeholders, including trade unions.

It can thus be asserted that the NCPs, not so much as they are conceived but as they were implemented, do consist of an interdisciplinary team as they do not only call one government official to decide. However, the variety of field of experts could be more diverse and it is to

[98] OECD Guidelines in the version of 2011: 71.
[99] TUAC: National Contact Points Comparison.

be hoped that the NCPs make frequent use of the possibility to involve external experts to enlarge the interdisciplinary variety. In non of the sample cases the view of an external expert had been obtained - but to know if an expert opinion would have been needed a substantial review would be necessary, which is again beyond the scope of this thesis.

7.3.3. Procedure

After having analysed the preliminary conditions as well as the actors involved in the procedure, the assessment procedure itself will be in the focus of the examination.

7.3.3.1. Minimum Conditions

In their paper on HRIA, Raza and Baxewanos identify four minimum conditions that were originally developed by the UN Human Rights Council, and which are seen as vital to every HRIA. These indicators are: independence, transparency, inclusive participation, and expertise and funding[100].

Theoretically, the NCPs have some of these principles already laid down as ground rules for their procedures. In Part II of the Guidelines under section A it says:

> *"NCPs will operate in accordance with core criteria of **visibility, accessibility, transparency** and **accountability** to further the objective of functional equivalence."*

On the cases of this thesis's sample as well as on the comparison of TUAC[101], these four key values of a HRIA will be tested to their occurrence in the NCPs' procedures.

a) Independence

"Independence" as a core value of HRIA refers to the one - or better to the team - conducting the examination. The claim is that "these person(s) should always be independent from the body that is designing or negotiating the policy in question"[102].

As this analysis does not examine a policy but an institution's process, the exigence has to be slightly reformulated. It is not the body designing or negotiating the policy but for the here

[100] Raza/Baxewanos: HRIA, 16.
[101] TUAC: National Contact Point Comparison.
[102] Raza/Baxewanos: HRIA, 16.

interested purpose we would have to ask if the person(s) involved in conducting the HRIA are independent from the body that has negotiated and/or ratified the OECD Guidelines and all further documents, the Guidelines refer to and that could become ground for an assessment under the Guidelines.

The independence of an NCP can be discerned by its structure, its financing, and - for the substantial part - through its decision making body where we can measure the impartiality of the NCP. The structure has already been discussed above in chapter 7.3.2. when I described the actors of the NCP's HRIA. Here lies one of the biggest problems for the NCPs that often hinders their impression as an impartial body. As laid down in the above mentioned chapter, the NCPs are all organised or grouped around the Ministry of Economics; some are even headed by government officials. This gives a skewed impression, even if the NCPs are not wholly government bodies but also consist of delegates from NGOs and representatives of the labour force and the enterprises. An important aspect of independence is (personal) impartiality. To this end, TUAC has examined the question if the NCPs have a multi-stakeholder oversight or advisory body. The Belgian, Finnish and UK NCP have, the French NCP does not. However, it turns out in the next question that these advisory or multi-stakeholder bodies do not play an oversight role in the countries where they exist; except for the UK.

Unfortunately TUAC does not describe the factors more specifically that were followed when assessing the question of steps taken by the NCPs to insure their impartiality. According to TUAC, only the UK NCP has taken such steps, leaving the other NCPs behind in the ranking.

It is difficult to assess whether the composition of the NCPs in the case sample had an influence on their decision making, without looking at the cases in detail and also not without making assumptions. We can only compare the requirements of an independent body with the composition of the current NCPs - and there we have to conclude that the independence is not wholly given.

b) Transparency

Transparency is another key value for a HRIA. The lack of transparency has been highly criticized amongst experts in the field of CSR. According to HRIA standards, "transparency includes the publication of the sources and methodology used as well as an open process of

investigation that allows for third parties or the public in general, to make submissions and contribute to the process as this could significantly broaden the information base.[103]

The four NCPs only fulfil this criteria partially. While every one of the examines final statements included a very detailed description of the methods, sources and steps the NCP relied on to come to the said conclusion, they do not encourage public submissions nor have they developed a procedure for third parties to participate in the procedure.

Although in some cases it is not clear from the NCPs final statement who submitted some of the treated documents, there is also no mention of a third party being involved, sending the NCP the material of its own initiative; e.g. in the case of Global Witness vs. Afrimex where the NCP refers to a research of "IPIS" on "Supporting the War Economy in the DRC: European Companies and the Coltan Trade". The final report states that the NCP has received relevant statistics that were more detailed than in the report "directly from IPIS", but it is not clear whether this was the result of the NCP's investigation or if IPIS has approached the NCP.

c) Inclusive Participation

Inclusive Participation should take all persons concerned with a current case or investigation into the procedure as much as possible. HRIA states that affected right-holders should be equipped with all available information and demands that they be consulted directly. Furthermore, the assessment should make explicit reference to their concerns and include recommendations on how to best address these issues[104].

