



From Soft to Hard Law and Interpretation: the Case of the OECD Guidelines for Multinational Enterprises and the Role of the National Contact Points

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Abstract

The Norwegian Transparency Act imposes on businesses to respect human rights and ensure decent working conditions, as well as a duty to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises. Countries adhering to the Guidelines are required to set up National Contact Points (NCPs), which are tasked with furthering the effectiveness of the Guidelines and to offer a grievance mechanism to resolve cases relating to non-observance of the Guidelines. Since the fundamental human rights and decent working conditions referred to by the Transparency Act are expansive concepts directly deriving from international standards, the evolution of the Guidelines through the concrete interpretation by the NCPs plays a role in the implementation of the Act itself. This contribution examines the implementation by NCPs of some of the core elements of the Guidelines, including which are the relevant stakeholders whose interests are protected in concrete cases, the responsibility of companies for their direct and indirect suppliers, and the coverage of the Guidelines also of minority shareholders and financial investors, which have no direct control of the actions of a business entity. The NCPs' implementation of international standards might thus have an impact on the general categories of domestic legislation and will thus affect—even if indirectly—the general understanding of respect for sustainability standards in domestic systems.

Keywords

Corporate Sustainable Responsibility, OECD Guidelines for Multinationals, National Contact Points, Soft Law, Due Diligence

1. The Transparency Act and the OECD Guidelines

The Norwegian Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)¹ imposes, *inter alia*, a duty to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises of 2011 (OECD Guidelines).² More specifically, the Transparency Act requires enter-

1. Original title: Lov 2021-06-18-99 om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven); in force 1 July 2022.
2. Available at <www.oecd.org/daf/inv/mne/48004323.pdf> accessed 12 September 2023. All subsequent references to URLs were accessed on the same date. Note that the Guidelines were last updated in June 2023 (for the 2023 version, see <<https://doi.org/10.1787/81f92357-en>>), but the update does not introduce any significant changes for the purposes of the analysis in this article.

prises to conduct due diligence assessments in relation to their own business, their supply chains, and their business partners to the effect of identifying relevant risks, as well as publish an account of the due diligence assessments made and provide information to third parties if so requested.

Although the Act limits such duties to fundamental human rights and decent working conditions,³ while the OECD Guidelines have a wider scope,⁴ it sets out steps to be taken that are almost identical to those set out in the OECD's Due Diligence Guidance for Responsible Business Conduct of 2018.⁵ The Act seems thus to replicate the OECD Guidelines not only as for their content but also in their application.

Yet, the impact of the Guidelines goes far beyond mere replication: fundamental human rights and decent working conditions are expansive concepts under the Act directly deriving from international standards that in turn evolve. Moreover, they evolve according to the content that is shaped through their implementation in concrete cases. Since the OECD Guidelines find implementation under various circumstances and different legal contexts, the ways in which the standards contained in the Guidelines are implemented in the countries that have adopted them, thus outside Norway, inevitably contribute to the implementation of the very same standards embedded into the Act.

Furthermore, the Act tasks the Norwegian Consumer Authority with monitoring compliance, through the issuance of orders to comply or enjoin a violation, imposition of fines (especially if a large enterprise is repeatedly non-compliant), and issuance of general information, advice, and guidelines in support of compliance. In executing such tasks, the Authority commits itself to maintain a close dialogue with the Norwegian National Contact Point (NCP) responsible for facilitating the implementation of the OECD Guidelines in the country.⁶

Such close contact between the Norwegian Consumer Authority and the Norwegian NCP is meant to ensure a uniform practice in the country in the implementation of the standards embedded in the two measures. No elaboration is available in public sources to understand the extent to which the Norwegian Consumer Authority will rely on the Norwegian NCP cases to apply the Transparency Act. However, the Norwegian NCP is part of the network of existing NCPs (one for each country that adopted the Guidelines), and thus coordinates its activities with such other NCPs. Its way of interpreting the OECD Guidelines is thus at least partially shaped by the understanding of the other NCPs.

The ensemble of cases addressed within the system of NCPs' mechanisms around the world thus feeds also the standards embedded into domestic legislation like the Norwegian

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3. See Section 1 of the Act. See also confirmation by the Norwegian Consumer Authority <www.forbrukertilsynet.no/the-transparency-act> (27 July 2022). This would exclude some of the objectives and areas covered by the OECD Guidelines. However, the definition of 'decent working conditions' in the Act opens the door also to standards on protection of the environment, although apparently limited to the workplace: see Section 3 (Definitions: '(c) Decent working conditions means work that safeguards fundamental human rights pursuant to (b) [fundamental rights] and health, safety and environment in the workplace, and that provides a living wage'). Since the Ministry of Children and Family Affairs has the power to issue regulations regarding what is considered fundamental human rights pursuant to the first paragraph (b) and decent working conditions pursuant to the first paragraph (c), the concrete scope of the Act shall be determined by the approach taken.
 4. Indeed, the OECD Guidelines represent a global framework for responsible business conduct covering all areas of business responsibility, including disclosure, human rights, employment and industrial relations, environment, anti-corruption, competition, and taxation.
 5. Available at <www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. The UN Guiding Principles on Business and Human Rights, as well as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, also contain due diligence recommendations.
 6. The Norwegian Consumer Authority <<https://www.forbrukertilsynet.no/the-transparency-act>>.

Transparency Act, or supranational laws, such as the European Union's (EU) Proposal for a Directive on corporate sustainability due diligence.⁷

2. Shaping the Content of the Guidelines Through NCPs' Specific Instances

Countries adhering to the Guidelines are required to set up NCPs, which are tasked with furthering the effectiveness of the Guidelines. More specifically, NCPs have two main functions: i) to promote the Guidelines and handle enquiries, with a view to ensuring that the Guidelines and the role of the NCP are known among relevant stakeholders and across government agencies; and ii) to provide a grievance mechanism to resolve cases ('Specific Instances') relating to non-observance of the Guidelines. NCPs are currently the only internationally recognised non-judicial grievance mechanism for responsible business conduct.

