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**THE INVESTOR RESPONSIBILITY TO RESPECT THE ENVIRONMENT
UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

Dissertation to obtain a Master's Degree in Law, in the
specialty of Management

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Investor Responsibility to Respect the Environment Under the OECD
Guidelines for Multinational Enterprises

In compliance with paragraph 4 of art. 37 of the Regulation n°981/2021 leading to the attainment of the Master's Degree, I declare that the body of the dissertation, including spaces and notes, occupies a total of 128884 characters

Resumo

Esta tese estuda o tema Responsabilidade do Investidor em Respeitar o Meio Ambiente sob as Diretrizes da OCDE para Empresas Multinacionais. Explora como os investidores devem ser responsáveis por suas ações ao fazer um investimento.

O artigo discute a exequibilidade das diretrizes como instrumento de direito, tendo constatado que, como guia com mecanismo de reclamação, é um instrumento de *soft law* com consequências duras.

A responsabilidade do investidor é um assunto sério, pois os investidores são igualmente responsáveis pelos projetos que financiam e devem participar da ação para garantir que os efeitos colaterais não aconteçam, portanto, o mecanismo de *due diligence* estabelecido nas Diretrizes da OCDE é tão importante, pois não é apenas um mecanismo de antecipação, mas um mecanismo contínuo, que permite aos investidores mitigar e prevenir continuamente os riscos.

Este artigo também aprofunda o tema dos Pontos de Contato Nacionais como mecanismo de reclamação e o Comitê de Investimentos e explica, com estudos de caso, como os Pontos de Contato Nacionais funcionam.

Conclui que os investidores devem realizar sua devida diligência ao investir para evitar serem igualmente responsáveis por efeitos ambientais adversos e que os Pontos de Contato Nacionais, como mecanismo de reclamação para um instrumento de *soft law*, auxiliam no cumprimento das Diretrizes da OCDE para Empresas Multinacionais.

Total de palavras: 211

Abstract

This thesis studies the topic of Investor Responsibility to Respect the Environment Under the OECD Guidelines for Multinational Enterprises. It explores how investors must be responsible for their actions when making an investment.

The paper discusses the enforceability of the guidelines as a soft law instrument having found that as a guideline with a grievance mechanism, it is an instrument of soft law with hard consequences.

Investor responsibility is a serious matter as investors are equally responsible for the projects they fund and must partake in the action to ensure that the side effects do not happen, hence, the mechanism for due diligence set in the OECD Guidelines is so important, as it is not only a mechanism for anticipating but an ongoing mechanism, that allows investors to continuously mitigate and prevent risks.

This paper also delves into the topic of National Contact Points as a grievance mechanism and the Investment Committee and explains, with case studies, how National Contact Points work.

It concludes that investors must perform their due diligence when investing in order to avoid being equally responsible for adverse environmental effects and that National Contact Points, as a grievance mechanism for a soft law instrument aids in compliance of the OECD Guidelines for Multinational Enterprises.

Word Count:208

1- Introduction

Environmental issues have become a growing global concern over the years, and now more than ever, a case can be made that environmental risks are the most pressing out of ESG risk management. News reports showing different and unprecedented natural catastrophes worldwide, such as wildfires, blizzards, hurricanes, and other environmental hazards, have become the norm.¹ Notwithstanding these natural events, artificial ecological disasters, which happen due to human interference, have occurred more frequently than before and sometimes worsen the magnitude of natural catastrophes.²

According to a report published by the Intergovernmental Panel on Climate Change appointed by the UN in August 2021³, human influence has unequivocally warmed the atmosphere, ocean, and land, as well as changes in the cryosphere and biosphere. It has been found that the earth's temperature has risen 1.1 degrees Celsius since the 19th century⁴. This increase in temperature has been occurring since pre-industrial times and can be attributed to burning fossil fuels, such as coal.⁵

Responsible investment has become a mainstream concern over the past years, and investors have seen an increase in the need to integrate the environmental, social, and governance factors to make investment decisions. If in the late 90s, the term responsible investment was a niche concept used by certain benefactors and specialized institutions who wished to invest more consciously, nowadays, this type of investment has become an intrinsic part of the financial sector in the 21st-century investors consider ways in

¹ Chaudhary, M. T., & Piracha, A. (2021b). Natural Disasters—Origins, Impacts, Management. *Encyclopedia*, 1(4), 1101–1131. <https://doi.org/10.3390/encyclopedia1040084>

² Kelkar, S., & Kumthekar, M. B. (2019). Need of Sustainable Planning and Development Against Natural Disaster Resulting Because of Climate Change and Human Intervention. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3366750>

³ IPCC. (2021). *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge University Press. <https://www.ipcc.ch/report/ar6/wg1/>

⁴ Allen, M. R., Dube, O. P., Solecki, W., Aragón-Durand, F., Mulugetta, Y., Cramer, W., Humphreys, S., Kainuma, M., Kala, J., Mahowald, N., Perez, R., Wairiu, M., & Zickfeld, K. (2018). Framing and Context. *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, 49–92. <https://doi.org/10.1017/9781009157940.003>

⁵ Oreskes, N. (2004). The Scientific Consensus on Climate Change. *Science*, 306(5702), 1686. <https://doi.org/10.1126/science.1103618>

which they may invest their money and have that investment be ethically and morally responsible.⁶

In 2005, the UNEP FI Asset Management Working Group invited the renowned law firm Freshfields Bruckhaus Deringer to determine whether institutional investors were permitted to include environmental, social, and governance concerns into their investment decision-making processes.

In this report⁷, it was crucial for the UNEP FI Asset Management Working Group that the report considers how the law in this field would evolve over the years as well as to examine the legal framework of seven specific jurisdictions, these being: France, Germany, Italy, Japan, the United Kingdom, the United States of America, and Spain. Additionally, Freshfields Bruckhaus Deringer decided to add two countries to this list, Australia, and Canada, given that both these countries' jurisdictions had a great deal of academic interest surrounding them.

The ESG acronym was formally introduced in this report, but it was not the first option, as both the acronyms SEG and GES were considered but dismissed; according to a recent report by Elliot Wilson⁸, the team thought that social investing was still a confusing concept and the latter acronym, which emphasize corporate governance, was not the right choice either. Mr. Clements-Hunt, given his experience with famous newspapers, suggested the ESG acronym as it was catchier.

The United Nations Principles for Responsible Investment were launched in April 2006 at the New York Stock Exchange. Still, the process started in early 2005, when the then United Nations Secretary-General Kofi Annan invited a group of 20 investors from 12 different countries and 70 experts from the investment industry, and intergovernmental organizations, amongst others, to join this process of development of the Principles for Responsible Investment.⁹ Six principles were created behind the

⁶ Sandberg, J., Juravle, C., Hedesström, T. M., & Hamilton, I. (2008). The Heterogeneity of Socially Responsible Investment. *Journal of Business Ethics*, 87(4), 519–533.
<https://doi.org/10.1007/s10551-008-9956-0>

⁷ UNEP FI Asset Management Working Group & Freshfields Bruckhaus Deringer. (2005). *A legal framework for integrating environmental, social, and governance issues into institutional investment*. UNEP FI Asset Management Working Group.
https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf

⁸ Wilson, E. (2021, October 7). *The United Nations free-thinkers coined the term 'ESG' and changed the world*. Euromoney. <https://www.euromoney.com/article/294dqz2h1pqywgbyh3zls/esg/the-united-nations-free-thinkers-who-coined-the-term-esg-and-changed-the-world>

⁹ PRI Association. (2021). *About the PRI*. PRI. <https://www.unpri.org/pri/about-the-pri>

philosophy that environmental and social factors should be considered and part of the investment decision-making process.¹⁰

The six Principles of Responsible Investment encourage the incorporation of ESG issues to the fullest, as signatories commit themselves to incorporate ESG issues into investment analysis and decision-making processes, as well as into their policies and practices, performing due diligence on companies they invest in, and promoting the Principles within the industry. Signatories will also report on their progress in implementing the Principles.¹¹

The Principles offer an in-depth explanation of how they may be implemented and the possible actions that may take place. As of October 2021, the PRI has over 4400 signatories worldwide.¹² This data is constantly updated on their website.

Caplan, Griswold, and Jarvis argue that responsible investment has become a growing concern to all investors. It is divided into three main categories: Socially Responsible Investing, Impact Investing, and ESG Investing.¹³

Socially responsible investment is the process of incorporating social and environmental factors into investment decisions.¹⁴ These non-financial factors are considered when the investor's goal is not only how their investment will affect them financially but also have a sense of how this investment will impact aspects such as the environment, for example.

However, this does not mean that socially responsible investors' main goal is different from that of a typical investor- their main goal is to profit and invest in opportunities that will allow them to have the best margin to do so. The only difference is that, in this case, there are a few more factors to take into consideration.

Impact investing is another category of responsible investing as we have mentioned above. Here, the investor intentionally aims to achieve a specific positive environmental and social impact beyond the financial gain they will have with that

¹⁰ PRI Association. (n.d.). *What are the Principles for Responsible Investment?* PRI. <https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment>

¹¹ PRI Association. (2021). *About the PRI*. PRI. <https://www.unpri.org/pri/about-the-pri>

¹² PRI. (2021, October). *Signatory directory*. <https://www.unpri.org/signatories/signatory-resources/signatory-directory>

¹³ Caplan, L., Griswold, J., & Jarvis, W. (2013). From SRI to ESG: The Changing World of Responsible Investing. *Commonfund Institute*. Published.

¹⁴ Hirst, S. (2016). Social Responsibility Resolutions. *Journal of Corporation Law, Harvard Law School Program on Corporate Governance*. <https://doi.org/10.2139/ssrn.2773367>

investment¹⁵. Although institutional investors typically believe that this type of investing only refers to micro-finance opportunities, micro-finance is banking services provided to low-income people who would otherwise not have access to this type of aid in a way that matches ethical lending practices¹⁶.

Governments are an enormous enthusiast of impact investing- they encourage it and can also partake in the investment. This type of governmental intervention can minimize the risk involved for the parties, ensure that these opportunities are solid, and have an excellent financial return to those involved.¹⁷

ESG investing is another category of responsible investing, and its focus, as the name states, is on Environmental, Social, and Governance factors and aims to maximize financial returns by including these factors into risk and opportunity assessments, especially in medium to long-term returns from investments¹⁸. What sets ESG investing apart from traditional investing is that it considers more than just short-term financial success and risks to that investment.

While on one side, there are investments made with the sole purpose of maximizing profits with no consideration of other social factors, on the other, there are those investments that are made with a purely philanthropic goal, seeking only social benefits, not regarding financial returns but social and environmental returns, such as the improvement of workers conditions for example. ESG investing is somewhere in the middle of these two types of investments and is an investment that will yield financial and social returns, as investors are socially aware and will consider ESG factors when investing¹⁹.

There have been several developments that have contributed to the evolution of this type of investment. According to Patalano and Boffo, nowadays, there is the understanding that the company serves not only the needs of shareholders but

¹⁵ O'Donohoe, N., Leijonhufvud, C., & Saltuk, Y. (2010). Impact Investments-An emerging asset class. *JPMorgan Chase & Co., The Rockefeller Foundation and Global Impact Investing Network, Inc.* Published.

¹⁶ Morduch, J. (1999). The Microfinance Promise. *Journal of Economic Literature*, 37(4), 1569–1614. <https://doi.org/10.1257/jel.37.4.1569>

¹⁷ Global Impact Investing Network. (2022). *What You Need to Know about Impact Investing*. The GIIN. <https://thegiin.org/impact-investing/need-to-know/#what-is-impact-investing>

¹⁸ Patalano, R., & Boffo, R. (2020). *ESG Investing: Practices, Progress and Challenges*. OECD Paris. <https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf>

¹⁹ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*. <https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

stakeholders as well.²⁰ This understanding has aided the expansion of corporate social responsibility both in businesses and in organizations and encouraged firms to report on these matters about social responsibility and good practices. The demand for this type of data regarding ESG factors has increased over the past few years as investors seek data on ESG and good practices.²¹

Investors are responsible because they must know where and what they are investing their money. For example, funding a project based solely on coal energy is not a sustainable practice for socially responsible investors. It is up to everyone to pay attention and make sure that companies are accountable with their investments, and if not, bring it to light by filing a complaint with a National Contact Point, for example.