This is an interesting question to approach. Firstly we need to identify the right holder in the case of a breach of the OECD Guidelines. The Guidelines intent is it to protect local communities, but also the protection of the environment is an issue, as well as the local economy regarding the anti-bribery chapter, for example. The identification could be made easier by taking the complainants as right-holders as it is they who file the complaint. However in most cases in general and in all cases contained in our sample, the complainant is an NGO or a consortium of NGOs, who are merely representing the people concerned or are

[103] Raza/Baxewanos: HRIA, 16.
[104] ibid, 16.

protesting against the violation of the rights that are about to happen or have already happened, without a specific (group of) person(s) suffering from the violation. The demand of the HRIA can therefore only be achieved in those cases where there is an actual person or a group of persons in the complainant's position.

In the cases examined, these right-holders however have not been approached directly, but always through their representatives - the NGOs. As the purpose of this claim for direct interaction is to initiate direct communication with the persons concerned, I think it is valid to say that this requirement can be fulfilled even if the contact is upheld solely through the representatives, as a direct contact would be a challenging organisational task with probably not much value-added. This conclusion is supported by the consideration that the right-holders have assigned the NGOs to represent them, entrusting them the defence of their rights. The information of their "clients" can therefore also be left to the NGOs and is not a duty that has to be assumed by the NCPs.

As the NCPs do not enter in direct contact with the right holders, it will be interesting to see if at least enough information is provided in the internet, so that interested people and persons directly affected have access to the information that concerns them. To this end I will draw upon the already mentioned statistic from TUAC.

One of the criteria for comparison was the presentation of the NCPs cases on their websites. The Finnish NCP is the only one of the four not to have a dedicated webpage for the work of the NCP. However, the websites available (the Finnish NCP documents can be found with a more complicated detour on the government's webpage) are in English or French and the material on the websites is equally available either or both of these languages. According to TUAC, key and current OECD materials are even accessible in "national languages" - although this criteria presumably only comprises the official language of the country and no dialects or indigenous languages.

Except for the Finnish NCP again, all the other NCPs have developed procedures for submitting specific instances. This is a tool highly valuable for persons interested in filing a complaint and therefore extremely important for the access to the NCP's procedure. TUAC found that these procedures were, where existing, available in English or French. Concerning

the course of the procedure, the French NCP stands out as the only one not disclosing the level of resources.

An important part of the issue of access is furthermore the accessibility of the outcomes of the procedures. Here TUAC states that all four NCPs publish the outcomes of their procedures, which cannot be confirmed for the case samples examined in this thesis. However, TUAC finds that the Finnish NCP is the only one not publishing its report *to the OECD* on its websites, whereas the other three do and do so in English.

The second requirement of HRIA in this chapter was that the concerns of the right holders might be taken explicitly into consideration and that recommendations shall be issued to resolve them. The first part of this obligation is inherent to the complaint mechanism's structure as the concerns are described in detail in the filing document of the complaints. All NCPs make explicit reference to the claims in their final statements - some much more elaborately than others. Recommendations are not generally included in the final statements which is why the requirement for HRIA to individually addressed proposals for improvement in each case is not met. Further elaborations on the results of the specific instances and the recommendations made therein are included in chapter 7.3.3.2. (*Analysis, Conclusions & Recommendations*).

d) Expertise & Funding

The part on expertise and funding has already been treated partly when examining the indicator of the independence and interdisciplinarity of the HRIA's actors (see chapter 7.3.2.).

As concerns the funding, the HRIA approach requests that the teams conducting the assessment shall have sufficient financial means at their disposal to ensure a high quality examination that is able to include all measures necessary to ensure the principles of participation and transparency.[105]

The Guidelines stipulate that it is each adhering country's own responsibility to finance their NCPs. Part II of the Guidelines under Chapter I (NCPs) paragraph 4 states:

[105] Raza/Baxewanos: HRIA, 16.

"Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices."

This is the basic provision for financing the NCPs, which shows that the Guidelines agree with the HRIA requirement of an adequate budget for the work of the assessment teams.

However there are no specifications on the NCP's websites as to their funding. As the NCPs all form part of the respective Ministries of Economics, their budget will presumably be provided by the Ministry, although no concrete listing could be found.

For the Finnish NCP it can be said that a CSR Action Plan has been published by the Finnish Government on 22nd November, 2012, which includes inter alia the commitment to ensure that the "NCP has sufficient resources to foster effective application of the OECD Guidelines"[106].

In the report of the UK NCP to the OECD Investment Committee an allusion to the budget can be found in the answer to the question if the above mentioned criteria to always allocate enough funding for the NCP's work has led to any changes in the human resources and budget arrangements: "In 2001/12 the UK NCP is funded by DFID but staffed by BIS & MOJ"[107].

Additionally, there was no mentioning by the NCPs themselves of a lack of resources or an investigation being hindered due to shortness of the budget.

It can or must therefore be assumed that the NCPs have sufficient financial means at their disposal to fulfil their tasks.

