

## **OECD National Contact Points and the Extractive Sector**

### **Workshop Report – Draft**

23 March 2012, The British Academy, 10-11 Carlton House Terrace, London

#### **1. EXECUTIVE SUMMARY**

The 2011 revision of the OECD<sup>1</sup> Guidelines for Multinational Enterprises (“the Guidelines”)<sup>2</sup> represents a significant development and an opportunity for all parties to the OECD process – governments, civil society, trade unions and businesses – to improve the protection of and respect for human rights. The revised Guidelines include an entirely new chapter on human rights that builds on the United Nations Guiding Principles on Business and Human Rights and strengthens the possibility of bringing complaints for mediation to National Contact Points (“NCPs”) established pursuant to the OECD Guidelines. The aim of the Workshop in London was to raise awareness of the potential impact of the revised Guidelines and ways in which they might be used constructively to best protect human rights.

The extractive sector was chosen as the focus for the workshop as nearly half of all existing complaints to NCPs have related to this broad sector. It therefore represents a significant amount of prior experience and insight in applying and participating in mediations under the Guidelines. As one speaker from the mining sector put it, the ‘social license to operate’ is now as core to operations as any technical issue, and there are often very significant business costs when this license is lost and trust breaks down. In this way, mediation as established by the OECD Guidelines, particularly when professionally and impartially managed, whilst still being overseen by the Home State, is a very important business tool that can help maintain the social license to operate or go some way towards restoring it. The work of NCPs can be seen as a valuable resource opportunity for all businesses seriously engaged in respecting the rights of individuals and their communities, but may also be seen as a threat to those businesses that are not seeking to conduct their activities in a responsible manner.

The Workshop reflected emerging lessons around how NCPs can operate most effectively against their core criteria set out in the Implementation Procedure of the OECD Guidelines<sup>3</sup> of visibility, accessibility, transparency and accountability to further the objective of functional equivalence between NCPs. A number of critical factors raised during the Workshop were: the competency and capacity of the NCP in relation to mediation and how professionals were engaged; the perceived and actual impartiality and credibility of the NCP; consistency and timeliness in dealing with complaints; understanding of the OECD Guidelines themselves; and local knowledge and capacity relating to where the complaint was located.

Many of these issues are reflected in the wording of the revised Guidelines. There was broad support from participants at the workshop for the main additions: the new chapter relating to human rights; the more comprehensive approach to the full spectrum of business relationships; additions to existing specialized chapters; clearer and reinforced procedural guidelines; and a pro-active implementation

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<sup>1</sup> The Organization for Economic Co-operation and Development (OECD)

<sup>2</sup> [http://www.oecd.org/document/28/0,3746,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html)

<sup>3</sup> Implementation Procedure for OECD Guidelines, Procedural Guidance, p. 71,  
<http://www.oecd.org/dataoecd/43/29/48004323.pdf>

agenda. It was also noted that the addition of an NGO (OECD Watch) as a key implementation partner, alongside the main business association (BIAC) and trade union (TUAC) groups, was an important development.

It was clear from discussions during the workshop that whilst much had been achieved in Paris during 2011 to empower the NCPs, the effectiveness of these reforms would be determined in quality and quantity of NCP activity and statements over the months and years ahead. Early indications are that there will be an upsurge in activity, particularly amongst NCPs that have been less active over recent years. Participants noted that while complaints relating to the extractive sector may continue to represent the largest number by sector, interest in other business sectors is likely to increase as well – in particular those sectors with significant global supply chains. Some NCPs are actively engaged not only in developing their own capacity to respond to such changes, but also in supporting other NCPs through specific training and capacity-building exercises. As the profile and reputation of NCPs increases so will the workload.