Investors must be made aware and conscious of the impact their investments may have. Suppose a bank that continuously supports and funds projects which do not consider good environmental practices, uses non-reusable energies, does not take into consideration the Paris Agreement (a legally binding international treaty on climate change, adopted in 2015 and entered into force later on in 2016, which has as a goal to limit global warming to well below 2, preferably 1.5 degrees Celsius, compared to pre-industrial levels).²² That being so, that bank is not a responsible investor. However, suppose that the bank starts to fund other environmentally conscious projects, for example. In this case, those initial projects will have either adapt to this new reality, or they will have no funding (or, at the very least, it will be harder to find an investor, given that the world is becoming more socially aware every day), so they will more likely start to slowly investigate more environmentally conscious practices, to comply with the expectations of today's socially responsible investors.

Throughout this thesis we will explore how investors are responsible towards the environment by understanding the instrument we have in hand, the OECD Guidelines for Multinational Enterprises, where it derives from, how it can be enforced, how it is applied and what grievance mechanisms are in place for times when parties feel that investors have not taken the Guideline into consideration when making their

²⁰ Patalano, R., & Boffo, R. (2020). *ESG Investing: Practices, Progress and Challenges*. OECD Paris. <https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf>

²¹ Camilleri, M. A. (2020). The market for socially responsible investing: a review of the developments. *Social Responsibility Journal*, 17(3), 412–428. <https://doi.org/10.1108/srj-06-2019-0194>

²² United Nations Climate Change. (2015). *The Paris Agreement*. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>

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investments. This thesis focuses on Chapter VI of the OECD Guidelines for Multinational Enterprises, which regulates the Environment.

2- The OECD, Due Diligence and Other Legal Instruments

Many legal instruments have shaped environmental sustainability and responsible investment in this area into what it is today. This thesis will focus primarily on studying the OECD Guidelines for Multinational Enterprises. Still, before delving into that instrument, it is essential to refer to a few other legal documents that have contributed to this subject matter.

The United Nations Guiding Principles on Business and Human Rights are guidelines for States and businesses to follow to avoid, confront, and rectify human rights violations in business activities. John Ruggie, the UN Special Representative on Business and Human Rights, presented the principles that the UN Human Rights Council ratified in June 2011.²³ The UN Human Rights Council constituted the UN Working Group on Business and Human Rights in the same resolution. These guidelines rest on three pillars: the State's duty to protect human rights, the corporate responsibility to respect human rights, and the access to remedy for victims of business-related abuses²⁴.

One key aspect of the UN Guiding Principles is the deep-rooted mechanism of due diligence that is in place. Human rights due diligence in the UNGP includes four main processes, including detecting and evaluating actual and potential adverse human rights impacts that the firm may cause, contribute to, or be directly linked to²⁵; taking necessary action, and integrating impact assessment results into relevant corporate

²³ UN. (2011). *Guiding Principles on Business and Human Rights*.

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

²⁴ United Nations Human Rights Office of the High Commissioner. (n.d.). *What are human rights?* OHCHR. <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

²⁵ It's critical to distinguish between causing, contributing to, and being directly related to a negative impact on human rights. A business can cause an adverse impact where its activities, by action or omission, are sufficient to result in the adverse impact. A business can contribute to an adverse impact through its own activities by action or omission either directly or alongside other entities, such as a client. Contribution implies an element of causality, that implies that the actions taken by the business were taken because the business influence the client in such a way to make the adverse impact more likely. A business is said to be directly linked to an adverse impact when the business has not caused or contributed to the adverse human rights impact caused, but there is a direct link between the operations, products and services of the business and the adverse human rights impact in question, through the business' relationships. See OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector* <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

procedures; tracking the efficacy of measures to understand their success;
communicating with stakeholders regarding how impacts are addressed.²⁶

The OECD Guidelines, Human Rights chapter, is very much in sync with the UN Guiding Principles²⁷, and the concept of due diligence that is seen throughout the whole text is derived from the Guiding Principle's concept of due diligence. This concept has been applied since the 2011 revision of the Guidelines.²⁸ The idea of due diligence will be explored in greater detail in Chapter 2.

There are many soft law legal instruments that can be related to investor responsibility, especially when it comes to the environment. In this paper, we are focusing on the OECD Guidelines for Multinational Enterprises, but in this chapter, we will look at other legal instruments that have had an impact in this area and have shaped this instrument and how investors act responsibly towards the environment.

First and foremost, we must start with the OECD Guidelines for Multinational Enterprises. The OECD is an intergovernmental organization created on December 14, 1960, as a successor to the Organization for European Economic Cooperation²⁹ and established in 1961 to promote global trade and investment. The purpose of the OECD is to promote and harmonize economic growth and free trade among its member countries and enhance social wellbeing. Responsible business conduct means that companies take accountability for their own economic, social, and environmental impacts.

The OECD Guidelines for Multinational Enterprises were adopted in 1976 as a part of the Declaration on International Investment and Multinational Enterprises and have been revised five times, the last time in 2011. The latest revision to the Guidelines included changes such as a new human rights chapter and changes in specialized

²⁶ United Nations & United Nations. Office of the High Commissioner for Human Rights. (2014). *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*. United Nations Publication.

²⁷ See above (United Nations & United Nations. Office of the High Commissioner for Human Rights, 2014)

²⁸ Macchi, C. (2020). The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence.' *Business and Human Rights Journal*, 6(1), 93–119. <https://doi.org/10.1017/bhj.2020.25>

²⁹ N. Wakkie, P. (1979). Some Comments on the Impact of the OECD Guidelines for Multinational Enterprises on European Employment Relations. *Oyola of Los Angeles International and Comparative Law Review*, 2(1). <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1028&context=ilr>

chapters such as the Environment, amongst other relevant alterations. Currently, there are 38 member countries and 12 non-members.³⁰

The text is the standard for responsible business conduct. The Guidelines are recommendations addressed by governments to multinational enterprises, and they aim to ensure that these companies are operating in alignment with government policies, to strengthen the confidence between enterprises and the societies in which they operate, to promote foreign investments, and to enhance the contribution to sustainable development made by multinational enterprises.

The Guidelines cover a wide range of subjects, including Human Rights, Employment and Industrial Relations, the Environment, Combating Bribery, Bribe Solicitation and Extortion, Consumer Interests, Science and Technology, Competition, and Taxation.³¹

The OECD Guidelines for Multinational Enterprises are the only guidelines on responsible business conduct that have an in-built grievance mechanism and are approved by governments. Governments that follow the Guidelines must establish a National Contact Point.³² The goal of the National Contact Point is to ensure the Guidelines' effectiveness by responding to inquiries and assisting in resolving issues that may arise from alleged non-compliance with the guidelines in specific cases. This is a non-judicial mechanism that allows for any interested party to submit a complaint. There are 49 National Contact Points³³, and this mechanism will be looked at in more detail further on.

The organization has been involved in developing responsible investment policies and procedures for institutional investors, including reports on various matters, such as the paper on Responsible Business Conduct for Institutional Investors: Key

³⁰ OECD. (2021). *OECD Declaration and Decisions on International Investment and Multinational Enterprises*. <https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>

³¹ OECD. (2011). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

³² OECD. (2021a). *Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity*. <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.html>

³³ OECD. (2019a). *Guide for National Contact Points on Structures and Activities*. OECD Guidelines for Multinational Enterprises. <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf>

Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises³⁴, amongst many other relevant studies.

The OECD Guidelines on MNEs define due diligence 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 systems³⁵.

According to the OECD Guidelines on MNEs, due diligence is an ongoing process carried out throughout the entire business relationship. They portray due diligence as a proactive and reactive process as it should not be limited to the initial investigation of a potential business relationship. Still, it should be a continuous process that is performed in such a way that it prevents potential risks through the monitorization of the business relationships and should also be implemented proactively by establishing methods that detect threats to responsible business conduct and reduce adverse consequences to those conducts.³⁶

Bruner and Perella defined due diligence as an inquiry, audit, or study conducted to check facts or details of an issue under consideration by a typical investor- due diligence implicates an enormous amount of research.³⁷ Whilst human rights due diligence and other types of due diligence differ, as we will see, I believe making such a distinction is important. In the financial industry, for example, it entails the review of financial records before finalizing a deal with another business. In M&A cases, which Bruner and Perella's work focuses on, the role of due diligence is to assist with valuation, arm negotiators, assess the veracity of representations and warranties contained in the merger agreement, and satisfy investor disclosure obligations, and inform post-merger integration plans.

Black's Law Dictionary 2nd Edition³⁸ defines due diligence as such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily

³⁴ OECD. (2018a). *Due Diligence Guidance for Responsible Business Conduct*.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

³⁵ OECD. (2011, Chapter 1). OECD Guidelines for Multinational Enterprises. OECD Publishing.

<https://doi.org/10.1787/9789264115415-en>

³⁶ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*.

<https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

³⁷ Bruner, R. F., & Perella, J. R. (2004). *Applied Mergers and Acquisitions* (1st ed.). Wiley.

³⁸ Black's Law Dictionary 2nd Edition. (2014, January 31). *What is DUE DILIGENCE? definition of DUE DILIGENCE (Black's Law Dictionary)*. The Law Dictionary. <https://thelawdictionary.org/due-diligence/>

exercised by, a reasonable and prudent man under the circumstances; not measured by any absolute standard but depending on the relative facts of the particular case.

The OECD Guidelines for Multinational Enterprises recognize the positive contributions that businesses can make to economic, environmental, and social progress, but also that business activity can result in adverse impacts related to workers, human rights, the environment, bribery, consumers, and corporate governance. Hence, the Guidelines recommend that businesses carry out risk-based due diligence to mitigate the negative impacts of their operations, supply chains, and other business relationships.³⁹ Risk-based due diligence addresses the actual adverse impacts or potential adverse impacts related to the topics covered in the OECD Guidelines, which provide detailed information on the conduct recommended for each responsible business conduct.⁴⁰

The paper on Responsible Business Conduct for Institutional Investors was developed to help investors implement the due diligence recommendations of the OECD Guidelines for Multinational Enterprises. It identifies the actions that must be taken in each step of the due diligence process⁴¹. Aside from this article, the OECD Due Diligence Guidance for Responsible Business Conduct is an essential tool intended to help businesses implement the Guidelines since it includes simple language explanations of the due diligence guidelines and related regulations.⁴² This Guidance mechanism came in response to the G7 Leaders' Declaration adopted in June 2015 in Schloss Elmau, which addresses the importance of establishing a common understanding of due diligence⁴³. The OECD Working Party on Responsible Industry Conduct oversaw the creation of this Guidance, which entailed a multi-stakeholder approach involving OECD and non-OECD nations, representatives from business, trade unions, and civil society. The OECD WPRBC accepted this Guidance on March 6,

³⁹ OECD. (2018). *Due Diligence Guidance for Responsible Business Conduct*.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴⁰ *Ibid.*

⁴¹ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*.