7.3.3.2. Course of Procedure

The course of a procedure before an NCP is described in Part II of the Guidelines under Section C "Implementation in Specific Instances". There the consecutive steps are:

1. Conduct of an initial assessment to determine whether the issues raised merit further examination;

[106] TUAC: National Contact Points Comparison.
[107] UK NCP: Annual Report to the OECD Investment Committee for 2011/12, p. 7.

2. Offer good offices in the cases admitted, and support the parties involved to resolve the issues. This can take various forms in which the NCPs are guided by a non-conclusive listing of options such as

a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other nongovernmental organisations, and relevant experts;

b) consult the NCP in the other country or countries concerned;

c) seek the guidance of the Committee if it has doubt about the interpretation of the *Guidelines* in particular circumstances;

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 the parties in dealing with the issues.

3. After the conclusion of the procedures the results are to be made publicly available. In the Guidelines three options are envisaged for this purpose:

a) a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision;

b) a report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto;

c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

In their paper, Raza and Baxewanos also describe a model for conducting HRIA and do so in the following eight steps (I have partly merged some points to suit the analysis of an NCP procedure)[108]:

- ***Screening & Scoping***. When conducting a HRIA the researcher shall identify the main human rights issues that can be potentially affected and base all further investigations on these starting points.

NCPs do not have to detect the potentially concerned human rights issues as the allegations are listed in the complaints. This step therefore becomes obsolete.

- ***Gathering Evidence & Consultations***. The gathering of evidence can be carried out in various forms, ideally by adopting a mixed-method approach of quantitative and qualitative methods and research techniques.

NCPs do not have a systematic approach that is generally applied, as their course of action seems adapted to the respective claim and situation. In the specific instances I have examined, the NCPs relied in their research mainly on the submissions of the two parties. The NCPs held meetings and talks with both parties and sought to hear their opinions and explanations in each case. However direct contact to the people directly concerned by the situation was not sought. This is also mentioned in the TUAC's comparison table which shows that none of the four NCPs of the sample have in fact or would be willing to conduct in-host country fact finding missions if necessary.

In the UK cases that involved the UN Panel of Experts on the Illicit Exploitation of Natural Resources and other Forms of Wealth of the DRC, very extensive research has been undertaken by the UN Panel, which was made accessible to the NCP. In the course of action against the company Afrimex, a procedure before the International Development Committee of the House of Commons was initiated, in which more evidence was gathered and witnesses heard. The NCP could also lean on this material for their examination. Additionally they were provided with a TV news report and a research document of an independent research institute (IPIS), however it could not be clarified if the NCP had requested this information or if it was provided by Global Witness or a third party. In the case of JA vs. BHPB the NCP was

[108] Raza/Baxewanos: HRIA, 16.

provided with documents that resulted from another Commission's work and independent newspaper research, however all evidence was brought forward by the parties involved. The other NCPs did either not mention what specific evidence their decision was based on or referred to documents submitted by the parties.

It can therefore be concluded from the present case sample that the NCPs did not gather information themselves but relied on the evidence presented to them. There was no initiative from the NCPs to consult an independent expert, to conduct a field mission, hold qualitative interviews, or any other pro-active investigations. A mixed-method approach as suggested by the HRIA-benchmarks can therefore not be observed.

- ***Analysis, Conclusion & Recommendations***. With the analysis a concrete assessment of the human rights impact should be made, formulated "as strong and concrete as possible"[109], which includes the identification of specific duty-bearers and responsibilities assigned to them.

The analysis of the NCPs are based on the submitted evidence and the communication with the parties. After the completion of the investigation procedure, the analysis begins and conclusions as well as recommendations are formulated without further contact to the parties or the public. The final statement always includes the naming of a person or entity responsible for the alleged (human rights) violations. In a second step, the NCP decides whether this person or entity is actually responsible under the Guidelines of a breach of its norms. Each NCP lists in the reasoning to its final statement the responsibilities accorded to the accused entity or person and an estimation if and how they could have prevented the violation from happening. These elaborations however can be very different in their content and extent: the UK and the Finnish NCP in the sample published reports of 13 to 27 pages whereas the French final statement comprises two pages and the Belgian reports usually have an extent of one to two pages. The latter ones are also very poorly justified and it is not clear on which grounds the NCP has come to its decision.

Furthermore, very often no recommendations are pronounced. Of the ten cases examined, no recommendations were included in the final statement of *JA vs. BHPB* (UK NCP), and only

[109] Raza/Baxewanos: HRIA, 16.

very vague and half-hearted ones in the cases of *Proyeto Gato vs. Tractebel* (Belgian NCP), and *ACIDH et al. vs Compagnie Minière de Sud Katanga* (Belgian NCP).

Good examples of recommendations were published by the UK NCP in the cases *Global Witness vs. Afrimex* and *RAID vs. Das Air*, where the MNEs were referred to the OECD Risk Awareness Tool for MNEs in Weak Governance Zones. This is a tool developed as part of the OECD's Investment Committee's follow up to the Guidelines after the request of the G8 summit in 2005. The Risk Awareness Tool consists of a list of questions for companies that consider investments in weak governance zones.[110]

The Finnish NCP issued extensive recommendations, however without specific proposals as rather with advices for desirable future behaviour. The French NCP, although the statement was rather short, contained strongly formulated advise as to the MNE's involvement in the situation, stressing compensation and efforts to made.