Some fundamental challenges remain. The first relates to the level of trust between some of the stakeholders involved and also their perceptions about the true motivations of others. Transparency on the NCP process and outcome was highlighted by many as key to building trust, while others emphasised the need for confidentiality. All recognized the need to protect business confidentiality, but results of mediation under the OECD Guidelines would not normally constitute such a breach. The Workshop discussion surfaced levels of mistrust that exist between some businesses and civil society organizations when entering into mediation. Also evident is a lack of trust by stakeholders in the commitment of some governments to administer mediation processes rigorously and impartially. One business representative underscored that the NCP also needed to be seen as competent and trusted by both parties in order to achieve a mediated result.

A second challenge is the ‘agreement to disagree’ between NCPs as to whether or not public statements at the end of the NCPs mediation process, sometimes determining specific responsibilities for human rights harms (i.e. ‘determinations’), should be part of the NCP function. For a number of NCPs, such determinations are clearly a core part of operations and are also perceived to be a useful way of encouraging companies into a mediation process. Others do not share this view and point to the possibility of public statements affecting the motivations of those bringing complaints and their willingness to enter mediation in good faith.

Arguments for and against NCP public determinations will not be settled lightly or quickly. However, given that all NCPs are now governed by the principle of transparency, and public disclosure at key points in the process, consensual statements involving all the parties might also appear more regularly – highlighting original differences, but also common understandings of human rights due diligence and remedial action. Greater disclosure by all NCPs about the participation of all parties in the process and assessment of specific instances, through consensus whenever possible and if necessary without consensus, should begin to build a more virtuous circle.

As NCPs build up further experience around applying the human rights chapter of the revised Guidelines, in particular with respect to the human rights due diligence provisions, and begin to make these findings public, greater clarity will be achieved for all participants around expectations of companies in addressing human rights. One business representative stated that companies falling short of these expectations, and not willing to enter into mediation might face increasing pressure from investors, the media and politicians to do so. Arguably, the consequences for businesses not willing to engage in NCP mediation have been light to non-existent in the past, but might be more significant in the future.

There was a generally expressed view amongst many NCP participants in the workshop that it was constructive to engage with businesses directly outside of the context of a specific complaint and that events such as the one held in London could help enable the ‘pro-active implementation’ agenda – to apply the Guidelines in a pro-active and preventive way in order to minimize situations that rise to a level of breach of the Guidelines. Extractive companies appear to be making progress in becoming more

familiar with the NCP network and their ability to use NCPs for advice and other functions and not just in response to complaints. Similarly, NCPs are recognizing the benefits of raising their profile amongst a much wider swath of civil society and trade unions and to communicate proactively the benefits of mediation. Industry organisations, such as the International Council on Mining and Metals (ICMM), have also proven to be valuable contributors to this process.

**Box One: The main areas of discussion at the Workshop**

- The opportunity presented by the revised Guidelines
- Public determinations: different views of the NCP role remain
- Building trust
- What makes mediation effective?
- Likely trends associated with a more comprehensive approach
- The interpretative role of NCPs
- Consequences and outcomes
- Pro-active implementation agenda

These issues are discussed further in Section Three of this report.

## **2. BACKGROUND TO THE WORKSHOP**

The Workshop was held in London on 23 March 2012 under the Chatham House rule of non-attribution. The report does not attribute specific comments to any individuals, although a full list of those who attended can be found in the Appendix. Specific references are made to organizations in this report when information was presented formally at the Workshop and is derived from publicly available material. Participants in the Workshop included representatives from 12 different NCPs (from Europe, South America and North America), 19 extractive companies, as well as investors, business organisations and associations and 13 civil society organizations and trades unions. The Workshop was organized by the Institute for Human Rights and Business (IHRB) and financed by the Norwegian National Contact Point. The event was also supported by the International Council on Mining and Metals, many of whose members attended.