<https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

⁴² OECD. (2018). *Due Diligence Guidance for Responsible Business Conduct*.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴³ *Leaders' Declaration G7 Summit 7–8 June 2015*. (2015, June). G7 Germany.

https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf

2018; on May 30, 2018, the Council at the Ministerial level endorsed an OECD Recommendation on Guidance.⁴⁴

As mentioned before, the due diligence aspect of the OECD Guidelines incorporated elements of the UN Guiding Principles in its 2011 revision. The OECD Due Diligence Guidance for Responsible Business Conduct settles issues and misunderstandings around due diligence for responsible business conduct. First and foremost, it is essential to define this idea of responsible business conduct, which according to the OECD Guidelines, means that businesses should make a positive contribution to economic, environmental, and social progress towards achieving sustainable development and should avoid and address adverse impacts through their activities and seek to prevent or mitigate effects directly linked to their products and services.⁴⁵

The Due Diligence Guidance clarifies two common misconceptions. It is essential to comprehend that the due diligence in the OECD Guidelines and the UN Guiding Principles is not the same as the due diligence conducted by corporations before signing a simple business contract, for instance. The OECD Guidelines, like the UN Guiding Principles, focuses on the effects of adverse effects on people rather than the corporation and strive to detect, mitigate, prevent, and account for how current and prospective negative impacts are managed.⁴⁶ Furthermore, regular due diligence and responsible business conduct due diligence are also very distinct when it comes to stakeholders, as the Due Diligence Guidance clearly states that one of the critical components of due diligence is meaningful stakeholder engagement.⁴⁷

Due diligence is a procedure used by investors to discover possible risks and obligations before making a financial commitment.⁴⁸ Under the OECD Guidelines, due diligence is a continuous activity since organizations must constantly identify, prevent,

⁴⁴ OECD. (2018). *Due Diligence Guidance for Responsible Business Conduct*.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴⁵ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*.

⁴⁶ OECD Watch Contribution. (2018). *Launch of the OECD Due Diligence Guidance on Responsible Business Conduct*. OECD Watch. <https://mneguidelines.oecd.org/OECDWatch-Due-Diligence-Guidance-Contribution-2018.pdf>

⁴⁷ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*. <https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

⁴⁸ Harvey, M. G., & Lusch, R. F. (1995). Expanding the nature and scope of due diligence. *Journal of Business Venturing*, 10(1), 5–21. [https://doi.org/10.1016/0883-9026\(94\)00020-u](https://doi.org/10.1016/0883-9026(94)00020-u)

mitigate, and account for any negative consequences. It refers to identifying risks and actively managing and accounting for them, in contrast to investment due diligence, which refers to the method of detecting concerns, generally before a transaction. According to the OECD Guidelines, due diligence attempts to prevent and respond to risks associated with responsible business conduct, while investment practice it tries to detect financial threats.⁴⁹

The environment chapter offers MNEs a series of guidelines for improving their performance in this field and contributing to environmental preservation via better internal management and planning. These guidelines broadly reflect the Rio Declaration on Environment and Development values and goals and Agenda 21's.⁵⁰ They also consider the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, more commonly known as the Aarhus Convention, and the ISO Standard on Environmental Management Systems.

The Rio Declaration on Environment and Development was a brief declaration created during the United Nations Conference on Environment and Development (UNCED) in 1992 and signed by over 175 nations. The Rio Declaration outlined 27 principles to help countries achieve long-term sustainable development.

The UNCED met in Rio de Janeiro, Brazil, in June 1992 to establish a new global partnership through the creation of levels of cooperation among States, key sectors of societies, and people, working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system.⁵¹

People's rights to participate in developing their economies are defined in the 1992 Rio Declaration on Environment and Development, as are human beings' obligations to maintain the familiar environment. The proclamation expands on the fundamental principles of people's and countries' attitudes toward the environment and development,

⁴⁹ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*.
<https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

⁵⁰ OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*.
<https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>

⁵¹ United Nations. (1992). *Rio Declaration on Environment and Development*.
<https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

initially identified during the United Nations Conference on the Human Environment (1972).⁵²

According to the Rio Declaration, long-term economic success is only possible if it is tied to environmental protection. If this is to be accomplished, countries must form a new global partnership that includes governments, citizens, and significant sectors of society. Human society must work together to create international accords that protect the global environment while allowing for responsible development.⁵³

One of the most important documents to emerge from the United Nations' Rio Summit on Environment and Development in 1992 was Agenda 21. The document is a plan of action to be implemented worldwide, nationally, and locally by UN entities, governments, and critical groups in every area where humans impact the environment.⁵⁴

Agenda 21 is a non-binding action plan signed by 178 nations regarding sustainable development. It was developed at the United Nations Conference on Environment and Development (UNCED) in 1992, where leaders agreed to become more sustainable. The document demonstrates how all levels of government, with particular consideration for developing countries, may work together to battle poverty and pollution, conserve natural resources and prosper sustainably.⁵⁵

The Aarhus Convention was adopted on 25 June 1998 and came into force on October 30, 200. It has 47 signatories, including 46 nations and the European Union, and institutes several public rights in environmental protection. Signatories are expected to adopt the appropriate measures to ensure that public authorities at all levels contribute to fulfilling these measures. The Convention sets three main pillars of protection: access to environmental information, public participation in environmental decision-making, and access to justice.⁵⁶

⁵² LinusWealth. (2019, January 24). *The Rio Declaration on Environment and Development / Sustainable Environment Online*. Sustainable Environment Online | Environment Resources and Sustainable Development. https://www.sustainable-environment.org.uk/Action/Rio_Declaration.php

⁵³ *Ibid*

⁵⁴ Momtaz, S., & Kabir, Z. (2013). *Evaluating Environmental and Social Impact Assessment in Developing Countries* (1st ed.). Elsevier.

⁵⁵ ICLEI. (2012). *FAQ: ICLEI, the United Nations, and Agenda 21 — ICLEI Local Governments for Sustainability USA*. <https://web.archive.org/web/20121212203307/http://www.iclei.org/about-iclei/faqs/faq-iclei-the-united-nations-and-agenda-21#what-is-agenda-21>

⁵⁶ Samvel, G. (2020). Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice. *Transnational Environmental Law*, 9(2), 211–238. <https://doi.org/10.1017/s2047102519000426>

One exciting aspect of the Aarhus Convention is that Article 15 establishes the possibility of a “review of compliance,” where, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention⁵⁷. In October 2002, the Meeting of the Signatories constituted a Working Group to design such a mechanism based on the content of article 15. The Parties Meeting enacted Decision I/7 on compliance review and elected the first Compliance Committee.⁵⁸

According to Decision I/7, there are four main ways in which the compliance mechanism may be triggered, which include parties bringing to the committee submissions about other parties or concerning their compliance, a secretariat referring a compliance issue to the committee, even though members of the public may also shed light on their concerns on a party’s compliance by making a communication to the committee.⁵⁹

Commonly and derivatively from the text of article 15, this mechanism has been viewed as a non-judicial, voluntary body whose verdicts are non-binding decisions. However, in recent years, some have argued, for example, Fasoli and McGlone, that the Committee has provided more than simply a soft remedy and that it has moved closer to judicialization, issuing binding judgments, authoritative interpretations of the Aarhus Convention.⁶⁰

ISO standards are agreed upon internationally by experts to ensure that certain criteria are upheld in a specific area. According to ISO, international standards allow consumers, ranging from medical practitioners to mothers, to know that the products they are acquiring are safe. Of good quality, as ISO has standards on medical packaging and toy safety. (International Organization for Standardization, 2015), ISO standards on the environment allow for regulators to develop new regulations based on their standards, knowing that they have a solid foundation of experts behind their criteria.

⁵⁷ Aarhus Convention, (1998). <https://unece.org/DAM/env/pp/documents/cep43e.pdf>
Entered into force: 30 October 2001

⁵⁸ UNECE. (n.d.). *Compliance Committee Background*. <https://unece.org/env/pp/cc/background>

⁵⁹ Aarhus Convention, (1998). <https://unece.org/DAM/env/pp/documents/cep43e.pdf>
Entered into force: 30 October 2001

⁶⁰ Fasoli, E., & McGlone, A. (2018). The Non-Compliance Mechanism Under the Aarhus Convention as ‘Soft’ Enforcement of International Environmental Law: Not So Soft After All! *Netherlands International Law Review*, 65(1), 27–53. <https://doi.org/10.1007/s40802-018-0102-0>

Similar to the other instruments previously mentioned, the ISO standards are also legally non-binding.

ISO 14000 is a set of environmental management standards designed to assist businesses in reducing the negative impact of their activities on the environment while ensuring their compliance with applicable laws and regulations.⁶¹

Among the set of environmental ISO standards, the ISO 14001 is a globally recognized standard that lays out the criteria for a quality environmental management system. It assists firms in improving their environmental performance through more effective resource utilization and waste reduction, resulting in a competitive advantage and stakeholder confidence.⁶² An Environmental Management System is a collection of systems and practices that allow a company to decrease its environmental footprint while increasing its operational efficiency.⁶³

These different regulatory instruments have an evident influence on Chapter VI of the OECD Guidelines. It is possible to look at each recommendation established in the Environment chapter of the Guidelines and relate it to a different instrument.

For instance, the first recommendation in Chapter VI regarding environmental management systems, including the collection of information regarding the environmental impact of their activities, the establishment of targets, and monitoring of progress towards environmental, health, and safety objectives⁶⁴, can be linked to the ISO standards, which have the specific ISO 14000 set of standards for environmental management. Articles 2 n°2, 2 n°3, 3 n°1, 4 n°1, 4 n°2, 5 n°1, 5 n°2 and 5 n°4 of the Aarhus Convention encompass the ideas of collection and evaluation of information regarding environmental health and safety impacts of business activities and the periodic review of established targets stated in the first recommendation.⁶⁵ Likewise, Agenda 21 is a distinct instrument that has served as a basis for this recommendation. Chapter 8, “Integrating Environment and Development in Decision-Making,” conveys

⁶¹ Mustafa, S. (2020). The Study on Environmental Management Accounting: ISO 14000 in Determining the Preventive Environmental Costs. *International Journal of Science and Business*, 4(2), 44–59. <https://doi.org/10.5281/zenodo.3611007>

⁶² International Organization for Standardization. (2015). *Introduction to ISO 14001:2015*. ISO. <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100371.pdf>

⁶³ US Environmental Protection Agency. (2021, September 30). *Environmental Management Systems*. US EPA. <https://www.epa.gov/ems>

⁶⁴ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

⁶⁵ Aarhus Convention, (1998). <https://unece.org/DAM/env/pp/documents/cep43e.pdf>
Entered into force: 30 October 2001

the idea in chapter 8.4 d) of monitoring and evaluating the development process, conducting reviews of the state of environmental and natural resources, which could be complemented with an annual environment and development review, to assess sustainable development achievements by the various sectors involved. Chapter 8.6 also states that countries could develop systems for monitoring and evaluating the progress towards achieving sustainable development goals by adopting specific indicators that measure change across environmental dimensions.⁶⁶

The second recommendation, which delves into issues of public information and communication, notwithstanding concerns about intellectual property rights, confidentiality, and cost⁶⁷, is not only derived from the Rio Convention but also the Aarhus Convention as well as Agenda 21. There is a clear connection between article 10 of the Rio Convention and the recommendation, as this article states that the public must have access to information held by public authorities on hazardous materials and activities in their communities and the opportunity to participate in the decision-making process. In addition to article 10, article 19 of the Rio Convention can also be linked to this recommendation, as it states that information concerning adverse transboundary environmental effects must be provided promptly to potentially affected States⁶⁸. Similarly, articles 4 n°4, 4 n°6, 5 n°, 6 n°1, 6 n°2, 6 n°3, 6 n°4, 6 n° 6, 6 n°8 and article 7 of the Aarhus Convention follow the same idea as recommendation n°2 of Chapter VI of the OECD Guidelines. All these articles illustrate how, taking into consideration the concerns mentioned above regarding confidentiality and such, the public must be informed of the relevant information which is relevant them and that this information is available to the public in a transparent manner.⁶⁹ Moreover, this recommendation can be linked to Chapter 12, “Managing Fragile Ecosystems: Combating Desertification and Drought,” of Agenda 21, for example, where more specifically, chapter 12.32 b) establishes that Governments should facilitate regular communication at all levels and exchange of information and experience between extension officers and researchers.⁷⁰

⁶⁶ Agenda 21, (1992). <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

⁶⁷ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

⁶⁸ United Nations. (1992). *Rio Declaration on Environment and Development*. <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

⁶⁹ Aarhus Convention, (1998). <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

Entered into force: 30 October 2001

⁷⁰ Agenda 21, (1992). <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

Recommendation number three deals with assessing and addressing in decision-making the foreseeable environmental health and safety-related impacts of a business activity⁷¹ and can be related to principle 17 of the Rio Convention, which expresses the point that impact assessments will be made for activities that are likely to have an adverse impact on the environment. Additionally, articles 5 n°1 c), 5 n°6 and 6 n°2 e) of the Aarhus Convention may also be associated with this recommendation. Article 5 n°1 c) states that in the event of a threat to the environment or human health, whatever the cause may be, all information that could help the public in mitigating or preventing the harm from this event must be released immediately to those affected. Article 5 n°6 encourages operators whose activities have an environmental impact to share with the public about their activity. Article 6 n°2 e) demonstrates that the public shall be informed in the decision-making process if an action is subject to a national or international impact assessment procedure⁷². These Aarhus Convention articles are parallel to this Chapter IV recommendation, as they mention the prevention, mitigation of risks, and impact assessment.