There were 50 NCPs in all adherent countries in 2021. By the end of 2021, they had received over 620 specific instances in total.⁸ The chapters on Human Rights and General Policies (which include recommendations on due diligence) were the most frequently referenced chapters in 2021, followed by the chapters on Environment, and on Employment and Industrial Relations. The Human Rights chapter thus remains the most referenced chapter in specific instances since its introduction in the 2011 updates of the Guidelines.

Soft law instruments are deliberately expressed in general terms and nourished by their application in concrete cases. The Guidelines are a soft law tool offering a set of general principles. They thus need that their actual content be concretely determined by practice, which the NCPs contribute in a decisive way to forge. The NCPs communicate with each other; where necessary, they collaborate in dealing with the request, and they mutually assign cases that potentially involve more than one NCP. At times, they refer to previous cases and rely on implementation by other NCPs. This permits some level of coordination and, above all, the establishment of common trends to interpret the Guidelines.

This short article does not permit any comprehensive or articulated assessment of the various cases addressed within the NCP mechanism around the world, nor does it permit addressing the more theoretical issue of the role of interpretation of soft law instruments directly referred to by domestic legislation. This latter task goes far beyond the scope of a brief article. However, at this stage and in this context, it is at least interesting to present the core elements of interpretation of the OECD Guidelines to offer some hints of the relevance that such cases might have on the future interpretation of domestic legislation on responsible business conduct and related due diligence.

2.1 Core Elements

From Multinationals to Supply Chains

Although the Guidelines are generally aimed at multinational companies, they are applied broadly, so much so that they cover even pure contractual relationships (going well beyond the cases that usually represent contractual control according to national laws).⁹ Moreover,

7. Commission Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final).

8. The last available data at the time of writing are those from the end of 2021. See OECD, *Annual report on the Activity of National Contact Points for Responsible Business Conduct* (2022) <<https://mneguidelines.oecd.org/annual-report-on-the-activity-of-national-contact-points-for-responsible-business-conduct-2021.pdf>>.

9. A precise definition of multinational enterprises was considered as not required for the purposes of the Guidelines. They are thus simply and generally described as being enterprises that operate in all sectors of the econ-

they apply to any corporate form and their application does not differ based on the type of activity or the purpose of the entity.¹⁰

Many cases concern business relationships where no corporate control existed. Furthermore, in supply chains, the responsibility of an entity is also found when the contested behavior is attributable to a sub-contractor with no direct business relation with the entity.

Contractors and supply chains were involved, for instance, in the notorious Rana Plaza accident. The case concerned an accident that occurred on 24 April 2013, when an eight-story commercial building, Rana Plaza, collapsed outside Dhaka (Bangladesh). The building contained five clothing factories. Most of the people in the building at the time were garment workers. The accident caused over 17 days of search and rescue, the evacuation of 2,438 people, the deaths of more than 1,100 people, with more being left with life-long debilitating injuries.¹¹

On 12 December 2014, the NGOs Clean Clothes Campaign Denmark and Active Consumers submitted a Specific Instance to the Danish NCP alleging that PWT Group (a clothing company) had not observed the OECD Guidelines due to a failure to carry out due diligence in relation to its supplier, the textile manufacturer New Wave Style Ltd, located in the Rana Plaza before the collapse of the factory. The NCP concluded that the company had violated the Guidelines for not having conducted proper due diligence. However, the supplier could not have sole responsibility for the accident. Indeed, not only various local garment producers were established in the same building, but suppliers did not necessarily work exclusively for one brand/western company.

The NCP devotes some time to due diligence in relation to a company's suppliers: according to Chapter II, paragraph A12 of the Guidelines, a company should 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. In light of this, the NCP considered the following three points: (i) to what extent were the respondent's activities directly linked with the supplier; (ii) to what extent had the respondent carried out due diligence in accordance with the OECD Guidelines; and (iii) to what extent should building safety have been part of the respondent's due diligence at the time of the accident.

omy, and that usually comprise companies or other entities established in more than one country and that are so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Whether a specific situation is covered by the Guidelines must thus be established on a case-by-case basis. However, NCPs seem to apply a broad definition of 'multinational enterprise' and tend to declare the application of the Guidelines to various levels of coordination, also when this is quite loose. On the other side, as shown further below in this article, the Guidelines apply also to minority shareholders and financial investors. Furthermore, the Guidelines (like the Transparency Act) extend also to business relations in general: the term 'business relationship' includes relationships with business partners, entities in the supply chain (at any level thereof) and any other non-State or State entities directly linked to the business operations, products or services of the entity.

10. Ownership may be private, by the State, or mixed. State-owned multinational enterprises are generally subject to the same recommendations as privately-owned enterprises. However, the OECD Guidelines on Corporate Governance of State-Owned Enterprises are conceived as a specifically tailored guide for these enterprises. One case is particularly interesting in this regard: in *Survival International v WWF* [2017] (complaint with Swiss NCP, case withdrawn and procedure concluded on 21 November 2017; see below) the Guidelines have been applied also to an NGO (WWF), since it was exercising its statutory aims through activities considered of a business nature.

11. Foreign & Commonwealth Office and Department for International Development, 'Case study The Rana Plaza disaster' (April 2014) <www.gov.uk/government/case-studies/the-rana-plaza-disaster>.

As for the first point (the respondent's relationship with NWS), the NCP states:

The New Wave Style factory manufactured products in the Rana Plaza building. The respondent's name is included on New Wave Style's list of 'Main Buyers'. The clothing brands Shine and Jack's were manufactured for the respondent at Rana Plaza. These brands are sold in the stores Tøjeksper-ten and Wagner, which are also owned by the respondent. A number of production documents from the respondent were found in the ruins. The respondent has also stated that New Wave Style has been a supplier to the respondent since 2010.