### **2.1 Background to the OECD Guidelines and the role of NCPs**

The OECD Guidelines on Multinational Enterprises currently<sup>4</sup> list 42 adhering Governments: 34 of whom are OECD members<sup>5</sup> as well as Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. All participating Governments are required to establish and facilitate the activities of a National Contact Point but there is no single organisational format for doing so: twenty NCPs are single government departments, eight are multiple government departments, two are bipartite (Government and Business), nine are tripartite (Government, Business and Trade Union), one is quadripartite (Government, Business, Trade Union and NGO) and another two are constituted of independent experts. Denmark has recently become the first state to re-instate its NCP through dedicated primary legislation – it is perhaps too early to determine whether this represents an

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<sup>4</sup> OECD (2011) Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future; OECD Publishing, Paris.

<sup>5</sup> The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

additional trend.

As of March 2012, 62 (48%) of the 128 OECD Guidelines cases brought forward by civil society organisations relate to the extractive sector<sup>6</sup>. Of these, the top five subject countries have been: Democratic Republic of Congo (17), Turkey (9), Zambia (7), Argentina (3) and Papua New Guinea (3). The NCPs involved in dealing with the most extractive industry cases have been the UK (13), United States (9), Canada (8), Belgium (7), Norway (4) and the Netherlands (4). The effectiveness of the outcomes in relation to all these cases is contested, but OECD Watch figures suggest that the practice of the NCPs vary greatly. Only a small minority assessed the merits of the claim thoroughly, while the majority of cases could not be classified as having been dealt with satisfactorily.

In 2011, member states agreed significant developments to the OECD Guidelines for Multinational Enterprises. Changes include:

- A new chapter specifically addressing human rights and based on the United Nations 'Protect, Respect, Remedy' framework and Guiding Principles;
- A new and more comprehensive approach, including the application of due diligence to supply chains and other relevant business relationships;
- Significant modifications to existing specialized chapters of the Guidelines (such as labour and environmental standards, bribe solicitation and extortion);
- Clearer and reinforced procedural guidelines, including on transparency, to strengthen the work of NCPs;
- A pro-active implementation agenda to help enterprises and other stakeholders address emerging changes in the area of corporate responsibility.
- New partners mentioned in the introduction as well as the addition of an NGO (OECD Watch) as a key implementation partner, alongside the main business association (BIAC)<sup>7</sup> and trade union (TUAC)<sup>8</sup> groups.

## **2.2 Agenda of the Workshop:**

### *Session 1: Opening*

Following introductory remarks by the Institute for Human Rights and Business, the Norwegian National Contact Point and the International Council on Mining and Metals, opening presentations were given by Hans Petter Graver, Chair of the Norwegian National Contact Point, and Roel Nieuwenkamp, Managing Director, Dutch Ministry of Economics (member of the OECD Investment Committee and chair of the 2011 working party for the new Guidelines). The session was chaired by Aidan Davy, Director of the International Council on Mining and Metal.

### *Session 2: The role of advice, dialogue and mediation: what have we learned so far?*

Presentations were given by Dina Aloi, Vice President, Corporate Social Responsibility, Goldcorp Inc; Austin Onuoha, Executive Director, Africa Centre for Corporate Responsibility; Herman Mulder, Independent Member, Dutch National Contact Point/ GRI Chair. The session was chaired by Caroline Rees, President of Shift.

### *Session 3: The role of communication, public statements and determinations: what have we learned so far?*

Presentations were given by: Danish Chopra, Dept. for Business, Innovation and Skills, UK National Contact Point; John Gilbert, Senior Counsel, BP plc; Joseph Wilde-Ramsing, Senior Researcher, SOMO (OECD Watch). The session was chaired by Chris Avery, Director of the Business and Human Rights Resource Centre.

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<sup>6</sup> Source: OECD Watch (2012) – data prepared for the meeting.

<sup>7</sup> Business and Industry Advisory Committee (BIAC) to the OECD.

<sup>8</sup> Trade Union Advisory Committee (TUAC) to the OECD.