The fourth recommendation illustrates the need for precautionary action in the case of severe threats to the environment, and lack of complete scientific certainty may not be used to postpone cost-effective measures to prevent or mitigate damages⁷³. Similarly, principle 15 of the Rio Convention also conveys this by stating a remarkably akin phrasing, where lack of complete scientific certainty may not be used as a reason to postpone cost-effective measures to prevent environmental degradation.⁷⁴ This is one of the most analogous recommendations in this Chapter of the OECD Guidelines, as the wording coincides perfectly with the article in question.

The fifth recommendation defines the need to maintain contingency plans for preventing and controlling adverse environmental risks, as well as mechanisms for immediate reporting to the competent authorities⁷⁵. It parallels with principle 18 of the

⁷¹ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

⁷² Aarhus Convention, (1998). <https://unece.org/DAM/env/pp/documents/cep43e.pdf>
Entered into force: 30 October 2001

⁷³ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

⁷⁴ United Nations. (1992b). *Rio Declaration on Environment and Development*. <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

⁷⁵ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

Rio Convention, which asserts that States must immediately inform others of any natural disasters or emergencies that are likely to cause sudden harmful effects on the environment of those States.⁷⁶ Moreover, Agenda 21 is another instrument that had an impact on this recommendation, as a few chapters may have influenced its development. Chapter 7, “Promoting Sustainable Human Settlement Development,” Chapter 8, “Integrating Environment and Development in Decision-Making,” Chapter 12 “Managing Fragile Ecosystems: Combating Desertification and Drought,” and Chapter 17, “Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources” all mention ideas that refer to the topic at hand with this recommendation. To cite specific examples from these chapters, chapter 8.5 h,) delves into the idea that countries will develop their priorities in establishing procedures for involving local communities in contingency planning for environmental and industrial accidents and maintain an open exchange of information on local hazards. Chapter 17.128 g) refers that based on precautionary approaches, small island states should, with the assistance of international communities, design and implement rational response strategies to address environmental impacts of climate change and prepare appropriate contingency plans.⁷⁷

Recommendation number six is the most significant recommendation in Chapter VI of the OECD Guidelines. It describes the need for continually seeking to improve corporate environmental performance by encouraging certain activities which are outlined in the sub-sections of the recommendation; these include the adoption of technologies in all parts of the enterprise that reflect standards concerning the environment, developing products that have no negative environmental impact, promoting awareness among customers of the environmental implications of the use of their products and services and exploring and assessing ways of improving the environmental performance of the enterprise, by for example developing strategies for emission reduction, recycling, among others.⁷⁸ This is a very complete recommendation, and it is derivative of principle 8 of the Rio Convention, which states that in order to

⁷⁶ United Nations. (1992b). *Rio Declaration on Environment and Development*. <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

⁷⁷ Agenda 21, (1992). <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

⁷⁸ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

achieve sustainable development, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.⁷⁹ This recommendation can also be linked to the ISO Standard, more specifically, the ISO 14000 set of standards, which as previously mentioned is a set of environmental standards, as the recommendation mentions on subsection a) the adoption of technologies and operating procedures that reflect standards concerning environmental performance and these standards are the basis for many regulations environmental standards.⁸⁰

The seventh recommendation provides for adequate education and training for workers on environmental health and safety matters, which ranges from handling hazardous materials to more general environmental management areas, such as public relations⁸¹, and this is derivative of Chapter 29.3 d) e) and Chapter 30.15 of Agenda 21. Chapter 29, “Strengthening the Role Of Workers and their Trade Union”, illustrates on point 29.3 d) and e) the reduction of occupational accidents and injuries, as well as the increase of the workers’ education and training, especially in the area of occupational health and safety and environment. Chapter 30, “Strengthening the Role of Business and Industry” refers that international organizations must increase education, training and awareness relating to cleaner production.⁸²

The last recommendation of Chapter VI of the OECD Guidelines, recommendation number eight, is not derivative of other instruments. This recommendation refers to the development of environmentally meaningful and economically efficient public policy, by means of partnerships or initiatives for example⁸³.

⁷⁹ United Nations. (1992b). *Rio Declaration on Environment and Development*. <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

⁸⁰ International Organization for Standardization. (2015). *Introduction to ISO 14001:2015*. ISO. <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100371.pdf>

⁸¹ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

⁸² Agenda 21, (1992). <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

⁸³ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

3. Enforceability of the OECD Guidelines for Multinational Enterprises and Limitations to the Guidelines as a soft law instrument

Having looked at different legal instruments and the OECD Guidelines themselves and how they implement due diligence throughout their text, it urges to understand how the Guidelines are, in fact, enforced. This chapter will explore how the Guidelines are enforced and its limitations as a soft law instrument.

Dr. Nieuwenkamp refers to the OECD Guidelines as a soft law mechanism with brutal consequences.⁸⁴ The Guidelines are the leading intergovernmental agreed upon “soft law” instrument of corporate accountability as there are not directly binding on the enterprises, but their force comes instead from a political commitment on the part of the OECD members, along with within the non-OECD countries that have adhered, to take steps to secure the implementation of the instruments in the Guidelines on behalf of the multinational enterprises.⁸⁵

Druzin⁸⁶ defined soft law as quasi-legal instruments with no legal effect, such as non-binding resolutions, statements, and guidelines issued by governments and private groups. It is interesting to consider that these instruments, in the case of this thesis, these Guidelines, are followed by signatory governments⁸⁷, even though they possess no legal force. Even though it has no legal authority or coercive methods, soft law is regularly obeyed.

Grnchalla-Wesierski described soft law⁸⁸ as a thesis in which states retained discretion over the definition of obligations they undertook and avoided legal obligations. He stated that provisions combining these techniques could be described as soft law. Nowadays, soft law is defined as constituting international norms, principles, and procedures that lack the requisite degree of normative content to create enforceable

⁸⁴ Nieuwenkamp, R. (2013). The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. *Dovens Schmidt Quarterly*, 1(4), 171–175.
<https://doi.org/10.5553/dq/221199812014001004003>

⁸⁵ Ward, H. (2004). *The OECD Guidelines for Multinational Enterprises and non-adhering countries Opportunities and Challenges Engagement*.
<https://www.oecd.org/investment/investmentfordevelopment/33807204.Pdf>
<https://www.oecd.org/investment/investmentfordevelopment/33807204.pdf>

⁸⁶ Druzin, B. H. (2016). Why does Soft Law Have any Power Anyway? *Asian Journal of International Law*, 7(2), 361–378. <https://doi.org/10.1017/s2044251316000229>

⁸⁷ OECD Watch. (2019, April 8). *The OECD Guidelines*. <https://www.oecdwatch.org/oecd-ncps/the-oecd-guidelines-for-mnes/>

⁸⁸ Grnchalla-Wesierski, T. (1984). A Framework for Understanding “Soft Law.” *Revue de Droit de McGill*, 37–88.

rights and obligations but can still produce specific legal effects. It works as a gap-filler, guiding States and other stakeholders without binding legal norms.⁸⁹

Druzin theorizes that soft law benefits from network effects.⁹⁰ A network effect happens when the value of a product or service increases as the number of others using it grows, bringing more users to the product or service.⁹¹ This network effect extends to many areas of our society, including languages. The choice to learn another language is mainly based on network effects. What language will yield the most network effect? Nowadays, many people speak English, so what other language could a person learn to make the most of the network effect? Many argue that it is Mandarin, for example. It is all about what will give you the best network advantage. Android phones mostly have the same chargers, which is a network effect advantage over Apple. For example, that has their charger for their brand as more people will see that as an advantage over Apple. And this effect will continue throughout many areas of our life.

Continuing with this train of thought, soft law instruments would follow this network effect, according to Druzin. In his theory, legal instruments are susceptible to these effects in the same ways as the examples mentioned before. A legal instrument, such as the OECD Guidelines, may be compared to a product, and its value can be determined by how many people subscribe to it.

The idea is that parties are often eager to employ a unified standard, as they will not be able to co-ordinate under lack of clarity, and that is what these soft law instruments give them.⁹² Druzin continues his point by stating that soft-law instruments possess much power as they make it possible for parties to coordinate around shared norms by providing clarity. Furthermore, in network-effect marketplaces, the codification process is sometimes more significant than the actual enforcement. Codifying an existing practice is beneficial in and of itself since it clarifies the rules for individuals who are eager to comply but unable to coordinate effectively.

Codification exists in many areas, such as law, where it is defined as the process of bringing together a legal act (or several related acts) and all its amendments into a

⁸⁹ European Center for Not-for-Profit Law. (2019). *Soft Law, Hard Law Consequences*. ECNL. <https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/UNSRCTbrieferSoftLaw.pdf>

⁹⁰ Druzin, B. H. (2016). Why does Soft Law Have any Power Anyway? *Asian Journal of International Law*, 7(2), 361–378. <https://doi.org/10.1017/s2044251316000229>

⁹¹ Liebowitz, S. J., & Margolis, S. E. (2002). Network Effects and Externalities. *The New Palgrave Dictionary of Economics and the Law*, 1329–1333. https://doi.org/10.1007/978-1-349-74173-1_252

⁹² Druzin, B. H. (2016). Why does Soft Law Have any Power Anyway? *Asian Journal of International Law*, 7(2), 361–378. <https://doi.org/10.1017/s2044251316000229>

single new act.⁹³ Codification can also refer to the codification of the English language, the processes through which a language is standardized. The construction and use of dictionaries, style, and use guidelines, classic grammar textbooks, and other similar ways are examples of these strategies.⁹⁴ Druzin states that much like soft law, dictionaries, for example, holds no enforcement mechanisms but are a regulating function in that they codify the language we speak.

Hard law refers to legal duties that are legally enforceable on the parties concerned and may be enforced in a court of law.⁹⁵ Soft law instruments, on the other hand, may not be implemented in a court of law. Both soft and hard law have their advantages and disadvantages. Soft law can be established and approved quite quickly in most cases. It is also less time-consuming, less expensive, more flexible, and more ambitious than strict legislation. On the other hand, hard law is thought to be more legitimate and democratic than soft law, as it is more exact and comprehensive, has greater enforcement, and may be applied to domestic players such as individuals and corporations.⁹⁶

Sekalala is a prominent advocate for the use of soft law in this field, citing evidence that soft law has been particularly helpful in combating HIV/AIDS, malaria, and TB.⁹⁷ In the Fortieth World Health Assembly, Geneva, 4–15 May 1987 WHA40.26 Global Strategy for The Prevention and Control Of AIDS⁹⁸, urged States to aid in the control of this condition, something Sekalala, has found to be true in their studies.