In multiple statements to the NCP, the respondent has asserted that it is unclear to the respondent what the relationship is between the collapse of the Rana Plaza building and the complainant's claim that the respondent has violated the OECD Guidelines. The respondent has also stated that New Wave Style was not manufacturing products for the respondent on the day that the building collapsed. The last time that clothing was manufactured at New Wave Style for the respondent was on 8 March 2013. The accident occurred on 24 April 2013.

Based on the above, the NCP finds that New Wave Style has been a supplier for the respondent since 2010 and thus PWT Group is directly linked with its supplier New Wave Style.

The NCP does not find it of significance that goods were not being manufactured at New Wave Style for the respondent at the time of the accident. No information was provided as to whether this was due to specific actions of the respondent, or whether the cooperation was suspended; therefore, this circumstance can be a matter of chance. Thus the NCP finds that the respondent and New Wave Style were directly linked at the time of the accident (ref the OECD Guidelines, chapter II, paragraph 12).

According to the OECD Guidelines, companies must 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, see the OECD Guidelines, chapter II, paragraph 12.

Therefore, according to the OECD Guidelines, the respondent was obliged to take appropriate measures to seek to prevent or remedy adverse impacts linked to the supplier New Wave Style, Rana Plaza.¹²

The respondent had stated that a due diligence had been performed some time before the accident. Nonetheless, the NPC considered that this did not adequately include checks of the safety conditions, or that evidence was given that such due diligence mechanisms were regular practice. Furthermore:

The NCP finds that the exercising of due diligence in relation to a business associate in Bangladesh was particularly required, as poor working conditions in large parts of the textiles sector in Bangladesh were known and reported upon (e.g. Foreign Trade Association's April 2006 press release 'European Commerce pushes for improvement of social standards in Bangladesh' and the March 2013 report by Clean Clothes Campaign and SOMO entitled 'Fatal Fashion').¹³

As already noted, responsibility extends to sub-contractors. In *Adidas and Südwind*, the Specific Instance was brought before the German NCP by three non-governmental organisations from Germany, the Netherlands and Indonesia, and directed against Adidas, a multi-

12. Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group, Final Statement (17 October 2016) 5.

13. *ibid* 6-7.

national sportswear manufacturer headquartered in Germany.¹⁴ The complainants believed that the respondent failed to fulfil its obligations under the Guidelines regarding certain events that occurred in its supply chain. These events took place in Indonesia at a factory that was acting as a sub-contractor to the respondent's main shoe manufacturing partner in that country. From the complainants' point of view, the respondent did not adequately use its influence as a buyer to curb alleged anti-union behavior, layoffs, and address wage matters at the subcontractor's factory, thereby violating provisions set out in Chapters II (General Policies) and IV (Human Rights) of the Guidelines. The respondent rejected these allegations pointing to, *inter alia*, the activities it undertook to help resolve the situation as well as the relatively small size of its order volume that limited its leverage *vis-à-vis* the subcontractor.¹⁵

The mediation organised by the German NCP resulted in a mutually accepted understanding regarding the wage issue, but not the right to work and freedom of association issue, prompting the NCP to recommend that the company review its reporting and complaint channels in this context and that the submitters contribute to this. More specifically, the NCP encouraged the company to assess possible obstacles for whistle-blowers to come forward:

52. Without prejudice to the failure of the Parties to reach a comprehensive agreement on the issues raised through mediation, the NCP believes that the instrument of recommendation could potentially help to avoiding freedom of association issues similar to those considered in this complaint from re-arising, thereby contributing to the better implementation of the OECD Guidelines in the future. The NCP therefore avails itself of the opportunity to give one recommendation each to the Respondent and the Complainants.

53. As laid out in paragraph 13 above, it was only with a delay of several months that the Respondent learned of the events which had taken place at the Subcontractor's factory since the beginning of 2012. The Respondent explained this delay by the fact that in spite of a multitude of channels provided for reporting, neither an individual worker nor a trade union had brought these events to the Respondent's attention.

54. The NCP therefore recommends to the Respondent to review its reporting and complaint channels and to discuss with relevant stakeholders (trade union representatives, workers, business partners)

– which impediments might exist that might make potential informants refrain from using these reporting and complaint channels and

– how the effectiveness of these reporting and complaint channels could possibly be improved.

The cases described are just two examples among the many that apply the Guidelines to purely contractual relationships, where there is no corporate control relationship between the parties, and where, nevertheless, a company is considered liable for the violation of the standard by the other. Furthermore, the cases illustrate how the Guidelines have been

14. *Adidas and Südwind*, final statement of the German National Contact Point for the OECD Guidelines for Multinational Enterprises at the Federal Ministry for Economic Affairs and Energy (24 April 2020) <www.bmwk.de/Redaktion/EN/Beschwerdefaelle-NKS/Abschliessende-Erklaerung/suedwind-institut-against-adidas-ag.html>.

15. The respondent's sourcing relationship with the subcontractor lasted for 19 months in total. The respondent asserted that throughout this time its order volume never exceeded five percent of the subcontractor's production capacity, while the majority of that capacity was taken up by the production of shoes for a Japanese competitor of the respondent.

applied to cases in which the violation was caused by a sub-subtractor, which the party has not directly selected and whose behavior it has no possibility to monitor directly. The excerpts quoted from the findings in *Rana Plaza* also indicate that the violation need not even be directly caused or have an immediate direct link with the consequences of the violation.

These are situations that clearly depart from the dynamics of civil liability under our domestic legal systems. Of course, the consequence of the application of the Guidelines does not impact on liability but imposes the obligation to execute a due diligence covering all the described aspects to avoid, or at least mitigate, the risk of their occurrence. However, the change in perspective is relevant.