#### *Session 4: The responsibility to respect: the potential contribution of National Contact Points moving forward*

The discussion was initiated by reflections from: Hege Rottingen, Head of NCP Secretariat, Norwegian Ministry of Foreign Affairs; Vicky Bowman, Global Practice Leader, Rio Tinto plc; Gregory Maggio, US Department of State, Special Advisor to National Contact Point. The discussion was chaired by John Morrison, Executive Director of the Institute for Human Rights and Business.

### **3. MAIN AREAS OF DISCUSSION**

#### **3.1 The opportunity presented by the revised Guidelines**

The revised Guidelines bring a particular focus to human rights issues as well as a wider perspective on more complex business relationships than had previously been the case. As a significant intergovernmental state-based mechanism for interpreting the United Nations 'Protect, Respect and Remedy' Framework and Guiding Principles that have been incorporated into the Guidelines, the work of NCPs presents an opportunity for all parties to better understand and apply the corporate responsibility to respect human rights in company operations and business relationships. The NCP process also presents a significant opportunity to develop practice and expertise in dealing with specific grievances – a principle that is core to the underlying UN Guiding Principles and OECD Guidelines.

In order to understand the full nature of the opportunity, it is important to be clear about what the OECD Guidelines and NCPs are not intended to do, or, nor likely, to accomplish. First, it would be a mistake to see NCPs as providing remedies akin to legal remedies that might be delivered by a court of law in most jurisdictions.<sup>9</sup> As one speaker put it:

*“A system primarily focused on mediation is not always appropriate for resolving cases of grave human rights abuse and environmental damage which can be associated with extractive industry cases.”<sup>10</sup>*

This then puts limits on the nature of some of the cases that might be brought forward or the forum in which they are addressed.

Second, the way in which cases are dealt with under the OECD Guidelines is significant. In cases where courts are in practice unavailable for victims of human rights abuses, the NCPs may represent the only available arena for dialogue with a company accused of actions which are in breach of human rights standards. If dialogue is rejected, a NCP final statement may be better than nothing, and in some cases the best solution out of available options. The UK NCP “Vedanta case”<sup>11</sup> and the Norwegian “Intex case”<sup>12</sup> provide two such examples.

NCP participants in the workshop underscored that it is unwise to expect NCPs to be too proactive in finding complaints themselves, due to limited resources and also their own neutrality. Complaints need to come from stakeholders themselves. NCPs are also aware that they might be distant geographically from affected communities and it is companies themselves that are often best placed to address alleged harms, provide redress and achieve adequate settlements. Nevertheless, some OECD Governments do have significant diplomatic and research capacity available for their NCPs, at embassy and consular

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<sup>9</sup> It is noted, however, that mediation is an acceptable outcome of some court-based legal mechanisms, such as family law or what might be labeled ‘alternative dispute resolution’ mechanisms.

<sup>10</sup> Quote from a Workshop participant.

<sup>11</sup> [www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases](http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases)

<sup>12</sup> [www.regjeringen.no/upload/UD/Vedlegg/ncp/intex\\_final.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf)

level in particular countries. Whilst the legal principle of exhausting all local remedies applies in the case of hard law mechanisms, the 'soft law' status of the OECD Guidelines does allow for immediate and direct trans-national involvement – particularly if the main intention is to mediate.

**Box Two: Effectiveness criteria for non-judicial grievance mechanisms<sup>13</sup>**

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm.

There was general agreement at the Workshop that significant improvements had been made in the revised OECD Guidelines to align with most of these effectiveness criteria, specifically "NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence." Speakers tended to link the legitimacy of the mediation in large part to the quality of the process, highlighting:

- The quality of the NCP's performance relating to the effectiveness criteria listed above;
- The capacity and expertise of the NCP to mediate in a timely and professional manner (with some hiring professional mediators as part of the process), and to undertake authoritative research as or when this is appropriate;
- The need for trust between all stakeholders is central and related to necessary levels of accountability and transparency balanced with necessary confidentiality;
- Clarity of expectations;
- The whole experience has to be meaningful and to produce tangible results for those concerned and most importantly those on whose behalf the complaints are lodged – the victims themselves.