- ***Publication***. HRIA requires a publication of the results at the earliest stage possible. The Commentary on the Procedural Guidance for NCPs, contained in Part II of the Guidelines version 2011, states in this respect:

> *"NCPs are expected to always make the results of a specific instance publicly available in accordance with paragraphs C-3 and C-4 of the Procedural Guidance*." (Guidelines 2011: 84)

Normally, the NCPs publish their final statement, some even issue a press release, in due time.

The UK NCP published all final statements on their website, as well as the Finnish and the French NCPs. The Belgian NCP publishes Communiqués in which the final statements are listed, however in one of the three cases not the complete version of the statement seems to have been uploaded.

Beyond the duty to publish the end-result in case of a non-reached agreement, the Commentary to the NCPs even suggests to communicate the outcome to the respective governmental administration, should this be relevant for the specific case:

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[110] The Risk Awareness Tool can be downloaded from: http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf. [latest access: 2014-01-25]

> *"Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant to the administration of government programmes and policies. In order to foster policy coherence, NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programmes."*[111]

The UK NCP has gone even further in the case RAID vs. Das Air, when they stated at the end of their final statement that they intended to contact trade organisations with an interest in freight forwarding and will request they bring this statement to the attention of their members.[112]

It can be noted therefore that the regular mode of all NCPs seems to be the immediate publication of the results.

- ***Monitoring & Review***. In the HRIA-tool the last of the eight key steps is on monitoring and reviews, that should be conducted continuously or periodically to supervise the progress of the policy with regular reports about it.

Generally, a follow-up mechanism is not part of the framework the NCPs are set up according to. However the Guidelines mention that it could be appropriate in some cases to follow-up with the parties their response to the recommendations that were made by the NCP in its final statement.

> *"If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow-up with the parties on their response to these recommendations. If the NCP deems it appropriate to follow-up on its recommendations, the timeframe for doing so should be addressed in the statement of the NCP."*[113]

In the present case sample, only the final statements of the French NCP contains recommendations that include a follow-up.

In the specific instance of *Proyeto Gato vs. Electricité de France*, the NCP suggests to engage in regular consultations with the company at least once a year, to follow up on the progress made.

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[111] OECD Guidelines in the version of 201: 85.
[112] Final statement of RAID vs. Das Air: 13.
[113] OECD Guidelines in the version of 2011: 85.

The UK, Finnish, and the Belgian NCPs made some recommendations in their final statements, although without an announced follow-up. It has to be mentioned, that in most of those cases no breaches of the Guidelines were concluded and therefore no follow up was deemed necessary. In the UK NCP's case of JA vs. BHPB the NCP explicitly issued no recommendations as it did not ascertain any violations of the Guidelines.

From this it can be said that the possibility of follow-up is employed very reluctantly, although it is unclear if this is due to the NCPs' different levels of exactingness or if the circumstances of the respective cases required different treatment.

As to the possibility of a review the UK NCP is the only one - not only of the sample of four NCPs here discussed, but of *all* NCPs compared by TUAC - to provide a possibility for an appeal. The procedure for initiating a review process set out that "a review may only be requested where the NCP does not accept a specific instance in its initial assessment or following the conclusion of a complaint and the issue of the final statement"[114]. The Steering Board of the NCP will form a Review Committee of its members but only those that have not been particularly involved in handling just this specific instance, to consider the claims being made against the NCP's concluding statement in the case and to give further recommendations if deemed necessary. The possible outcome of such a review are listed in point 7.1. of the above mentioned document:

"If the Steering Board considers that there were good grounds for the request the Board may:

- remit the decision back to the NCP with instructions on how to rectify the procedural irregularity;
- acknowledge that there were deficiencies in the NCP process in the specific instance and make recommendations as to how those errors can be avoided in the future.

However, the Board will not replace the NCP decision with its own appraisal."[115]

[114] UK NCP: Review Procedure for dealing with complaints brought under the OECD Guidelines for MNEs to the UK NCP.
[115] ibd.: p. 7.

The procedure of an NCP would not hinder the installation of a reviewing mechanism or procedure, however, as mentioned above, the British NCP is the only one to have initiated such a review so far.

8. Conclusions

The conducted analysis has shown that NCPs from four different European countries act quite differently in the way they handle specific instances. Starting with the information for potential complainants as to the filing of a complaint with the NCP, the transparency, interdisciplinarity and inclusiveness of the procedure, to the set of recommendations and the possibility of follow-up measures and review mechanisms.

The underlying question of this research was to see firstly, what the problems and issues are that arise between European MNEs doing business in LDCs and secondly, if the existing complaint mechanism set up under the Guidelines of the OECD is a valid tool to assess the human rights impact of the MNEs actions in those countries.