Financial Investors and Minority Shareholders

Minority shareholders and financial investors are also covered by the Guidelines. This occurs even though such minority shareholders or financial investors have no control over the management of the challenged entities. Furthermore, NCPs have established, after various discussions and confrontations, that the Guidelines also apply to the financial market: financial institutions have, on the one side, the duty to generally implement investment policies favoring investment in entities and projects ensuring business responsibility, as well as in business sectors where sustainability is promoted, and, on the other side, to perform accurate due diligence for any specific investment they adhere to.¹⁶

Subsequent cases concerning Norges Bank Investment Management (NBIM) helped set such principles. In the very first case, concerning minority shareholding, Norges Bank, as the operational manager of the Government Pension Fund Global (the GPFG), argued in a letter to the Investment Committee of 21 June 2013, that the Guidelines apply to companies in the GPFG's investment universe, but generally not to minority shareholders in relation to their investee companies. Further, it stated:

*the complexity of the relationships in the financial sector and the multitude of business models within this sector warrant a careful and thorough assessment of the proper functioning of the Guidelines within the sector. It is also NBIM's opinion that the applicability of the Guidelines to minority shareholders warrants a separate and thorough assessment.*¹⁷

Subsequently, and along the same line, the Dutch NCP and the Norwegian NCP in two Specific Instances concerning the involvement of respectively APG and NBIM with the enterprise POSCO, concluded that financial institutions and investors, including minority shareholders, are covered by the term 'business relationships' in the Guidelines.¹⁸ The Dutch NCP, however, also agreed with APG that further clarification of the applicability of the Guidelines in the day-to-day business of FIs was necessary.¹⁹

16. For more information, see Global Forum on Responsible Business Conduct, *Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises* (OECD June 2014) <<https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf>>.

17. Norges Bank, 'OECD Guidelines for Multinational Enterprises – Minority shareholders, letter to the Chair of the OECD Investment Committee' (letter of 21 June 2013) reported in Global Forum on Responsible Business Conduct (n 16) 6.

18. Netherlands NCP, *Final statement ABP/APG – Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development* (Ministry of Foreign Affairs 2013); Norwegian NCP, *Final statement: complaint from lok shakti abhiyan, Korean transnational corporations watch, fair green and global alliance and forum for environment and development vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)* (2013).

19. Along the same line, the Office of the High Commissioner for Human Rights (OHCHR) stated that it was of the view that the UN Guiding Principles on Business and Human Rights apply to institutional investors

In December 2014, the Norwegian NCP received a further request for review from some NGOs alleging that the Korean company Daewoo International, its parent company POSCO and NBIM had breached the human rights provisions of the Guidelines. The allegations assumed that Daewoo International and POSCO, domiciled in the Republic of Korea, did not comply with the Guidelines. The NGOs had asked NBIM to contact the companies with a view to getting them to stop their alleged undesirable activities which were stated to include violations of labour rights in their Uzbekistan subsidiaries. The request to the NCP concerned NBIM's handling, investigations and follow-up of the alleged violations.

The complaints raised questions about what type of due diligence could be expected of a minority shareholder, and questions of principle concerning the application of the OECD Guidelines in relation to financial institutions. To that end,

NBIM has submitted that the OECD Guidelines do not apply to minority shareholding nor in this Specific Instance. The NCP does not share this view. The OECD Guidelines apply to the financial sector, as they do to all sectors. They do not make any exception for sub-groups of investors, nor do they exempt minority shareholders. The OECD Chapter on Human Rights converge with the UN Guiding Principles on Business and Human Rights, which are applicable to minority shareholders of institutional investors. The Norwegian NCP has consulted with the Dutch and UK NCPs, which in recent cases applied the Guidelines to the actions of multinational enterprises in the financial sector, including investors as majority and minority shareholders. All three NCPs have come to the conclusion that the OECD Guidelines apply to minority shareholders.

Consequently,

The question is thus not whether the OECD Guidelines apply to the financial sector and minority shareholding but how they apply.

In situations where the enterprise has a large number of business relationships, the NCP recognizes that it may not be feasible to conduct significant research on all companies in the portfolio prior to each investment. However, in such situations the enterprise is expected to develop a risk-based approach to human rights beyond the mere financial risks. NBIM already takes such an approach to certain human rights risks, such as child labor.

NBIM should build on its experience from focusing on children's rights to find ways to integrate also other human rights into their risk management system, provide more information on the processes it uses, and seek opportunities to enhance its data collection regarding human rights.²⁰

In *IUF, EFFAT-IUF, SEIU and UGT v NBIM*, the parties reached an agreement on 9 March 2022. The submission from four trade unions concerned allegations of gender-based violence and harassment in McDonald's and related due diligence by two institutional investors: APG Asset Management (APG) and Norges Bank Investment Management (NBIM). The US NCP handled the specific instance concerning McDonald's; the Dutch NCP handled the specific instance relating to the Dutch investor APG; while the Norwegian NCP handled the specific instance relating to NBIM, which was concluded with the mentioned agreement. The parties agreed, *inter alia*, that GBVH is a material risk that companies in the fast-food

holding minority shareholdings: see Interpretative Guidance of 26 April 2013, The application of the Guiding Principles on Business and Human Rights to minority shareholdings of institutional investors (2013) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterSOMO.pdf>>.

20. Norway NCP, 'NCP Norway concludes two new specific instances regarding NBIM' (2 July 2015) <www.responsiblebusiness.no/news/ncp-norway-concludes-two-new-specific-instances/>.

restaurant sector need to adequately address in order to create a safe and respectful environment for workers. They further agreed to make efforts to pay more attention to the issue, including through individual and collective action, as appropriate. The agreement equally affirmed that NBIM uses its best efforts to implement the due diligence recommendations of the OECD Guidelines.