### **3.2 Public Determinations: diverse perspectives on NCP roles remain**

Participants agreed that the 2011 revisions to the OECD Guidelines constituted an overall improvement

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<sup>13</sup> Included in the United Nations, 'Protect, Respect, Remedy' Framework on Business and Human Rights (2008) and the Guiding Principles (2011), United Nations Human Rights Council, Geneva.

and step forward although it was suggested that more could have been done to ensure NCPs reform themselves. It was also noted that the extent to which the OECD Investment Committee will seek to guide the work of NCPs moving forward remains in question.

*"It is best to be transparent about the fact that OECD Member States could not reach a common position on the determination processes: some see them as an essential part of the work of NCPs, others do not. In the case of the Norwegian NCP, for example, determinations are a key part of the mandate and an expectation of wider society."<sup>14</sup>*

The revised Guidelines do not require NCPs to make public determinations against a business, should they fail to engage in mediation or do so in bad faith, but neither do they proscribe this. Three of the NCPs that best fulfil the effectiveness criteria and have also succeeded in mediation in recent years – those of the UK, the Netherlands and Norway – have all made public determinations. This might suggest the potential effect of public determinations in achieving focus and outcome in mediations as some participants claimed. Others argued that the public determinations have been most attractive to NGOs lodging complaints. Moving forward, diverse views amongst NCPs on this issue will likely continue, but greater alignment around the process and scope of the Guidelines in most other respects should create a more level playing field.

### **3.3 Building Trust**

Trust seemed to a central commodity for all present at the Workshop. On the positive side, the fact that the Workshop was able to bring together such diverse stakeholder groups in a context outside of the OECD in Paris was a positive indication of good faith surrounding the revised Guidelines. So too, as was noted several times, was the incorporation of OECD Watch (the specialist NGO focusing on the OECD Guidelines) as a named actor to the Guidelines themselves.

Whilst it is clear that trust exists between some extractive companies, some NGOs and some trade unions, it would be wrong to underestimate the level of mistrust that remains between constituencies. The concept of legitimacy has a core place in the UN Guiding Principles in relation to the effectiveness of grievance mechanisms (see Box 1 above) and it can be seen as a cornerstone to trust more generally in relation to the OECD Guidelines. There is a strong correlation: trust cannot be developed without legitimacy, nor can legitimacy be developed without trust. In this way, the governance and operational integrity of the NCP is critical.

Transparency and disclosure were seen as important markers for building relationships and trust if balanced with the need to retain confidentiality at the mediation stage and with regards to any information that might harm the safety and wellbeing of participants or reveal commercially confidential information that might significantly damage the company's interests.

Perhaps the most difficult trust-deficits to address were perceptions of bad-faith between the motives of companies and civil society and vice versa. It was clear that there are specific cases where both parties feel that the other entered mediation with no intention of it succeeding, or refused to enter mediation at all hoping the complaint would then disappear (from a business perspective) or that the NCP might initiate research leading to a possible public determination with an opportunity to highlight this in the press (from the perspective of civil society). Such alleged 'gaming' of the system is perhaps inevitable to some degree, but it is clearly incumbent on NCPs moving forward to be rigorously fair in their assessment of motivations. Such assessments cannot be blind to the resources available to the parties. Significant imbalances of power, capacity and expertise between parties should also be factored into NCP engagement.

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<sup>14</sup> Quote from a Workshop participant.

### **3.4 What makes mediation effective?**

There is no single and comprehensive data set on what makes mediation between business and civil society on issues of human rights effective, but experiences are accumulating. For example, experience in the Niger Delta over recent years shows a broad range of issues being raised during mediation (see Box Three below).