The analysis showed that the main reasons for conflict are perceived breaches of human rights, followed by damage done to the environment and a lack of proper disclosure and information policy on the part of the MNEs.

These issues shall be tackled by the OECD Guidelines' complaint mechanism that foresees a national complaint agency (NCP) to mediate in case of conflicts and to judge, whether the regulations of the Guidelines have been breached in the specific instances brought before them. To assess if this complaint procedure before the National Contact Points lives up to international standards of human rights assessments was the aim of the analysis' second part.

The NCPs' procedures are difficult to judge all at once as their different structure and functioning lead to varying results. Nevertheless it can be noted that the NCPs' structure and way of working lend itself very well to a comparison with the way HRIA work, as the processes are most of the time running parallel. The NCPs fulfilled most of the indicators and conditions required of a HRIA and it can therefore be concluded that NCPs under the OECD Guidelines do constitute a human rights impact assessment tool.

There are some areas where NCPs do not quite fulfil the standards demanded for HRIA, but the general structure is according to the high standards of an internationally recognized HRIA, which leads to the conclusion that NCPs are HRIA-institutions.

TUAC states in its comparative research that the UK NCP is leading in the field in terms of NCP performance. Although this present analysis has not evaluated as many and partly other criteria as the TUAC research, the conclusion of the analysis here conducted will be a similar one.

The UK NCP makes explicit reference to human rights obligations. It has a very transparent procedure and issues final statements that are elaborately founded and include recommendations to the MNEs. The other NCPs, although some upcoming and clearly improving, lag behind in one or more categories. In the areas of transparency and inclusive participation as well as in respect to their independence there is still room for improvement. It would be also very desirable to install some kind of follow-up mechanism as suggested by the HRIA-requirements to ensure and enhance the effectiveness of the NCPs' procedures.

It is to be noted that the OECD Guidelines for MNE are, in spite of CSR being their objective, after all governmentally developed rules and principles. They are not as radical as many NGOs and representatives of civil society would like them to be. In their introductory statements and general comments the Guidelines outline the positive contribution of MNEs to the economic development in "developing countries" as a purely good thing and stress the interest of the adhering governments to intensify transnational business conduct and international direct investment. The OECD is an international organisation that unites most of the economically most potent countries in the world and it must therefore be quite clear that their main aim is, after all, to promote economic goals. However, the installation of the NCPs open a door of possibilities, as these entities are free to evolve and have the potential to become quite more progressive than the government formulated rules they are based on. The basis for this aspiration can be drawn from the analysis in this thesis as it showed that the NCPs evolved quite differently, taking their task of promotion of CSR seriously. This field opens the room for more research in this direction as to which factors influence the NCPs to be more progressive towards the promotion of CSR in their countries.

It is, however, in my opinion albeit a slow yet a powerful and very sustainable approach to contact the involved business entities and win them for the cause of CSR. Because it is only with their support - however reluctant they are in the beginning to give it - that the system with them as one of the main actors, can actually lastingly change.

Table of Abbreviations

CED	Committee for Economic Development
CSR	Corporate Social Responsibility
EC	European Commission
ECHR	European Convention on Human Rights and Fundamental Freedoms
EP	European Parliament
EU	European Union
HR	Human Rights
ILO	International Labour Organization
NCP	National Contact Point
NGO	Non-Governmental Organization
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
TNC	Transnational Corporation
TUAC	Trade Union Advisory Committee
UN	United Nations
UNCTAD	United Nation Conference on Trade and Development
UNIDO	United Nations Industrial Development Organisation
UK	United Kingdom
WTO	World Trade Organization
WBCSD	World Business Council for Sustainable Development

Table of Figures

References

- **Abbott**, Kenneth W.; **Snidal**, Duncan (2000): Hard and Soft Law in International Governance. International Organization 54: 421-456.
- **Australian Human Rights Commission** (2008): Corporate Social Responsibility & Human Rights. Online: http://www.humanrights.gov.au/publications/corporate-social-responsibility-human-rights, access: 30.09.2013
- **Bassen**, Alexander; **Jastram**, Sarah; **Meyer**, Katrin (2005): Corporate Social Responsibility. Eine Begriffserläuterung. In: *zfwu* (6/2), S. 231–236.
- **Bertelsmann Stiftung** (year of publication unknown): Das CSR-ABC. Online: http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-0A000F0A-F5998951/bst/hs.xsl/14743.htm?suchrubrik, access: 26.01.2014
- **Blaufield**, Michael; **Murray**, Alan (2011): Corporate Responsibility. Oxford: Oxford University Press.
- **Bowen**, Howard R. (1953): Social Responsibilities of a Business Man. New York: Harper Brothers.
- **Carroll**, Archie B. (1991): The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. In: *Business Horizon* (34 Iss. 4), S. 39–48.
- **Carroll**, Archie B. (1999): Corporate Social Responsibility. Evolution of a Definitional Concept. In: *Business & Society* (38), S. 286–295.
- **Committee for Economic Development** (1971): Social Responsibilities of Business Corporations. New York: CED.
- **Davis**, Keith (1960): Can Business Afford to Ignore Social Responsibilities? In: *California Management Review* (Vol 2, Iss. 3), S. 70–76.
- **Davis**, Keith (1973): The Case for and Against Business Assumption of Social Responsibilities. In: *Academy of Management Journal* (Vol 16, Iss. 2), S. 312–322.
- **EU Commission** (2001): Promoting a European Framework for Corporate Social Responsibility. Green Paper. Online: http://eur-

lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf, access: 22.01.2014

- **EU Commission** (2002): Communication from the Commission concerning Corporate Social Responsibility: A business Contribution to Sustainable Development. Online verfügbar unter http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:en:PDF, access: 24.09.2013.
- **Hohnen**, Paul: OECD MNE Guidelines: A responsible business choice. OECD Observer No 270/271, Dec 2008-Jan 2009, online: http://www.oecdobserver.org/news/archivestory.php/aid/2772/OECD_MNE_Guidelines:_A_responsible_business_choice.html, access: 22.01.2014
- **Holme**, Richard; Watts, Phil (2000): Corporate Social Responsibility: Making good business sense. Conches (Switzerland): WBCSD.
- **Jamali**, Dima; **Mirshak**, Ramez (2007): Corporate Social Responsibility (CSR): Theory and Practice in a developing country context. Journal of Business Ethics 72 (3): 243-262.
- **Johnson**, Harold L. (1971): Business in contemporary society: framework and issues. Problems in a business society. USA, Michigan: Wadsworth Publications & Co.
- **Klink**, Daniel (2008): Der ehrbare Kaufmann - das ursprüngliche Leitbild der Betriebswirtschaftslehre und individuelle Grundlage für die CSR-Forschung. In: *Zeitschrift für Betriebswirtschaftslehre* (Special Issue 3), S. 57–79.
- **Lenssen**, Joris-Johann; **Van Wassenhove**, Luk N. (2012): A new era of development: the changing role and responsiblity of business in developing countries. In: *Corporate Governance* (12 Iss. 4), S. 403–413. Online: http://www.emeraldinsight.com/journals.htm?issn=1472-0701&volume=12&issue=4&articleid=17051049&show=html&PHPSESSID=n2tu09vsr90j13k41am5jqmme2, access: 24.09.2013.
- **Luetkenhorst**, Wilfried: CSR and the Development Agenda: The role of small and medium enterprises. In: Business and Poverty: Innovative Strategies for Global CSR, Bd. 2008, S. 49–55.

- **McGuire**, Joseph W. (1963): Business and Society. USA, Michigan: McGraw-Hill.
- **OECD** (2000): OECD Guidelines for Multinational Enterprises. Online: mneguidelines.oecd.org, access: 22.01.2014
- **OECD** (2009): Annual report on the OECD guidelines for multinational enterprises 2008. Employment and industrial relations. Paris, France: OECD Pub.
- **OECD** (2011): 2011 Update of the OECD Guidelines for Multinational Enterprises. Online: http://www.oecd.org/daf/inv/mne/2011update.htm, access: 09.09.201.
- **OECD** (2011): OECD Guidelines for Multinational Enterprises. Online: mneguidelines.oecd.org, access: 22.01.2014
- **OECD** (2013): OECD Guidelines for Multinational Enterprises. Responsible Business Conduct Matters. Hg. v. OECD. Online verfügbar unter mneguidelines.oecd.org, access: 24.09.2013.
- **OECD Watch** (2012): OECD Watch Quarterly Update November 2012. Online: http://oecdwatch.org/publications-en/Publication_3904 , access: 08.01.2014.
- **OHCHR** (2011): Guiding Principles on Business and Human Rights. Geneva: OHCHR.
- **Raynard**, Peter; **Forstater**, Maya (2002): Corporate Social Responsibility. Implications for Small and Medium Enterprises in Developing Countries. Hg. v. UNIDO. Wien.
- **Raza**, Werner; **Baxewanos**, Fabiane (2013): Human Rights Impact Assessments as a New Tool for Development Policy?. Wien: ÖFSE.
- **Schiebl**, Walter (year unknown): CSR in der Lehre. Online: http://www.ethacos.com/fileadmin/user_upload/pdfs/CSR-in_der_Lehre.pdf, access: 22.01.2014
- **Thannesberger**, Benjamin (2012): The OECD Guidelines for Multinational Enterprises and their Complaint Mechanism - Evaluation and Statistical Analysis of the Case Law. Masterthesis. University of Vienna.

- **TUAC** (year unknown): National Contact Point Comparison. Online: http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp [accessed: 2014-01-15]
- **UK NCP** (2012): Annual Report to the OECD Investment Committee for 2011/12. Online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34809/12-p98-uk-ncp-annual-report-oecd-investment-committee-2011-12.pdf, access: 26.01.2014
- **UK NCP**: Review Procedure for dealing with complaints brought under the OECD Guidelines for MNEs to the UK NCP. Online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31804/11-654-review-procedure-uk-national-contact-point.pdf , access: 27.01.2014
- **UN**: Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. Annex 1. Online under: http://www.un.org/news/dh/latest/drcongo.htm , access: 14.12.2013
- **UNIDO** (2002): Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries. Vienna: UNIDO.
- **Votaw**, Dow (1973): "Genius Became Rare: A Comment on the Doctrine of Social Responsibility". California Management Review, Spring73, Vol. 15 Issue 3.