The agreement noted that institutional investors have a role to play in contributing to responsible business conduct by considering associated risks throughout the investment process and to use leverage to influence investee companies to prevent or mitigate adverse impacts. It further stated that institutional investors should undertake human rights due diligence to identify actual and potential adverse impacts, and, where directly linked to an entity causing or contributing to adverse impacts, seek to prevent and mitigate adverse impacts by using leverage.

The fact that even minority shareholders must comply with the Guidelines is not surprising considering the conclusions reached in the previous section, which assumes the responsibility (for performing due diligence) even in the event of a lack of any form of control. The applicability to the financial sector also seems undisputed today, in the light of the numerous obligations also established at the domestic level for sustainable finance. These principles are less in conformity with the general theory of foreign investment law in respect of the obligations required of a foreign investor who intends to invest in a host state, although this area of law is also opening up to the principles of sustainability.²¹

Interests Protected Under the Guidelines

NCPs offer, if not an alternative method of resolving disputes, a means of responding to requests through which a party raises a concrete reservation on behaviour under the Guidelines also when the conditions for legitimation in a court do not arise under a specific legal order.

Under the Guidelines, companies have duties towards those having a stake in their activities. No definition is provided in the Guidelines of ‘stakeholder’, and it could be broadly stated that anyone bearing some interest in, or being somehow affected by the business of the enterprise, would want to have its interest or position protected. Leaving aside possibly more straightforward categories, such as workers, employees and consultants, minority shareholders or counterparties, the Guidelines explicitly also refer to local communities.²²

In *Survival International v WWF*,²³ the submission concerned the rights of the Baka population of southeast Cameroon in respect of the environmentally protected areas which the government of Cameroon introduced with the financial and logistical support of WWF, but—according to the submitting party—without the free, prior and informed consent (‘FPIC’) of the Baka community. Consequently, the Baka population was allegedly denied or

21. See among the most recent sources, Human Rights Council, Expert Mechanism on the Right to Development, Right to development in international investment law (A/HRC/EMRTD/7/CRP.2; 9 March 2023) <https://www.ohchr.org/sites/default/files/documents/issues/development/emd/session7/A_HRC_EMRTD_7_CRP.2%20for%20the%20web.pdf>.

22. See preface II, General Policies, A.14 (‘Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities’) and Commentary on General Policies § 2 (‘Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process’).

23. Swiss NPC, *World Wide Fund for Nature International (WWF) and Survival International Charitable Trust* (OECD 2016) <<https://mneguidelines.oecd.org/database/instances/ch0014.htm>>.

had seriously curtailed access to their traditional territories and natural resources on which they depend. The submitting party further stated that the Baka people were subjected to violent abuse by the eco-guards and other law enforcement officials who patrol the protected areas with WWF's support.

The submitting party claimed that the WWF violated the OECD Guidelines by failing to conduct a due diligence assessment and not making its support for the demarcation of the protected areas conditional upon the FPIC of the Baka. Moreover, WWF should have supported eco-guard patrols only if effective steps were taken to ensure that the patrols focused on commercial poachers rather than Baka hunting for subsistence, and that eco-guards should be held accountable if they used or threatened violence against the Baka. The result of the non-intervention of WWF was reputedly a denial of Baka rights to their land and natural resources.

This was by no means the only case where the rights of local communities arose before a NCP.²⁴ In fact, the frequent issue of protection of rights of local communities, especially when representing minorities or vulnerable groups, has taken the OECD to delve into the specific matter of protection of indigenous populations and publish the *Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances*.²⁵

The starting point for the Guide is the Commentary to the Human Rights chapter of the OECD Guidelines, according to which enterprises should

*respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations (UN) instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families.*²⁶

On the other side, interests of local communities expand when environmental damages are invoked. To this end, in *Survival International Italia v Salini Impregilo*, the NGOs addressed the Italian NCP on behalf of indigenous people of the Omo region (South-West Ethiopia)

24. In the case of *Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village* (2012) handled by the Swedish and Norwegian NCP and which concerned human rights due diligence and FPIC in relation to a wind-farm project, the NCPs indicated that they did not find 'any grounds for concluding that Statkraft has failed to comply with the Guidelines', but they also stated that 'the company could work in a manner that even more clearly promotes indigenous rights and the implementation of the Guidelines' particularly as the company 'was aware that indigenous groups and reindeer herders in the area where the company wanted to set up the wind park were in a particularly vulnerable situation and would be negatively affected by the project'. The parties subsequently reached agreement on compensation for the impact and negative effects of the windmills. For further description of the case, see the Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances (n 26) 16.

25. OECD, *Guide for National Contact Points on the Rights of Indigenous Peoples when handling Specific Instances* (OECD 2022) <<http://mneguidelines.oecd.org/guide-for-national-contact-points-on-the-rights-of-indigenous-peoples-when-handling-specific-instances.pdf>>.

26. The Guide (ibid 7) devotes text to the different definitions of 'indigenous people' under international and national law, to then conclude for the purposes of the NCPs: 'In essence, what makes indigenous peoples "indigenous", and different from other groups in a vulnerable situation, are the links that they have with lands, territories and resources that they have traditionally owned, used or occupied and that, with few exceptions, remain largely insufficiently protected by national regulatory frameworks. The economic, social, and legal status of indigenous peoples typically means that they have limited possibilities to defend their rights to and interests in land and resources, and are rarely consulted about the design or implementation of projects that can profoundly affect their lives or communities. Specific human rights standards for indigenous peoples respond to the need to protect their distinct historical, cultural, social and economic characteristics. In short, international human rights standards for indigenous peoples seek to ensure that indigenous peoples can remain partly different and, as peoples, pursue a development path of their own choosing'.

and of the Lake Turkana in Kenya, and against behaviours of the Italian company in its construction of the dam Ibe III over the Omo River.