The World Health Organization also created 2003 a Framework Convention on Tobacco Control, which entered into force in 2005, and has led to several studies that led to the rapid enactment of domestic tobacco control legislation.⁹⁹ In Portugal, for

⁹³ EUR-Lex. (n.d.). *Codification*. <https://eur-lex.europa.eu/EN/legal-content/glossary/codification.html>

⁹⁴ *Codification and Standardization in Language*. (2019, July 3). ThoughtCo. <https://www.thoughtco.com/what-is-codification-language-1689759>

⁹⁵ *Hard law/soft law*. (2022, June 8). ECCHR. <https://www.ecchr.eu/en/glossary/hard-law-soft-law/>

⁹⁶ Bosi, G. (2021, November 30). *Overcoming the “Soft vs Hard Law” Debate in the Development of New Global Health Instruments*. *Opinio Juris*. <https://opiniojuris.org/2021/11/30/overcoming-the-soft-vs-hard-law-debate-in-the-development-of-new-global-health-instruments/>

⁹⁷ Sekalala, S. (2017). *Soft Law and Global Health Problems: Lessons from Responses to Hiv/Aids, Malaria and Tuberculosis*. Cambridge University Press.

⁹⁸ WHO. (1987). *Fortieth World Health Assembly, Geneva, 4–15 May 1987 WHA40.26 Global Strategy for The Prevention and Control Of AIDS*. <https://www.afro.who.int/sites/default/files/2017-06/htl%20WHA40-26.pdf>

⁹⁹ Bosi, G. (2021, November 30). *Overcoming the “Soft vs Hard Law” Debate in the Development of New Global Health Instruments*. *Opinio Juris*. <https://opiniojuris.org/2021/11/30/overcoming-the-soft-vs-hard-law-debate-in-the-development-of-new-global-health-instruments/>

example, *Lei n.º 37/2007, de 14 de Agosto*¹⁰⁰, a decree for the protection of citizens from involuntary exposure to tobacco smoke and reduction measures related to dependence and cessation of tobacco use, entered into force in 2007, 2 years after the World Health Organization Framework entered into force.

This can lead us to conclude that mechanisms of soft law, such as recommendations, can lead to the creation of hard law instruments, as was the case of Portugal illustrated above. But a soft law mechanism or instrument does not need to be supported by a hard law instrument to comply.

Even though the OECD Guidelines are soft law mechanisms, as Nieuwenkamp described them well, I agree with the statement that they are soft law mechanisms with hard consequences.¹⁰¹

The OECD Guidelines, in their text itself, contain an Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises convene and propose, to promote the effectiveness of these, that adhering countries shall set up National Contact Points and that the Investment Committee shall periodically, or at the request of an adhering country, hold exchanges of views on matters covered by the Guidelines and experienced gained in their application.

A National Contact Point is a well-established grievance mechanism within the Guidelines that we will delve into in ***Chapter 5- National Contact Points***.

After merging the Committee on International Investment and Multinational Enterprises and the Committee on Capital Movements and Invisible Transactions in April 2004, Investment Committee¹⁰² was created.

The Investment Committee must periodically invite the Business and Industry Advisory Committee, the Trade Union Advisory Committee, the OECD Watch, and other international partners to express their views on matters covered by the Guidelines. They must also engage with non-adhering countries to promote responsible business conduct worldwide.¹⁰³

¹⁰⁰ Available at: *Lei n.º 37/2007, de 14 de Agosto*. (2007). PGD Lisboa.

https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1066&tabela=leis

¹⁰¹ Nieuwenkamp, R. (2013). The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. *Dovenschmidt Quarterly*, 1(4), 171–175.

<https://doi.org/10.5553/dq/221199812014001004003>

¹⁰² OECD. (2019). *OECD Investment Committee*.

<https://www.oecd.org/daf/inv/oecdinvestmentcommittee.htm>

¹⁰³ OECD. (2011, Part II). *OECD Guidelines for Multinational Enterprises*. OECD Publishing.

<https://doi.org/10.1787/9789264115415-en>

Any clarification necessary regarding the Guidelines is of the Investment Committee's responsibility. They shall hold exchanges of views with National Contact Points to enhance the effectiveness of the Guidelines and the National Contact Points themselves. It is essential that the Investment Committee periodically reports its findings on matters covered to the Council. These reports must include the views of those who participated in the discussions, such as the Business and Industry Advisory Committee and other international partners, and feedback from National Contact Points.¹⁰⁴

Another significant responsibility that falls under the scope of the Investment Committee is, alongside National Contact Points, to trace an agenda that promotes the enterprises' adherence and observance of the principles and aids them in doing so.

The Investment Committee must consider the procedural guidance when dealing with the abovementioned issues. In terms of procedural guidance, the Guidelines are clear. They state that the Investment Committee will consider requests from National Contact Points to assist them in cases of uncertainty regarding the interpretation of the Guidelines.¹⁰⁵

According to the procedural guidance chapter¹⁰⁶, the Investment Committee will, to enhance the effectiveness of the Guidelines, consider the reports of National Contact Points and the submissions made by adhering countries, amongst other ways that will aid in this effectiveness.

The Investment Committee can seek advice from experts on issues touched upon in the Guidelines, and it must also discharge its responsibilities effectively, being assisted by the OECD Secretariat.

It is important to note that due to the non-binding nature of the Guidelines, the Investment Committee does not act as a judicial branch. It does not, in any way, take the requests of the National Contact Points and reach a different from that of the National Contact Point. The referral made is a consultation because the National Contact Point wishes to clarify a doubt regarding the interpretation of the Guidelines. Therefore, the

¹⁰⁴ OECD. (2011, Part II). *OECD Guidelines for Multinational Enterprises*. OECD Publishing.
<https://doi.org/10.1787/9789264115415-en>

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*

Investment Committee, at their request, intervenes to help. This is highly beneficial to ensure that the performance of the Guidelines does not vary from country to country.¹⁰⁷

Nevertheless, the Investment Committee may make recommendations regarding the proper functioning of the National Contact Point regarding their implementation of the Guidelines.

Going back to the initial idea of this chapter on soft law, it is essential to note that even though the OECD Guidelines are a soft law mechanism, that does not limit its enforceability. As we have seen, the Guidelines possess grievance mechanisms that distance themselves from a common soft law mechanism, making them, as Nieuwenkamp described, a soft law mechanism with hard consequences.¹⁰⁸ Later, in this study, we will look at National Contact Point case studies that showcase the effectiveness of this grievance mechanism as a compliance tool.

Despite the grievance mechanisms available and the fact that the Guidelines are soft law but have more to them than simply common soft law, they have limitations.

National Contact Points are the closest grievance mechanism complainants have to a court per se. It is not a court in any way, shape, or form. Still, a party may file a complaint to a National Contact Point against a multinational enterprise claiming they have failed to uphold one of the recommendations mentioned in the Guidelines. The National Contact Point deals with that complaint and, if deemed necessary, accepts the complaint and deals with it from there. The intricacies of the National Contact Point process will be dealt with in detail later in chapter 5- National Contact Points.

There are, however, limitations to the system. National Contact Points can receive complaints, follow through with them, make their final assessment and after some time, follow up with the company in question to understand if the recommendations made are being followed. However, no sanctions can be applied and given that, the company does not have to oblige to the recommendations given by the National Contact Point, they are merely that, recommendations, strong ones if that. At worst, their reputation will take a hit.

¹⁰⁷ OECD. (2011, Part II). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

¹⁰⁸ Nieuwenkamp, R. (2013). The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. *Dovenschmidt Quarterly*, 1(4), 171–175.

In my opinion, the mechanisms available in the OECD Guidelines are very effective soft law mechanisms. Unlike other delicate law instruments, they have grievance mechanisms that allow for reparation and debate where debate is due.

The practicality of a party being able to file a complaint with a National Contact Point regarding an issue they deem has not been observed by another party and have said issue followed by an unbiased party who has complete knowledge of the text of the Guidelines and understands what is at stake is a privilege other instruments do not have.

The Investment Committee is also a great tool to keep the National Contact Points in check and aid them, when necessary, in case they need any assistance in understanding the Guidelines to ensure they are providing the best service possible to the parties involved in that complaint.

The OECD Guidelines, being a soft law instrument, are enforced by adhering countries who must adopt them and promote their compliance. Compliance may arise from many places. As we previously discussed, network effects in my opinion have a part to play in it. Investors will comply it because others are complying it and they want to do as well as others. Other than that, companies have a corporate sense of responsibility. In our day and age, being socially responsible is a business advantage and investors are aware of that. Most investors are not eager to invest in a company that is not socially aware. And through all that, enforceability and compliance arise.¹⁰⁹

¹⁰⁹ Ahmed, A., & Jahid Mustofa, M. (2016). Role of Soft Law in Environmental Protection: An Overview. *Global Journal of Politics and Law Research*, 4(2), 1–18. <https://www.eajournals.org/wp-content/uploads/Role-of-Soft-Law-in-Environmental-Protection-An-Overview.pdf>

4. Corporate Applicability of the Guidelines

The OECD Guidelines are recommendations for responsible business conduct in a global context. Eleven chapters discuss various topics, as we have previously seen in Chapter 2 of this thesis. This thesis focuses on chapter VI of the Guidelines, which deals with the Environment. There are eight main recommendations, with subsections, under the environment chapter of the Guidelines. The primary purpose of this chapter of the Guidelines is for enterprises to take due account the need to protect the environment, public health, and safety and generally conduct their activities in a manner contributing to the broader goal of sustainable development.¹¹⁰

It is now key to identify how corporations, and hence, investors, apply the guidelines in their day to day and how that affects their investment decisions.

As we have previously seen, the first recommendation deals with environmental management systems, which is precisely what we will look further into now. In Chapter 2, we have already illustrated the ISO standards, which have the specific ISO 14000 standards, known as an International Organization for Standardization. This is the most widely used form of Environmental Management System EMS. An EMS is a system and database which integrates procedures and processes for training personnel, monitoring, summarizing, and reporting specialized environmental performance information to internal and external stakeholders of a firm.¹¹¹

Environmental management systems may help a company enhance its environmental performance, decrease risk, and cut costs.¹¹² There are external and internal environmental management systems. External environmental management systems rely on potential consulting assistance and outside personnel training. Internal environmental management systems rely on staff or managers' time to perform these tasks.¹¹³

The benefits of environmental management systems are enhanced compliance, resource conservation, enhanced employee morale with the public, investors, and

¹¹⁰ OECD. (2011, Chapter VI). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

¹¹¹ Sroufe, R. (2009). Effects Of Environmental Management Systems On Environmental Management Practices And Operations. *Production and Operations Management*, 12(3), 416–431. <https://doi.org/10.1111/j.1937-5956.2003.tb00212.x>

¹¹² *Ibid*

¹¹³ *Learn About Environmental Management Systems*. (2021, September 28). US EPA. <https://www.epa.gov/ems/learn-about-environmental-management-systems>

regulators, improved environmental performance, bringing new customers into business, and raising employee awareness of environmental issues.¹¹⁴

The environmental management system follows a Plan-Do-Check-Act or PDCA cycle. The first step is planning an environmental policy, where there is an initial environmental review, and legal requirements are identified to understand and set targets for that plan. Then, in the “do” part of the cycle, we implement the said policy by providing the resources and training staff about the policy at hand. There is also emergency preparedness and training to identify potential emergencies and establish procedures to prevent them. The system will then check on the policy by monitoring, measuring, and recording what is happening. The active part of the cycle refers to the reviews. The environmental management system will be assessed, recommendations will be made, and actions shall be taken to redefine objectives and other elements to ensure continual improvement.¹¹⁵

The model is continuous as an environmental management system is a process of constant improvement that any organization is constantly reviewing and revising.¹¹⁶ This model can easily be used by various organizations, enterprises, and governmental agencies.