**Box Three: Most frequently cited specific issues raised by communities in mediation with extractive companies in the Niger Delta, Nigeria.<sup>15</sup>**

Land/water  
Funding  
Leadership  
Employment  
Scholarship  
Exclusion  
Preferential treatment/ double standards  
Communication  
Prevention of interface with company contractors  
Lack of remuneration for  
Over-bearing influence of company  
Side-tracking of existing community governance structures  
Non-recognition of traditional rulers  
Lack of trust  
Perception that company imposes decisions  
Contracts  
Unclear allocation of roles/ responsibilities

Other examples from a range of countries discussed during the Workshop address similar issues. Experiences were shared both from BP plc and the UK NCP about mediation processes relating to the Baku-Tbilisi-Ceyhan Pipeline and public commitments made as a result of the process were discussed. This contrasted with a number of other British companies who have refused to engage in mediation and some of whom have been the subjects of determinations by the UK NCP.

### **3.5 Likely trends associated with a more comprehensive approach**

The consequences of a more comprehensive approach under the revised OECD Guidelines could only be speculated at as most NCPs have yet to undertake any mediation, make statements or determinations since the revised Guidelines came into effect in 2011. However, the Norwegian NCP's experiences both of mediation and determination might be indicative of a significantly more intensive and rigorous process over the months and years to come. Box Four below describes the main trends identified during the Workshop.

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<sup>15</sup> Research BY WHO? conducted in the Nigeria Delta with over one hundred community-based organizations and presented at the Workshop, African Centre for Corporate Responsibility – DATE? Weblink? etc.



#### **Box Four: Trends in OECD Guidelines implementation**

- Increased activity across a greater number of NCPs over the months and years ahead is expected, along with a growing need for increased oversight by the OECD Investment Committee to help ensure consistency of approach;
- Differences of perspective concerning public determinations will remain one area of significant distinction between NCPs certainly in the short term;
- Inclusion of a detailed human rights chapter in the revised OECD Guidelines is likely to increase the number of human rights-related complaints and lead to consideration of a much broader range of human rights issues in addition to those associated with worker rights, conflict and indigenous peoples;
- Given the lifting of the 'investment nexus', a wider spectrum of complaints relating to other types of business relationships is likely, in particular supply chain relationships, noting also the OECD's forthcoming work on the finance sector;
- Extractive sector will likely remain the most prevalent sector in terms of complaints, but other business sectors will feature increasingly often – in particular those with significant global supply chains. The specific inclusion of protecting freedom of association on the Internet is likely to become a focus, and relates to OECD's work on conflict minerals;
- Public disclosure and public and political awareness of the role of NCPs will increase;
- The Dutch, UK, German and Norwegian NCPs have all engaged in awareness raising activities with their national companies. This trend is likely to develop amongst NCPs globally. It should be noted again that the Danish NCP will now have a significant national profile given the primary legislation developed for its new incarnation;
- More focus on disclosure including around taxes.

### **3.6 The interpretative role of NCPs**

NCPs will become an increasingly important source of understanding and interpretation not just of the OECD Guidelines, but also of the UN Guiding Principles on Business and Human Rights. Clearly, NCPs might need to look at other interpretations of similar complaints when undertaking mediation and this becomes essential if public statements are to be made at the end of mediation or at the end of a determination process. Understanding what the corporate responsibility to respect human rights (and especially human rights due diligence) means in concrete terms for the extractive sector and other sectors globally will be a complex and iterative process involving many actors, including the industries themselves. The most authoritative source of guidance and interpretation will be the work of the United Nations Expert Working Group on Business and Human Rights, inter-governmental organizations (such as the sector-specific guidance currently being developed by the European Commission) and national initiatives such as national legislation, judicial rulings or the work of National Human Rights Institutions or Multi-Stakeholder Initiatives. NCPs may also refer to industry specific guidance from ICMM, as was done by the Norwegian NCP in the Intex case.