The NGOs complained that the construction of the dam had caused the natural flooding cycle of the river to cease, and the substantial depletion of the water resources needed for recessive agriculture and to irrigate the pastures on which the downstream communities depended for their livelihoods. Furthermore, the dam and related irrigation projects would allegedly lower the level of the lake by 20 meters, with serious consequences for its salinity and therefore for the potability and fish stocks of the basin.

These elements would allegedly violate, in addition to the obligations of the Guidelines, also the African Charter on the Rights of Men and Peoples, because: (i) the communities had not been adequately consulted, in violation of their right to self-determination; (ii) the communities lost or were at risk of losing vital livelihoods; and (iii) communities were denied the right to development, due to failure to carry out an adequate environmental impact assessment of the project.

Salini rejected the totality of claims. Nonetheless, aside from the assessment of the various individual points, the duty clearly emerged for an investor to make an environmental due diligence as well as an environmental and social impact assessment, in addition to identifying mitigation measures to reduce the impact of the project.²⁷

In this context, brief mention must also be made of *Climate Network and Concerned Scientists Norway v Statoil*, addressed by the Norwegian NCP. In June 2007, Statoil ASA entered the Canadian oil sands industry with the purchase of the North American Oil Sands Corporation (NAOSC), and subsequently obtained a licence for an oil sands project to produce 80,000 barrels of oil per day (the Kai Kos Dehseh project). The objective of the project was to operate and continue to develop a steam-assisted gravity drainage (SAGD) bitumen recovery operation near Conklin, Alberta.

Two NGOs (Norwegian Climate Network and Concerned Scientists Norway) objected to the project arguing that the extraction of oil sands is incompatible with international efforts to limit global warming to an average increase of 2 °C above preindustrial levels. The complainants thus had as a stated interest that the company concerned should withdraw from the oil sands.

To begin with, the NCP considered that the interest of the NGOs was a shared concern that humankind, especially future generations, will suffer, and biological diversity will be greatly reduced due to the consequences of climate change. The NGOs aimed for a Norwegian climate and energy policy that is coherent with the gravity and extent of the climate crisis, as described by the Intergovernmental Panel on Climate Change (IPCC). No specific local community was thus identified, but the interest at stake concerned the whole humankind. The NCP accepted such interest as valid to accept the claim.

However, it decided not to proceed. The NCP admitted that the complaint concerned some of today's most pressing issues—greenhouse gas emissions and climate change. The risks of major greenhouse gas emissions and the cumulative environmental impacts from oil sand extraction are serious. In this particular case, however, the complaint seemed to be directed more towards Canada's policy of allowing oil sands development than towards the manner in which Statoil had operated in the context of this policy. The complaint did not concern the issue of whether Statoil, through its activities, had breached international stan-

27. Italian NPC's Final Declaration (8 June 2017) §§ 57-61 <[https://pcnitalia.mise.gov.it/attachments/article/2016847/DF_Survival_v._Salini_def_firmata%20\(21\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2016847/DF_Survival_v._Salini_def_firmata%20(21).pdf)>.

dards or national rules that are covered by the OECD Guidelines. In order for the OECD Contact Point to be mandated to process a complaint, it must concern specified violations of the Guidelines that can be attributable to the company in question, but this did not seem to be the case.²⁸

These latter cases open a further chapter of extreme importance. It is not just a matter of noting the specific importance that environmental issues and climate change have in the application of the Guidelines. This element would be significant *per se*, and it is known that today even some domestic courts are starting to apply international standards on climate change directly to companies. However, the fact that communities are considered relevant stakeholders, and in charge of protecting collective interests or even general interests, is also extremely important.

In this specific context, a further obligation is also introduced for companies that make investments in a host country, to inform the communities affected by such investment, involve them in relevant decisions, and mitigate the negative effects on them of the investment. The Transparency Act does not concern environmental matters, but it does concern the protection of human rights, for which these cases, *mutatis mutandis*, assume specific importance also for the application of the Act.

Mediation and Beyond: Changing the Future Rather Than Sanctioning the Past

Finally, the NCPs' procedures are not intended for compensation but to change future behavior. The NCPs' mechanism is construed as a procedure where parties stand one opposing the other and where individual, concrete behaviors are assessed. However, the mechanism is established not to sanction past conduct. Through it, companies are rather guided to change their policies and business behaviours for the future and commit to the achievement of objectives of a general interest together with their business plans (or to achieve their business plans through behaviours that mitigate the risk of infringing the common interest).

The above-described Rana Plaza case represents one of the most concrete examples of change produced by the action of the NCPs. In fact, in the light of the many companies and stakeholders involved, this case could not be a matter for a sole NCP and was dealt with through coordination of various national and international bodies, under an articulated set of measures.

Significant steps have since been taken to address the challenge in Bangladesh, although criticism still exists of the efficiency of some of such measures. These include: (i) measures undertaken by the Bangladesh government under the Bangladesh National Tripartite Plan of Action on Fire Safety and Structural Integrity; (ii) measures adopted by the multilateral policy community, ILO Better Work Program, and the EU-US-Bangladesh-Sustainability Compact; and (iii) supply chain initiatives such the Bangladesh Accord on Fire and Building Safety and the Alliance for Bangladesh Worker Safety. Compensation schemes for the victims have also been set up both nationally (in the form of the Prime Minister's Relief and Welfare Fund) and internationally (in the form of the Rana Plaza Donors Trust Fund).

28. Norway NCP, *Initial assessment Norwegian Climate Network et al vs Statoil* (OECD 13 March 2012); Press release by Norway NCP: *The OECD Contact Point rejects the case against Statoil* (13 March 2012). The NCP also stated that other OECD NCPs had rejected complaints similar to the one at hand. For instance, the German NCP had rejected two complaints related to a company's obligations to implement policies aligned with the 2° C limit as the complaints were not sufficiently substantiated, fell outside the scope of the Guidelines, and would not contribute to the purpose of the Guidelines: see German NCP, *Greenpeace v Vattenfall Europe AG* (2010); German NCP, *Germanwatch v Volkswagen* (2007).