The European Commission designed the EU Eco-Management and Audit Scheme or EMAS as a top management tool for corporations and other organizations to monitor, monitor, and improve their environmental performance.¹¹⁷ The EMAS is available to any organization that wants to enhance its environmental performance. It is relevant internationally and covers all financial and service industries. It is a voluntary tool.¹¹⁸ This mechanism was developed in 1993 by the European Commission¹¹⁹

¹¹⁴ *Learn About Environmental Management Systems*. (2021, September 28). US EPA. <https://www.epa.gov/ems/learn-about-environmental-management-systems>

¹¹⁵ Croner-i. (n.d.). *An Introduction to Environmental Management Systems (EMS): In-depth*. <https://app.croneri.co.uk/topics/introduction-environmental-management-systems-ems/indepth>

¹¹⁶ *Section 0.4 Plan-Do-Check-Act Model for EMS*. (2019, April 30). ISO 14000 Store. <https://14000store.com/iso-14000-2015-requirements/iso-14001-2015-pdca/>

¹¹⁷ European Commission. (n.d.-b). *EMAS – Environment - European Commission*. https://ec.europa.eu/environment/emas/index_en.htm

¹¹⁸ Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC

¹¹⁹ Biondi, V., & Frey, M. (1995). Participation in the EU eco-management and audit scheme: An analysis of small-and medium-sized enterprises in Italy. *European Environment*, 5(5), 128–133. <https://doi.org/10.1002/eet.3320050503>

The EU Commission pitched EMAS to achieve excellence in environmental performance, which offered organizations business advantage.

Like many other EU legislation, the practical details of how EMAS works are contained in annexes of EU legislation. These annexes cover matters such as the environmental review, organizations using EMAS must handle extra challenges as well as the requirements of the environmental management system., the necessity of carrying out an internal environmental audit, environmental reporting, the use of the EMAS logo, the information that is required for registration and the statement of the environmental verifier on verification and validation efforts.¹²⁰

The OECD Guidelines are the only international standard on responsible business conduct that covers all areas of business responsibility, including a chapter solely on the environment.¹²¹

In the most recent OECD Annual Report available, a case was made that the application of the Guidelines concerning business-related impacts on the environment has been growing. An indicator of this is the increasing number of environmentally related specific cases submitted to National Contact Points.¹²² In Chapter 5, we will look at two issues presented to the NCP that illustrate this very point in depth.

These mechanisms aid the Guidelines in ensuring that multinational enterprises comply with the recommendations given by the OECD Guidelines.

According to a 2018 study, some 60,000 MNEs worldwide control over 500,000 subsidiaries.¹²³ Of course, not every country in the world adheres to the guidelines. Still, for example, in 2021 the United States alone, there are approximately 719 multinational enterprises headquartered on US soil, a country that adheres to OECD Guidelines for Multinational Enterprises.¹²⁴ This means that those around 719

¹²⁰ *Employees and EMAS: the benefits of involvement*. (2019). Croner-i. <https://app.croneri.co.uk/feature-articles/employees-and-emas-benefits-involvement>

¹²¹ OECD. (2020a). *2019 Annual Report on the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf>

¹²² OECD. (2020a). *2019 Annual Report on the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf>

¹²³ *Multinational Corporations*. (2018, September 28). World Atlas of Global Issues. <https://espace-mondial-atlas.sciencespo.fr/en/topic-strategies-of-transnational-actors/article-3A11-EN-multinational-corporations.html>

¹²⁴ Barklie, G. (2022, March 14). *Where are the global hotspots for MNC subsidiaries?* Investment Monitor. <https://www.investmentmonitor.ai/insights/where-are-the-global-hotspots-for-mnc-subsidiaries>

multinational enterprises and their many subsidiaries follow the Guidelines' recommendations and must uphold the values set forth by it.

A multinational enterprise is a company that produces goods or provides services in more than one country. It is also known as a multinational corporation, simply multinational, or international corporation.¹²⁵

A multinational enterprise's management headquarters are usually located in one country, the home country, and it operates in other countries known as host countries.¹²⁶

The multinational's history is intertwined with the history of colonialism. Many of the early corporations were commissioned to perform voyages at the request of European rulers. Many of the colonies not controlled by Portugal or Spain were administered by some of the world's first multinational corporations. The British East India Company, which participated in worldwide commerce and exploration and operating trading stations in India, was one of the first to emerge in 1600.¹²⁷

This idea illustrates that multinational enterprises have built on and modernized a concept that dates far from modern times. The British East India Company was a multinational enterprise in every sense. It was based in one country but operated in another nation.

Corporations like to establish a presence in regions where their assets are most efficient or have the lowest salaries. Multinational corporations cut prices and enhance the disposable income of consumers throughout the world by manufacturing the same quality items at cheaper costs.¹²⁸

By establishing operations in various countries, a multinational can take advantage of tax differences by registering its firm in a country with a low tax rate, even if its operations are done elsewhere¹²⁹. Other benefits include improved employment

¹²⁵ Eurostat. (n.d.). *Glossary: Multinational enterprise (MNE)*. [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Multinational_enterprise_\(MNE\)](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Multinational_enterprise_(MNE))

¹²⁶ *Ibid*

¹²⁷ The East India Company. (n.d.). *History*. <https://www.theeastindiacompany.com/finefood/fine-foods/the-company/our-heritage/>

¹²⁸ Kravis, I. B., & Lipsey, R. E. (1982). The location of overseas production and production for export by U.S. multinational firms. *Journal of International Economics*, 12(3–4), 201–223. [https://doi.org/10.1016/0022-1996\(82\)90036-8](https://doi.org/10.1016/0022-1996(82)90036-8)

¹²⁹ Gumpert, A., Hines, J. R., & Schnitzer, M. (2016). Multinational Firms and Tax Havens. *Review of Economics and Statistics*, 98(4), 713–727. https://doi.org/10.1162/rest_a_00591

development in local economies, possible tax income gains for the corporation, and a more comprehensive range of items.¹³⁰

More minor, local firms may suffer due to the arrival of multinationals into a host country's economy. Activists have frequently charged that multinational corporations violate ethical norms, accusing them of dodging ethical regulations and utilizing wealth to further their corporate objectives.¹³¹

There are four types of multinational enterprises. These are¹³²:

- Multinational Decentralized Corporation, where every branch office has a decentralized management structure with no significant chain of command for decision-making.
- Global Centralized Corporation, where from its headquarters in the home country, a centralized corporation administers and controls the worldwide units.
- International Company, in this case, the worldwide branches follow the parent company's technology or R&D in this way. The headquarters is where all the research for new product development and improvisations occurs.
- Transnational Enterprise is a hybrid of the three types of MNCs mentioned above. The parent business directs but does not control the operations of its international subsidiaries.

It is essential, in my opinion, to define the concept of multinational enterprise as, after all, this is one of the critical concepts of this thesis. However, the OECD Guidelines for Multinational Enterprises that a precise definition of multinational enterprises is unnecessary for the Guidelines.

In the first chapter of the Guidelines¹³³, the concept is briefly characterized as enterprises that operate in all sectors of the economy and usually comprise companies or

¹³⁰ Baaij, M. G., Mom, T. J., van den Bosch, F. A., & Volberda, H. W. (2015). Why Do Multinational Corporations Relocate Core Parts of Their Corporate Headquarters Abroad? *Long Range Planning*, 48(1), 46–58. <https://doi.org/10.1016/j.lrp.2012.07.001>

¹³¹ Counts, L. (2020, April 7). *Do multinational corporations exploit foreign workers? Q&A with David Levine*. Haas News | Berkeley Haas. <https://newsroom.haas.berkeley.edu/do-multinational-corporations-exploit-foreign-workers/>

¹³² Wallstreetmojo Editorial Team. (2022, May 25). *Multinational Company (MNC)*. WallStreetMojo. <https://www.wallstreetmojo.com/multinational-company/#h-types-of-mncs>

¹³³ OECD. (2011, Chapter I). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

other entities established in more than one country and so linked that they may coordinate their operations in various ways. Ownership may be varied, State, private or mixed, and the Guidelines are addressed to all the entities within the multinational enterprise, meaning the parent company and its local entities.¹³⁴

The Guidelines aim not to treat multinational and domestic enterprises differently but to encourage good practice for all with them. That being said, the Guidelines wish that Governments encourage small and medium-sized companies also observe the recommendations of the Guidelines as much as possible.

The fact that a government is adhering to the Guidelines should not, in any way, affect the way multinational enterprises invest in that country.

Multinational enterprises located in various countries are subject to the laws applicable in these countries. When conflicts arise by adhering countries or third countries, the governments concerned are encouraged to co-operate in good faith to resolve problems that may occur. Governments are encouraged to use mechanisms such as arbitration and other international dispute-settling means to facilitate the resolution of the issues that arise.¹³⁵

As previously mentioned, governments that adhere to the Guidelines must encourage their use and aid in their implementation by establishing a National Contact Point and acting as a forum that can aid in all matters related to the Guidelines. They will also participate in consultation procedures when it comes to cases of the interpretation of the Guidelines.¹³⁶

Investor responsibility is an important topic as investors are responsible for their actions when investing in companies, lending money, funding projects, and so on. Suppose a company funds a project that plans to build near an indigenous area in the Amazon. For example, which project will cause deforestation, affect indigenous people, affect the environment, and have countless other impacts. In that case, the fault does not fall only on the company that executed the project but also on the company that funded the project.

That is why the Guidelines are so essential and have already impacted the countries in which it acts. With the aid of NGOs and other complainants, the National

¹³⁴ OECD. (2011, Chapter I). *OECD Guidelines for Multinational Enterprises*. OECD Publishing. <https://doi.org/10.1787/9789264115415-en>

¹³⁵ *Ibid*

¹³⁶ *Ibid*

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Contact Points become aware of situations in which companies are operating in manners they should not be working according to the Guidelines (an example will be provided in Chapter 5- National Contact Points), and they can make recommendations accordingly.

Besides National Contact Points, multinational enterprises themselves uphold a new standard of practice thanks to the OECD Guidelines themselves, which have set the standard for good business practice.

5- National Contact Points

Governments that have adhered to the OECD Guidelines are required to set up National Contact Points.¹³⁷ Their two main goals are to promote the Guidelines and to respond to inquiries by establishing events to raise awareness to responsible business conduct and consequently, the Guidelines, and providing a grievance mechanism to solve cases where the recommendations of the Guidelines have not been followed by adhering parties.¹³⁸

From an investor responsibility point of view, national contact points are extremely important and pertinent to discuss as they are the mechanism that uphold the OECD Guidelines to their standards and, as we will see, both in theory and in practical cases, complaints can be brought against the investors if parties understand that they are not complying with the guidelines.

Over the years the role of the National Contact Points has evolved. When it was first established back in 1984, they were responsible for promoting the Guidelines and responding to inquiries regarding the Guidelines.¹³⁹ Years later, in 2000, they were given this new conflict resolution, mediatory role, having established themselves as a grievance mechanism.¹⁴⁰

National Contact Points must follow the key requirements of visibility, accessibility, transparency, and accountability,¹⁴¹ which implies that their functions should be publicized and that stakeholders should be able to make inquiries or file cases with the NCP with ease. It is important that NCPs publish on its operations and how they handle cases, and report on them annually. They should also engage in meetings where the efficacy of NCPs is examined.¹⁴²

There is also a principle of cooperation between National Contact Points. They meet bi-annually at the OECD to contribute with their knowledge and background from their NCP to debate ideas on ways this grievance mechanism may be strengthened.