There are several key conceptual areas now contained in the revised OECD Guidelines that will need careful interpretation by NCPs. These include:

1. The degree to which a business is associated with a potential or actual alleged abuse of human rights via causation, contribution or linkage through their own operations or through business relationships and the appropriate response;

2. Thresholds of adequacy - what should be considered as reasonable due diligence and transparency on the part of extractive and other companies in light of foreseeable risks and impacts, following the UN Guiding Principles approach to 'knowing and showing';
3. The appropriate balance between preventive steps to avoid negative impacts and mitigation to address negative impacts, and remedies for harms caused;
4. The leverage the company had, or might have acquired, to prevent or respond to harm.

The interpretative role of NCPs might then have a cumulative effect and will have an element of methodological learning within and across NCPs akin to 'jurisprudence' (although clearly not in any legal sense). The development of a body of knowledge will depend on levels of disclosure, not just in the issuing of NCP determinations when appropriate, but also public statements following mediation, with the consent of all parties, and in which specific aspects of interpretation could be cited.

### **3.7 Consequences and outcomes**

*"The revised OECD Guidelines are not as soft as they might look, there will be increasing consequences for companies unwilling to engage in mediation."*<sup>16</sup>

It is recognized that, for a range of reasons, NCPs will not be able to provide an adequate outcome in every case, both in terms of remedy for victims where allegations are borne out as well as consequence for those responsible for any abuse. Therefore, NCPs need to ensure they do not hinder or undermine access to justice and, where possible, enable – or increase the likelihood – of consequences for those found to be responsible through other non-judicial means. Where relevant, the NCP should refer to more appropriate authorities if the issues at hand are beyond the NCP mandate. States themselves should seek more effective and appropriate ways of dealing with cases that are beyond the competence or capacity of an NCP.

When a business refuses to enter into mediation, or even to communicate with the NCP, there was a call for NCPs to respond vigorously and ensure appropriate consequences. The most basic of these would be to disclose publicly that the company concerned was unresponsive.

If the NCP moves forward to conduct its own research, there is the potential of issuing an assessment of responsibility, and an analysis of deficits in prevention or mitigation. When NCPs do communicate determinations, these can have a number of possible consequences for the party found to be at fault. If a business, investors might look closely at the case and possibly divest from the company concerned (as, for example, the Norwegian Pension Fund has done). It is also possible for a Government to consider the determination in relation to applications for public support (export credit), public procurement or trade missions.

### **3.8 Pro-active implementation agenda**

NCPs can undertake a wide range of activities to raise awareness amongst businesses and prevent abuses from occurring by increasing capacity for effective human rights due diligence. Some of the examples discussed during the workshop included:

- Surveys on the OECD Guidelines for MNEs show that knowledge is low. The Norwegian NCP surveyed 600 Norwegian companies for knowledge on the Guidelines and the NCP in June 2011 and will repeat the survey in 2012. The UK NCP surveyed FTSE 100 companies, 12 UK-based business organisations, 32 UK-based NGOs and 27 UK-based trade unions in January 2012.
- Outreach – one NCP is focusing on outreach in particular to BRIC nations to encourage adherence with the OECD Guidelines.
- Consistency - promoting a level playing field in the implementation of the Guidelines across OECD countries.

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<sup>16</sup> Quote from a Workshop participant.

- Spreading best practice – NCPs share best practices at annual meetings under the auspices of the OECD, but also through direct contact in specific cases or on more general issues.

#### **4. ENDNOTE**

The Workshop did not intend to produce specific recommendations for governments, businesses or other stakeholders. It is clear that such workshops, outside of the daily business of either the OECD or specific NCPs, can add value to all parties and widen the community of interest around the Guidelines themselves. The Institute for Human Rights and Business (IHRB) welcomes comments on this report sent to: [feedback@ihrb.org](mailto:feedback@ihrb.org) along with proposals for similar events that could contribute to deepening understanding amongst all relevant actors.