Moreover, various actions were taken by the NPCs themselves. The French NCP released, at the request of the French Minister of Trade, a comprehensive report on the challenges and solutions at hand for building a safer and more responsible textiles and garment supply chain. The report contains recommendations for multinational enterprises, governments and consumers on the observance of the Guidelines. It includes mapping of the supply chain, risk assessment, audits, traceability, labelling, communication, transparency, and remediation. The Italian NCP adopted an ‘Action Plan for Bangladesh’ to promote responsible business conduct in the textile and garment supply chain through due diligence processes, multi-stakeholder initiatives and international framework agreements (agreements between MNEs and global trade union federations). One of the outcomes is a report containing operational recommendations on the observance of the Guidelines for the textile and garment supply chain. Similarly, the Belgium NCP highlighted the need for a comprehensive approach to due diligence and responsible supply management and called upon Belgium firms to sign the Bangladesh Accord on Fire and Safety. The Belgium NCP also supports initiatives from sectoral organisations or companies with the objective to improve respect for the human rights and workers’ labour conditions at national and international level.²⁹

The Rana Plaza case did not represent an isolated case. However, it was exceptional for its size and consequences, as well as for the multiplicity and complexity of the parties involved, thus also as for the remedial measures adopted.

It is, however, a rule that NCPs’ procedures terminate either by agreement of the parties or recommendations by the NCPs for future action, where very often also the stakeholders having started the procedure are called upon to collaborate for future action. Indeed, the follow-up reports, which take stock of concrete implementation of commitments undertaken or recommendations given, are an essential part of such mechanisms, and monitor the actions taken by all stakeholders involved in the progressive amelioration of the contested practice.

Although at this stage little detailed information is yet available to assess the way the Norwegian Consumer Authority will implement the Transparency Act, the international standards referred to in the Act engender active consideration of whether the Authority will adopt an approach more prone to affect future behaviour than sanctioning past conduct.

3. Due Diligence

To fully understand the above considerations on the difference between sanctioning past conduct and directing future behaviors, some reflections are needed regarding the central element of the Transparency Act—ie, due diligence. For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations,

29. OECD, ‘Statement by the National Contact Points for the OECD Guidelines on Multilateral Enterprises one year after Rana Plaza’ (25 June 2014) <<https://web.archive.oecd.org/2014-06-26/309740-NCP-statement-one-year-after-Rana-Plaza.pdf>>.

products, or services by a business relationship. ‘Contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates, or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.

As mentioned, to this end the OECD adopted in 2018 the *Due Diligence Guidance for Responsible Business Conduct*.³⁰ Such Guidance complements existing resources developed by the OECD to help enterprises carry out due diligence for responsible business conduct in specific sectors and supply chains including in the agriculture, minerals and extractive, garment and footwear, and financial sectors.³¹ However, also for the understanding of due diligence commitments, the cases dealt with by the NCPs play an essential role.

In *Imperial Metals Corporation and SEACC*, for instance, the Canadian NCP offered guidance for the involvement of relevant stakeholders in the due diligence process. That guidance addresses recommendations to both the company and the stakeholders having started the procedure, which are requested to cooperate with the company whose behavior were put in question.

On 23 December 2016, the Southeast Alaska Conservation Council (SEACC) submitted a Specific Instance to the Canadian NCP alleging that Imperial Metals Corporation had failed to disclose and conduct human rights and environmental due diligence with respect to the impacts of their mining operations on Alaskan ecosystems and fisheries.

The mediation organised by the Canadian NCP did not result in an agreement, prompting the NCP to make several specific recommendations, including putting in place a stakeholder consultation strategy drawing upon the OECD Due Diligence for Meaningful Stakeholder Engagement in the Extractive Sector that identifies communities potentially affected by its activities and ensures those communities are adequately consulted and informed.

The recommendations to Imperial Metals/Newcrest Mining Limited include:

Recommendation 1: The NCP recommends that Imperial Metals/Newcrest Mining Limited put in place a stakeholder consultation strategy that includes a process to identify communities that could potentially be affected by Imperial Metals/Newcrest Mining Limited’s activities and ensure those communities are adequately consulted and informed over the life of the project. In this regard, the NCP invites Imperial Metals/Newcrest Mining Limited to draw upon the OECD Due Diligence for Meaningful Stakeholder Engagement in the Extractive Sector. In line with the OECD Guidelines and Due Diligence Guidance, the NCP takes this opportunity to encourage Imperial Metals/Newcrest Mining Limited not to limit the identification of affected stakeholders to what is required legislatively. In this instance, this includes anticipating and including stakeholders that stand to be directly and/or indirectly affected by the mine’s activities over the life of the mine.

*Recommendation 2: The NCP recommends that Imperial Metals/Newcrest Mining Limited communicate publicly about efforts related to the recommendation above and include information on its ongoing stakeholder consultation processes and outcomes in accordance with Chapter VI, paragraphs 2A and 2B of the OECD Guidelines.*³²

30. See n 5.

31. For further information, see OECD, ‘Due diligence for RBC’ (OECD 2018) <<https://mneguidelines.oecd.org/Flyer-RBC-Due-Diligence.pdf>>.

32. Canada NCP, *Final Statement – Imperial Metals Corporation and Southeast Alaska Conservation Council* (8 May 2020) §§ 7-8.