Websites:

- **Access** (Belgian NGO): http://accessfacility.org/oecd-ncp-belgium-111111-vs-george-forrest-international-group [access: 07.01.2014]
- **Asian Human Rights Commission**: http://www.humanrights.asia/resources/journals-magazines/article2/0902/reflection-on-article-2-of-the-iccpr-the-role-of-human-rights-activists-in-diagnosing-the-lack-of-effective-remedies [accessed: 15.01.2014]

- **BIAC**: http://www.biac.org/mne_guidelines.htm [accessed: 22.01.2014]

- **NCPs websites**:

  Belgian NCP: http://www.oecd-guidelines.fgov.be

  Finnish government website: http://www.tem.fi/index.phtml?l=en&s=888

  French NCP: http://www.tresor.economie.gouv.fr/pcn

  UK NCP: http://www.bis.gov.uk/nationalcontactpoint

- **OECD Watch**: www.oecdwatch.org [accessed: 22.01.2014]

  Case sample analysed in this thesis:

- ACIDH et al vs. Compagnie de Minière de Sud Katanga: http://oecdwatch.org/cases/Case_250
- 11.11.11. et al vs. George Forrest International SA: http://oecdwatch.org/cases/Case_64
- Proyeto Gato vs. Tractebel: http://oecdwatch.org/cases/Case_35
- Siemenpuu et al vs. Pöyry Group: http://oecdwatch.org/cases/Case_259
- Proyeto Gato vs. Electricité de France: http://oecdwatch.org/cases/Case_55
- Justica Ambiental vs. BHP Billiton: http://oecdwatch.org/cases/Case_189
- RAID vs. Avient: http://oecdwatch.org/cases/Case_40
- RAID vs. DAS Air: http://oecdwatch.org/cases/Case_41
- RAID vs. Oryx: http://oecdwatch.org/cases/Case_39
- Global Witness vs. Afrimex: http://oecdwatch.org/cases/Case_114

- **Stadt Münster**: www.muenster.de/stadt/agenda/thesen/glossar.htm [accessed: 24.09.2013]

- **UN** Website on LDCs: http://www.un.org/en/development/desa/policy/cdp/ldc/profile [accessed: 22.01.2014]

Annexes

Annex 1: Overview of the specific allegations made under the Guidelines in the cases sample

OECD Guidelines 2000

Chapter		Case[116]	Total
Chapter I	Concepts & Principles		
Chapter II	General Policies		
Paragraph I			
Paragraph II			
1		6, 8	2
2		1, 2, 3, 4, 5, 6, 8, 9	8
3		6	1
4		6	1
5		4, 5	2
6		6	1
7		6	1
10		3	1
11		1, 6	2
Paragraph III			
1		5	1
2		5	1
3		1	1
4		1	1
Chapter III	Disclosure		
Paragraph III			
1		5, 6, 8	3
2		5, 6	2
3		1	1
4		1, 6	2
5		6	1
Chapter IV	Employment & Industrial Relations		
Para IV			
4		6	1
Chapter V	Environment		
Paragraph V			

[116] The number of the cases is corresponding with the listing of the cases under chapter 6.

1		5, 6, 8, 9	4
2		5, 9	2
3		6, 9	2
6		1	1
7		6	1
Chapter VI	Combating Bribery		
Paragraph VI			
1		1	1
5		1	1
Chapter IX	Competition		
Paragraph IX			
1		1, 9	2
2		6, 9	2

OECD Guidelines 2011

Chapter		Case	Total
Chapter I	Concepts & Principles		
Chapter II	General Policies		
A1		10	1
A2		7	1
A5		7	1
A11		7, 10	2
A12		7, 10	2
A13		10	1
Chapter IV	Human Rights		
Para 2		7, 10	2
Para 3		10	1
Para 4		7	1
Para 6		7	1
Chapter V	Employment and Industrial Relations		
Para 2		10	1
Para 3		10	1
Chapter VI	Environment		
Para 4		10	1
Para 6		10	1
Para 8		10	1

Annex 2: German Abstract

In der vorliegenden Arbeit wird der Versuch unternommen, die Nationalen Kontaktstellen (NKS), die als Beschwerdemechanismus der OECD Richtlinien für multinationale Unternehmen eingerichtet wurden, auf ihre Qualität als Instrument zur Beurteilung von Menschenrechts- bzw. CSR Verletzungen zu überprüfen.