¹³⁷ OECD. (2021). *National Contact Points for the OECD Guidelines for Multinational Enterprises*. <https://www.oecd.org/corporate/mne/ncps.htm>

¹³⁸ *Ibid*

¹³⁹ OECD. (2021). *What are National Contact Points for Responsible Business Conduct ?* <https://mneguidelines.oecd.org/ncps/what-are-ncps-for-rbc.htm>

¹⁴⁰ *Ibid*

¹⁴¹ OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, Procedural Guidance, I, *OECD/LEGAL/0307*

¹⁴² OECD. (2017). *Frequently Asked Questions- National Contact Points for the OECD Guidelines for Multinational Enterprises*. OECD. <https://www.oecd.org/daf/inv/mne/NCP-FAQ.pdf>

Besides this time, NCPs may also confer with one another when it comes to matters such as which NCP will be in charge when a case involves several jurisdictions.¹⁴³

Adhering countries can set their National Contact Point offices within their own government agencies or independent from them and these offices may also include non-governmental stakeholders including trade unions and corporate representatives.¹⁴⁴

According to the Decision of the Council on the OECD Guidelines for Multinational Enterprises I. 4., adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, considering internal budget priorities and practices.¹⁴⁵ As stated in the 2020 Annual Report, twenty NCPs had a budget dedicated to their activities, whilst four stated that the resources available to them were not sufficient to handle cases in a timely and effective manner.¹⁴⁶

NCPs are allowed to choose their own structure, and this structure varies between countries.¹⁴⁷ The latest annual report available for analysis, which is the 2020 Annual Report on the OECD Guidelines for Multinational Enterprises¹⁴⁸, NCPs around the world are structured as follows:

In 2020, there were 19 single agency or individualized NCPs, located in Argentina, Austria, Chile, Colombia, Estonia, Greece, Iceland, Ireland, Israel, Italy, Luxembourg, Mexico, New Zealand, Peru, Poland, Turkey, Ukraine, the United Kingdom, and the United States. Single Agency NCPs are composed of one individual in a single ministry or by a group of people who belong to the same service in the same ministry.¹⁴⁹

Inter-agency or inter-ministerial NCPs are composed of a group of representatives from several ministries or government agencies. In the latest report

¹⁴³ OECD. (2017). *Frequently Asked Questions- National Contact Points for the OECD Guidelines for Multinational Enterprises*. OECD. <https://www.oecd.org/daf/inv/mne/NCP-FAQ.pdf>

¹⁴⁴ *Ibid*

¹⁴⁵ OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, Decision I, 4, OECD/LEGAL/0307

¹⁴⁶ OECD. (2021). *Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity*. <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.html> Page 32

¹⁴⁷ OECD. (2019). *Guide for National Contact Points on Structures and Activities*. OECD Guidelines for Multinational Enterprises. <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf>

¹⁴⁸ OECD. (2021). *Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity*. <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.html>

¹⁴⁹ *Ibid* page 26

available, there were 12 inter-agency NCPs, Brazil, Canada, Costa Rica, Germany, Hungary, Japan, Morocco, Portugal, Romania, Slovenia, Spain, and Switzerland.¹⁵⁰

Expert-based NCPs are made up of, as the name says, experts, who are appointed by the government but are not a part of the government, they are external to it.¹⁵¹ These are usually set up as independent entities, who only depend of the government for funding. These experts do not represent themselves, but the organizations they were nominated to represent. In 2020, Norway, Denmark, Lithuania and the Netherlands all adopted had expert-based NCPs.¹⁵²

There are also multipartite NCPs, which are NCPs composed of a group of government officials and stakeholder representatives.¹⁵³ In the latest annual report available, there were eleven multipartite NCPs, and out of these ten, five were tripartite and five were quadripartite. Tripartite NCPs, as the name states, include members from three different areas, in this case, the government, business and trade unions.¹⁵⁴ France, Belgium, Sweden, Latvia and Tunisia have tripartite NCPs. Quadripartite NCPs include all the intricacies of tripartite NCPs, but they also include representatives of civil society organizations.¹⁵⁵ Croatia, Finland, Czech Republic, the Slovak Republic and Kazakhstan have adhered to a quadripartite structure of NCP.¹⁵⁶ Croatia, who first reported in 2020 about their structure, also has a multipartite structure, in this case, a bipartite structure, being composed of two bodies, the secretariat and the external body.

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Moreover, there are special cases, where NCPs were set up under a hybrid structure that combines aspects from the models mentioned above. Australia's NCP is a hybrid combination of a single-agency NCP and an expert-based NCP. On the other hand, Korea's NCP is a hybrid combination of an inter-agency NCP and an expert-based NCP.¹⁵⁸

¹⁵⁰ OECD. (2021). *Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity*. <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.html>

¹⁵¹ OECD. (2020a). *2019 Annual Report on the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf> page 27

¹⁵² *Ibid* page 27

¹⁵³ *Ibid* page 27

¹⁵⁴ *Ibid* page 27

¹⁵⁵ *Ibid* page 27

¹⁵⁶ *Ibid* Page 27

¹⁵⁷ *Ibid* Page 28

¹⁵⁸ OECD. (2020a). *2019 Annual Report on the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf> page 27

The latest annual report available, which was published in 2021 and was in reference to the year 2020 stated that no information was available on the NCPs for both Egypt and Jordan, which was also the case for Jordan in 2019.¹⁵⁹ However, in a 2019 publication by the OECD titled “*Guide for National Contact Points on Structures and Activities*”, they classified Egypt as having an inter-agency or inter-ministerial NCP. This document also stated that the Jordan NCP was a single-agency or individualized NCP.¹⁶⁰

National Contact Points are required to be accountable to the OECD Investment Committee and must therefore, in accordance to the Decision on the Guidelines, report annually to them.¹⁶¹

NCPs should observe principles of impartiality, predictability, equitability and compatibility with the Guidelines when handling cases.¹⁶² Any person or organization with a legitimate interest in the topic can file a complaint with an NCP about a company that is operating in or is from that NCP’s country and that they believe is not following the Guidelines.¹⁶³ They may handle cases involving companies headquartered in the NCP's country and operating there, in the NCP's country and operating in any other country, and in any other country and operating in the NCP's country.

Promotion is an important part of the NCPs array of functions as they are required to promote awareness of the OECD Guidelines, as well as the sector specific and general due diligence guidance.¹⁶⁴ An example of this promotion is the translation of the OECD Due Diligence Guidance for Responsible Business Conduct and the

¹⁵⁹ *Ibid* Page 28

¹⁶⁰ OECD. (2019). *Guide for National Contact Points on Structures and Activities*. OECD Guidelines for Multinational Enterprises. <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf>

¹⁶¹ OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, Procedural Guidance, Section I.D.1., OECD/LEGAL/0307

¹⁶² *Ibid*

¹⁶³ OECD. (2017a). *Frequently Asked Questions- National Contact Points for the OECD Guidelines for Multinational Enterprises*. OECD. <https://www.oecd.org/daf/inv/mne/NCP-FAQ.pdf>

¹⁶⁴ OECD. (2019b, May). *Progress Report on National Contact Points for Responsible Business Conduct* (C/MIN(2019)7).

OECD Due Diligence Guidance for Responsible Corporate Lending and Securities Underwriting in other languages, such as German¹⁶⁵ and Portuguese¹⁶⁶.

National Contact Points handle complaints in four steps.¹⁶⁷ In Phase 1, the NCP conducts an Initial Assessment to determine whether the issues raised in the individual case warrant further investigation.¹⁶⁸ This stage lasts about three months. If the matter warrants further investigation, it advances to Phase 2: Good Offices, which can take up to 6 months and involves the NCP facilitating discourse through conciliation and/or mediation with the purpose of assisting parties in reaching an agreement on the issues at hand.¹⁶⁹

After that, we move on to Phase 3, the Conclusion, in which the NCP drafts a report on the agreement and may make suggestions if the parties achieve an agreement. If the parties are unable to come to an agreement, the NCP will issue a final statement and may make recommendations.¹⁷⁰ If the NCP determines at the end of Phase 1 that the case in question does not warrant further investigation, it will bypass Phase 2 and proceed directly to Phase 3, where the NCP will provide a final statement on the case and, if desired, make recommendations. This phase takes approximately 3 months.¹⁷¹

Phase 4 is called the Follow Up phase, and this is where the NCP can touch base on the execution of the agreement and/or the recommendations they provided to the parties at the time of the report or final statement.¹⁷²

NCPs have been able to handle cases in over 100 nations and territories during the last 20 years, including over 50 that do not comply to the Guidelines.¹⁷³ It is important to note that National Contact Points are not in any way courts of law,

¹⁶⁵ OECD. (2020). *Die Erfüllung der Sorgfaltspflicht für ein verantwortungsvolles Firmenkredit- und Emissionsgeschäft*. <https://mneguidelines.oecd.org/die-erfullung-der-sorgfaltspflicht-fur-ein-verantwortungsvolles-firmenkredit-und-emissionsgeschäft.pdf>

¹⁶⁶ OCDE. (2018). *Guia da OCDE de Devida Diligência para uma Conduta Empresarial Responsável*. <https://mneguidelines.oecd.org/guia-da-ocde-de-devida-diligencia-para-uma-conduta-empresarial-responsavel-2.pdf>

¹⁶⁷ OECD. (n.d.). *How do NCPs handle cases?* <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>

¹⁶⁸ OECD. (2015, June 19). *National Contact Points: An Overview*. OECD.

<https://mneguidelines.oecd.org/global-forum/2015GFRBC-National-Contact-Points-Overview.pdf>

¹⁶⁹ OECD. (n.d.). *How do NCPs handle cases?* <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>

¹⁷⁰ OECD. (2015, June 19). *National Contact Points: An Overview*. OECD.

<https://mneguidelines.oecd.org/global-forum/2015GFRBC-National-Contact-Points-Overview.pdf>

¹⁷¹ OECD. (n.d.). *How do NCPs handle cases?* <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>

¹⁷² *Ibid*

¹⁷³ *Ibid*

participation is voluntary, and the NCP does not have the authority to order the party they have deemed to be in the wrong to integrate their remedy recommendations- they are simply that, recommendations. The NCP will, however, follow up as we have seen, on whether the parties involved have taken up on these recommendations or not.

Parties do not need to be representation to file a case to a National Contact Point, but representation is allowed as parties may be represented by lawyers or other organizations such as NGOs or trade unions.¹⁷⁴ To ensure that this grievance mechanism is accessible to all, there is no charge to file a case. If the submitter fears retaliation from the other party, the NCPs can ensure that the filing party's identity is protected in the process.¹⁷⁵

There are platforms that can represent businesses, trade unions and other societies in case they need it and may give advice or support in special cases.¹⁷⁶ These platforms are the Business and Industry Advisory Committee¹⁷⁷, BIAC, which is a trusted OECD partner with an international business network that represents over 7 million companies, the Trade Union Advisory Committee¹⁷⁸, TUAC, an interface for trade unions with the OECD, that has consultative status with the OECD and its committees, and the OECD Watch¹⁷⁹, which, with over 130 members from over 50 countries is a global network of civil society organizations and its main goal is to advise the global NGO community on how to use the Guidelines and how to ensure that corporations are held accountable through the grievance mechanisms that the Guidelines makes available to those harmed by corporate malfeasance.

As explained, complaints reach National Contact Points, and these will assess the complaint through the means that have been elucidated. Having looked at the theory of how these grievance mechanisms work, we will now have a look at an actual case, Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) *versus* ING.

¹⁷⁴ OECD. (n.d.). *How do NCPs handle cases?* <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>

¹⁷⁵ OECD. (2015, June 19). *National Contact Points: An Overview*. OECD.