Recommendations to SEACC include instead:

Recommendation 1: If SEACC has a stakeholder engagement strategy, the NCP recommends it includes language clarifying how the organization will identify concerned communities to inform, consult and/or involve them in the submission of any future complaints to a dispute resolution mechanism to ensure that their respective interests and objectives are clearly identified, communicated appropriately and are material to the complaint mechanism.³³

A further recommendation is directed to SEACC, which illustrates the role of the mediation itself and the very same logics of the NCPs' mechanism:

The NCP also takes this opportunity to remind SEACC that offering good offices after the initial assessment should not be construed as confirmation of non-observance of the Guidelines by the Company. Rather, it implies the NCP has assessed that its offer of good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, and developing meaningful recommendations on enterprise conduct, would support or encourage the resolution of the issues.³⁴

On the other side, the Specific Instances regarding NBIM described above offer also interesting elements for the conduct of due diligence in general, and by financial investors in particular:

The OECD Guidelines affirm the corporate responsibility to respect human rights ... The responsibility to respect applies not only to impacts created through an enterprise's own actions, but also to the impacts from products, services or operations of business relationships that are directly linked to it.

To identify and address those impacts, the Guidelines set out three basic steps an enterprise should take to help ensure that it is respecting human rights: (i) have a policy commitment to respect human rights; (ii) carry out human rights due diligence; and (iii) provide for or cooperate in remediation of adverse human rights impacts in designated circumstances. These steps apply to investors and to all the companies in their portfolio as all enterprises have a responsibility to respect the UN Guiding Principles and for those covered by the OECD Guidelines. Investors can use the same steps as a useful framework for assessing whether companies under consideration or already in their portfolio meet their responsibility to respect human rights.

According to the OECD Guidelines, due diligence is generally understood as the process to identify, prevent and mitigate actual and potential adverse impacts and account for how adverse impacts are addressed. The UN Special Representative to the Secretary General who developed the UN Framework and UN Guiding Principles referred to this as companies 'knowing and showing' what they are doing to respect human rights. Companies should develop relevant operational policies and procedures, which can be nested in the enterprise's risk management system, so that acting on these policies and procedures becomes a routine part of doing business. The enterprise risk management system should, however, go beyond simply managing risk to the enterprise itself and include risks to rights holders. These processes should be supported by appropriate human and financial resources, with assigned responsibility to relevant functions in the enterprise to ensure it is acting upon identified risks.

Human rights due diligence is not a one-size-fits-all approach. It should be carried out 'as appro-

33. *ibid* § 10.

34. *ibid* § 11.

priate to [the enterprise's] size, the nature and context of operations and the severity of the risks of adverse human rights impacts.' Given that NBIM manages one of the largest funds in the world with potentially severe human rights impacts from some sectors – such as industrials, extractives and companies operating in high-risk environments – a robust system of human rights due diligence is appropriate. At the same time, the human rights due diligence system must take into account the fact that NBIM invests in 7,000 companies, so it is not possible to scrutinize and engage each company in detail or even individually.

The cases commented not only help for the concrete application of the due diligence criteria that will have to be adopted in applying the Transparency Act, but also to show how the result of applying the Guidelines does not produce effects exclusively on the entity that is believed to have committed the violation (more accurately, on the entity that is responsible for the behaviour of its counterparties with whom it has established long-term business relationships), but also on all the stakeholders involved, including those who initiated the Specific Instance. This confirms once again how the application of these standards is independent of any logic of individual responsibility but requires a collective effort to apply international standards also from the private sector.

4. Hard Fragmentation Versus Soft Unification?

The overview presented in the previous pages of the NCPs' interpretative practices of the OECD Guidelines in relation to their core elements does not claim to be complete. It is only intended to provide some starting points for a broader reflection on the relationship between international standards of soft law, and national laws that adopt them. This is done through the lense of the OECD Guidelines, as the only international standards disposing of a non-judicial means for compliance, with concrete and detailed results in addition.

As stated, there is no claim in the above few pages to reconstruct the conceptualisation of the interpretation of these tools in their interaction either, but only to illustrate criticalities. However, a further critical point has to be added before concluding: the need to transpose soft law measures into hard law usually arises from the concern that non-binding instruments are often not respected (for which it is decided to make these measures mandatory). However, it remains that the transformation of soft law into hard law occurs at a national or at most regional level (the proposal for a European Union Directive), with the result of producing fragmentation across the international arena.

Hard law instruments do level obligations and are mandatory but are so only within their jurisdictional scope of application. On the contrary, soft law instruments—meant to be applied internationally—are flexible precisely to facilitate their adoption according to the circumstances. Within such context, the function of the NPCs is to guide the application of soft law principles towards convergent solutions and interpretations. In this way, they do not level the obligations, but rather create a uniform application in the long run. They deliberately fill high-level principles with concrete content on a step-by-step, or case-by-case basis. Furthermore, they can broadly apply irrespective of where the contested facts occurred, or the activities are performed.

The result is that, where the binding nature of the instrument prevails, fragmentation is yet generated. Unification-by-approximation typical of soft law is instead produced by the slow and often fluctuating process of continuously self-generating practices, which—by not being binding—are yet always subject to re-discussion and amendment, as well as to voluntary acceptance by the relevant actors.

Such systemic considerations go well beyond issues of interpretation and the relationship between hard and soft law within the same legal system. However, they do provide the necessary background to justify how standards embedded in domestic hard law might be interpreted through evolving international principles intended to be fed on international practice.

5. Conclusion

The transition from (international) soft law to (national) hard law generates various and complex issues of interpretation and of coexistence between instruments, which in the case of the Transparency Act are made even more evident by the coexistence of the Norwegian NCP, on the one hand, to implement the Guidelines per se, and the Norwegian Consumer Authority, on the other, to implement the very same standards as embedded in the Transparency Act. Although not meant to be complete, the case study offered in this contribution provides a first analysis of how standards embedded in domestic hard law might be interpreted through evolving international principles intended to be fed on international practice.