Zu diesem Zweck wird der "Human Rights Impact Assessments"-Ansatz (HRIA) herangezogen. Dieser in der Literatur und von internationalen Organisationen maßgeblich mitgeprägte Forschungsansatz stellt ein Mittel dar, um die Auswirkungen von zu prüfenden Regierungsabsichten, Entwicklungszusammenarbeitsprogrammen, etc. auf die menschenrechtliche Situation vor Ort zu bewerten.
Die Parallele zu den NKS der OECD Richtlinien ergibt sich daraus, dass diese dazu konzipiert wurden, CSR Verletzungen durch multinationale Unternehmen festzustellen, während HRIA darauf ausgelegt ist, die Verletzung internationaler Menschenrechtsnormen durch Staaten und andere Akteure festzustellen. Es ergibt sich daraus eine Anwendbarkeit des HRIA-Ansatzes auf die Struktur der NKS, als deren Ergebnis erwartet werden kann, eine Aussage über die Konformität der NKS Verfahren mit internationalen Standards eines menschenrechtlichen Überprüfungsprozesses zu treffen.

Es wurden zu diesem Zweck die Beurteilungskriterien aus dem HRIA-Konzept isoliert und auf die Struktur der NKS sowie auf die von diesen geführten Verfahren angewandt. Zur Veranschaulichung der Verfahren wurden jene Fälle ausgewählt, bei denen die vorgebrachte Verletzung der Richtlinien in einem der ärmsten Länder der Welt (*least developed country*) geschehen ist und für die ein multinationales Unternehmen mit Sitz in einem EU-Mitgliedstaat verantwortlich gemacht wurde.

Um eine Einbettung der NKS in ihr Arbeitsumfeld zu erhalten, beinhaltet die Analyse einen einleitenden Teil in dem auf die verletzten Normen eingegangen wird und diese aufgeschlüsselt werden, um die Probleme zu zeigen, die in dem Verhältnis zwischen

Die Ergebnisse daraus sind interessant und aufschlussreich und werfen weitere Fragen im Hinblick darauf auf, weshalb die verschiedenen NKS in ihren Leistungen und Ergebnissen derart unterschiedlich sind.

Annex 3: **Curriculum Vitae**

Education:

1992 - 1996	primary school Julius- Meindl Gasse
1996 - 2004	secondary school AHS Maroltingergasse
May 2004:	A- levels finished with excellent success
Sept 2004 - July 2005	Au- Pair and language studies in France, Côte d'Azur
2005 - 2011	Master of Law (University of Vienna)
February - June 2009	semester abroad in Fribourg (Switzerland)
2005 - 2014	Master Degree in International Development (University of Vienna)

Professional Qualifikation:

- Master of Law to be completed in April 2011 at the University of Vienna
- Additional Specialization in "International Relations" and "Human Rights" (each specialization concluded with a diploma)
- Master in "International Development" to be completed in March 2014 at the University of Vienna

Employment history:

since Nov 2012	legal adviser for refugees and aliens (Diakonie Flüchtlingsdienst)
Jan 2012 - Oct 2012	legal adviser for refugees and aliens (Volkshilfe Wien)
Aug 2011 - Dec 2011	assistant to the judge at BG Fünfhaus and LG für Strafsachen Wien
Nov 2010 – Jan 2011	voluntary internship at the UNHCR Office in Austria
Dez 2009 – June 2010	voluntary internship at „Ludwig Boltzmann Institute for Human Rights" in the department of „children's rights, women's rights and human trafficking"
Dez 2009 – Jan 2010	voluntary internship at „Kindernothilfe Österreich" (NGO lobbying children's rights)
August 2009	English teacher and youth coach at "Young Austria- holiday camps"
July 2009	Internship at the lawyer's office Fiebinger, Polak, Leon & Partner

Aug- Sept 2008	voluntary internship at the Austrian Permanent Mission to the United Nations and other International Organisations in Geneva
August 2007	Internship at the lawyer's office Wolf Theiss & Partner
August 2006	Internship at the lawyer's office Wolf Theiss & Partner
September 2005	Internship at Erste Bank (customer service)
July- August 2003	voluntary service in a Swedish Youth Center (Holsby Brunn)
August 2002	Internship at S- Bausparkasse (customer support service)

Experiences abroad:

2003: language and cultural exchange with Liège (Belgium) in the course of a school exchange programme
2003: working visit in Vetlanda (Sweden)
2004: language studies in Cork (Ireland)
Sept 2004- July 2005: language studies and working visit in Nice (France)
Aug – Sept 2008: working visit in Geneva (Switzerland)
Feb. – June 2009: study visit in Fribourg (Switzerland)

Language Skills:

German:	mother tongue
English:	fluent in spoken and written; excellent knowledge of the language
French:	fluent in spoken and written; very good knowledge (oral: C1; written: B2)

Honorary functions:

Honorary functions in the Protestant parish church „Messiaskapelle"in Vienna:

- since 2001: Substantial and organisational planning of educational courses and teaching as preparatory courses for Confirmation (14- year old teenager), project planning, event organisation;
- since 2004: Leader of the youth work of the Parish;
- since 2012: Member of the Board of the Human Rights NGO "Österreichische Liga für Menschenrechte"