IHRB has no specific status with respect to the OECD Guidelines, but is committed to continuing to play a catalytic role as or when it might be appropriate. Beyond the extractive sector specifically, the Institute has been asked to consider hosting a follow-up meeting in early 2013 focusing on the impact of the revised OECD Guidelines on supply chain relationships. It is looking as well at how references in the Guidelines to freedom of expression, assembly and association with respect to the Internet might be interpreted.

### **Appendix – Resources**

2011 OECD Guidelines:

[www.oecd.org/dataoecd/43/29/48004323.pdf](http://www.oecd.org/dataoecd/43/29/48004323.pdf)

Business and Industry Advisory Committee to the OECD (BIAC):

[www.biac.org](http://www.biac.org)

Trade Union Advisory Committee to the OECD (TUAC):

[www.tuac.org](http://www.tuac.org)

OECD Watch:

[www.oecdwatch.org](http://www.oecdwatch.org)

Business and Human Rights Resource Centre:

[www.business-humanrights.org](http://www.business-humanrights.org)

Institute for Human Rights and Business (IHRB):

[www.ihrb.org](http://www.ihrb.org)

### **Appendix – List of Participants**

#### **Governments and National Contact Points (NCPs)**

Juan Manuel Uribe – Embassy of Colombia to the UK

Joachim Steffens – Federal Ministry of Economics and Technology, Germany

Hendrik Zechner – Federal Ministry of Economy, Family and Youth, Austria

Kristin Palsson – Ministry for Foreign Affairs, Sweden

Roel Nieuwenkamp – Ministry of Economics, Netherlands

Hege Rottingen – Norwegian NCP

Gregory Maggio – US State Department  
Christina Skagen - Danish Business Authority  
Hans Petter Graver – Norwegian NCP  
Herman Mulder – Dutch NCP  
Danish Chopra – UK NCP  
Andrea Paola Pradilla-Cont - Colombian NCP  
Ambassador Santos Goni - Argentinian NCP  
Collette Vanstraelen - Belgian NCP

#### Companies, Business Associations and Investors

Alanna Heath – Barrick Gold  
Ian Wood – BHP Billiton  
Vicky Bowman – Rio Tinto  
Liesel Mack Filgueiras – Vale  
Juanita Olaya – Cerrejon  
Ines Andrade – Cerrejon  
Thabani Mlilo – AngloGoldAshanti  
Rachel Cowburn-Walden – Unilever  
Tam Nguyen – Chevron  
Miles Seaman – formerly of Lloyds and Technica  
Vicky Bowman – Rio Tinto  
John Gilbert – BP  
Dina Aloi – Goldcorp  
Roper Cleland – IPIECA  
Philip Ruck – IPIECA  
Ross Gallinger – Prospectors and Developers Association of Canada (PDAC)  
Aidan Davy – International Council on Mining and Metals (ICMM)  
Richard Brophy – Herbert Smith  
Stephane Brabant – Herbert Smith  
Rae Lindsay – Clifford Chance  
Hilde Roed - Statoil

#### Civil Society, Trade Unions and Investors

Louise Haigh – Office of Lisa Nandy MP, British Parliament  
Peter Frankental – Amnesty UK  
Tricia Feeney – Rights and Accountability in Development (RAID)  
Chris Avery – Business and Human Rights Resource Centre (BHRRC)  
Joseph Wilde-Ramsing – SOMO  
Caroline Rees – SHIFT  
Austin Onuoha – Africa Centre for Corporate Responsibility  
Anne Lindsay - CAFOD  
Adrienne Margolis – Lawyers for Better Business  
Jim Catterson - International Federation of Chemical, Energy, Mine and General Workers' Unions  
John Howchin – Ethical Council of Swedish Pension Funds  
Saskia van den Dool – PGGM Investments

#### Institute for Human Rights and Business (IHRB)

John Morrison - IHRB  
Kelly Davina Scott - IHRB  
Haley St Dennis - IHRB  
Margaret Wachenfeld - IHRB