<https://mneguidelines.oecd.org/global-forum/2015GFRBC-National-Contact-Points-Overview.pdf>

¹⁷⁶ Ministerie van Buitenlandse Zaken. (2021, December 1). *Stakeholders*. NCP | National Contact Point OECD Guidelines. <https://www.oecdguidelines.nl/ncp/stakeholders>

¹⁷⁷ Business at OECD. (2019). *Who We Are*. https://biac.org/?page_id=108

¹⁷⁸ *The Trade Union Advisory Committee (TUAC) to the OECD*. (2021, April 27). TUAC. <https://tuac.org>

¹⁷⁹ *About us*. (2021, October 11). OECD Watch. <https://www.oecdwatch.org/about-us/>

In May of 2017, Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) notified the Dutch NCP of an alleged violation by ING, a multinational enterprise within the meaning of the guidelines. They claimed that ING violated the Guidelines in respect to the environment and climate and asked the NCP to scrutinize ING, their climate policy and urged ING to align its climate (and other policies) with the guidelines. They lodged a complaint against ING Bank for neglecting to commit and contribute properly to the goals set out in the international climate agreement signed in Paris in 2015.¹⁸⁰

Oxfam Novib is a global development organization that harnesses people's power to fight poverty. They seek to create practical, inventive solutions for people to rise out of poverty and prosper across the world.¹⁸¹

Greenpeace Netherlands uses peaceful creative and action to pave the path for a greener, more peaceful future and to tackle the systems that endanger our environment.¹⁸²

Banktrack's aim is to push commercial banks throughout the world to act quickly and aggressively on four interconnected global crises: the rising climate catastrophe, continued environmental damage, the threat of new pandemics, and pervasive human rights violations.¹⁸³ It is important, before we continue, to emphasize BankTrack and their requested advice from the OHCHR regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector in 2017.¹⁸⁴ This note is important as it provides clarification on factors that influence how a bank is involved with an adverse human rights impact, the responsibilities of banks regarding remediation in these situations where they have contributed to an adverse human rights impact and the role of grievance mechanisms in this context.¹⁸⁵

In this note, BankTrack asks the OHCHR three questions, these being, what factors influence whether a bank is causing or contributing to an adverse impact in the

¹⁸⁰ OECD Watch. (2021, April 30). *Dutch NGOs vs. ING Bank*.

<https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/>

¹⁸¹ Oxfam Novib. (n.d.). *Our story*. <https://www.oxfamnovib.nl/donors-partners/about-oxfam/our-story>

¹⁸² Greenpeace International. (n.d.). *About Us*. <https://www.greenpeace.org/international/tag/about-us/>

¹⁸³ *About BankTrack*. (2022, March 8). Banktrack. https://www.banktrack.org/page/about_banktrack

¹⁸⁴ OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

¹⁸⁵ *Ibid*

context of the banking sector;¹⁸⁶ what are the responsibilities of the bank and the company where a bank has contributed to an adverse impact through its financing;¹⁸⁷ and how should the responsibilities of banks to establish or participate in grievance mechanisms for individuals and communities who may be adversely impacted by their operations under Guiding Principle 29 be interpreted with regard to adverse impacts that a bank may cause or contribute through its financing actions?¹⁸⁸

The OHCHR replied to all three questions. Firstly, they addressed question number one and replied that while it is not possible to provide a list of situations per se, it is possible to enumerate some factors that may be used to determine whether a bank is causing, contributing or has a direct link to an adverse impact, such as whether the bank's actions and decisions alone were sufficient to result in that outcome, whether the bank was incentivizing harm, among other factors.¹⁸⁹

In reply to the second question, the OHCHR replied that two main scenarios may occur, where a bank recognizes its responsibility and where a bank does not.¹⁹⁰ Article 22 of the UN Guiding Principles states that "where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."¹⁹¹ In situations where a bank states that it has not caused that adverse impact, the bank is not expected to provide remedy itself unless it is obliged to do so, by a court or by a grievance mechanism. If a bank accepts responsibility, they must provide remediation for that adverse impact they have caused and are assuming responsibility for.¹⁹²

Regarding the third question, the OHCHR states that according to Article 29 of the UN Guiding Principles states that "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and

¹⁸⁶ OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.*

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ *Ibid*

¹⁹¹ UN. (2011). *Guiding Principles on Business and Human Rights.*

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

¹⁹² OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.*

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

communities who may be adversely impacted.”.¹⁹³ The OHCHR provides that one of the most systematic ways for remediation of such impacts is through an operational-level grievance mechanism, which is directly accessible to stakeholders who feel they have been adversely impacted.¹⁹⁴ This mechanism serves two purposes, to identify adverse human rights as a part of ongoing human rights due diligence and to make sure that once adversities are detected, they are remediated as soon and as directly as possible.¹⁹⁵ These operational-level grievance mechanisms also serve as a feedback mechanism to the back, providing guidance on what types of adverse impacts it may face and how to improve due diligence in the future.¹⁹⁶

Going back to the case at hand, Friends of the Earth Netherlands (Milieudefensie) aspires to a society where people share the earth's wealth fairly among themselves and with future generations A planet where natural resources are not depleted. A world that is clean, healthy, long-lasting, and equitable.¹⁹⁷

ING's mission is to equip individuals with the tools they need to succeed in life and business. ING is a multinational bank with a considerable presence throughout Europe. They employ over 57,000 people in over 40 countries to serve roughly 38 million customers, business clients, and financial institutions. Their mission is to provide people with the tools they need to succeed in life and business. In most of their retail marketplaces, they provide savings, payments, investments, loans, and mortgages.¹⁹⁸

At the time of the complaint, ING disclosed its direct greenhouse gas emissions, however, it did not disclose its indirect greenhouse gas emissions, which were caused

¹⁹³ UN. (2011). *Guiding Principles on Business and Human Rights*.

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

¹⁹⁴ OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

¹⁹⁵ OHCHR. (2017, June 12). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

¹⁹⁶ *Ibid*

¹⁹⁷ Friends of the Earth Netherlands (Milieudefensie). (n.d.). *About Milieudefensie*. Milieudefensie.

<https://en.milieudefensie.nl/about-us>

¹⁹⁸ ING. (2022). *About Us- Profile*. ING.Com. <https://www.ing.com/About-us/Profile.htm>

by the firms and projects it funds throughout the world and had not stated that had plans do so in the near future. Furthermore, at the time of the complaint, the bank had yet to announce its own goals for reducing greenhouse gas emissions associated with its financial products. The complainants claim that ING is in violation of the OECD Guidelines' requirements on disclosure, the environment, and consumer interest.¹⁹⁹

The goal of this complaint by the NGOs is the NCP would urge ING to enforce compliance with the OECD Guidelines by requesting that the bank adjust its emission reduction objectives for loans and investments, as well as its reporting processes, by the end of 2018.²⁰⁰

On May 8, 2017, the complaint was filed with the Dutch NCP. The Dutch NCP announced its initial evaluation on November 14, 2017, accepting the matter for further investigation. The evaluation summarizes ING's answer to the complaint lodged, in which ING claims that the complaint is unfeasible, unneeded, and baseless, since they think there was no infringement of the Guidelines. They agree that they have a role to play in climate change and they subscribe to the importance of measuring CO₂ emissions related to financing activities and of developing a methodology to this end. They are committed to the decarbonizing methodology to this end, to be developed by Science Based Targets initiative. They also offset 100% of its corporate carbon emissions so that, as an organization, it has been climate-neutral since 2007.²⁰¹

When justifying the acceptance of the complaint, the Dutch NCP stated that they were aware of the complexities of the problem, especially as ING says that climate change is a considerable concern for the globe and that banks have a responsibility to play in it. As a result, the NCP, at the time of the complaint, believed that taking into account this notification could help to achieve the goals of the Guidelines and improve their effectiveness, in the sense that it could clarify issues relating to climate change in the financial sector in the context of due diligence, particularly in this case. All parties showed an interest in participating in the mediation process.²⁰²

¹⁹⁹ OECD Watch. (2021, April 30). *Dutch NGOs vs. ING Bank*. <https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/>

²⁰⁰ *Ibid*

²⁰¹ Ministry of Foreign Affairs. (2019, April). *Final Statement- Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*. National Contact Point OECD Guidelines for Multinational Enterprises. https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/Final%20Statement%20NGOs%20vs%20ING%202019-04-19.pdf

²⁰² *Ibid*

The Dutch NCP published its final statement on the matter on April 19, 2019. The OECD Guidelines for Multinational Enterprises require ING Bank to define clear climate targets for its financial services that are consistent with the Paris Climate Agreement.²⁰³

The discussions during the good offices' process shed light on various topics, and the parties agreed on crucial matters, such as²⁰⁴:

- ING's adoption of the Terra strategy to measure, set objectives, and steer the bank's climate impact is based on the underlying PACTA and PCAF techniques.
- ING's commitment to reduce its thermal coal exposure to near zero by 2025 and refrain from financing new coal-fired power plants.
- ING, BankTrack, Greenpeace, Milieudefensie, and Oxfam Novib have joined forces to urge the Dutch government to ask the International Energy Agency to create two models as quickly as possible that both have a 66 % likelihood of maintaining global warming below 1.5 degrees.

According to Oxfam Novib, the decision made by the National Contact Point made it clear that makes must also build up concrete targets for their climate goals. Their financial services must be in line with the Paris Climate Agreement to conform to the OECD Guidelines,²⁰⁵ implying that banks in the Netherlands (where the decision took place) and across the world will have to follow their lead and make an effort in this area. Oxfam Novib believes that this was one of the first times a National Contact Point took a firm stance on climate targets.²⁰⁶

The Dutch NCP released an evaluation in November 2020 as a follow-up to the concluding declaration on the NCP final statement. The review stated and expressed confidence in the ongoing the positive communication between the parties after the procedure was completed.²⁰⁷ Oxfam Novib, Greenpeace Netherlands, BankTrack, and

²⁰³ OECD Watch. (2021, April 30). *Dutch NGOs vs. ING Bank*.
<https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/>

²⁰⁴ *Ibid*

²⁰⁵ Ministry of Foreign Affairs. (2019, April). *Final Statement- Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*. National Contact Point OECD Guidelines for Multinational Enterprises. https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/Final%20Statement%20NGOs%20vs%20ING%202019-04-19.pdf

²⁰⁶ *Ibid*

²⁰⁷ OECD Watch. (2021, April 30). *Dutch NGOs vs. ING Bank*.
<https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/>

Friends of the Earth Netherlands (Milieudefensie), also known as the complainants, were pleased with NCP's assessment and ING's efforts to combat climate change. They were concerned about ING's lack of development and willingness to lead.²⁰⁸ This case was considered by the 2019 Annual Report on the OECD Guidelines as very important, as understanding the obligations of businesses to reduce and handle climate impacts is very important. The Statement emphasizes the applicability of the OECD Guidelines' "cause, contribute, directly related" terminology to business responsibility for climate effects and calls attention to the Guidelines' particular suggestions that frame this obligation.²⁰⁹

As we have seen, this complaint was accepted by the National Contact Point and all the procedures such as providing the NCP their good offices for mediation were respected for a full discussion to be had and for an agreement to be reached. But we shall now have a look at another case, to understand what happens when the National Contact Point rejects the complaint, in practice.

Global Witness has offices in London, Washington, DC and Brussels and their vision is for a world that is more sustainable, just, and equitable. They demand forests and biodiversity to flourish, fossil fuels to remain in the ground, and companies to put people and the environment first.²¹⁰ Global Witness filed a special instance at the United Kingdom NCP on March 16, 2020, against UK Export Finance, the UK's export credit agency.²¹¹ Their issue regarded UK Export Finance's operations offering export finance services across the world. The complainants claimed the UK Export Finance were neglecting to commit to the Paris Agreement's climate goals, as well as neglecting to declare its indirect greenhouse gas emissions, in direct violation of the OECD Guidelines.²¹² Global Witness requested help from the NCP to ensure that UK Export Finance would disclose its whole carbon impact, align its portfolio with the Paris

²⁰⁸ Ministry of Foreign Affairs. (2020, November). *Evaluation of the NCP Final Statement dated 19 April 2019 regarding the notification Oxfam Novib, Greenpeace, BankTrack, Milieudefensie vs. ING*. National Contact Point OECD Guidelines for Multinational Enterprises. <https://www.oecdguidelines.nl/>

²⁰⁹ OECD. (2020a). *2019 Annual Report on the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf>

²¹⁰ Global Witness. (n.d.). *About us*. <https://www.globalwitness.org/en/about-us/>

²¹¹ UK National Contact Point. (2020, September 8). *Initial assessment: Global Witness complaint to the UK NCP about UK Export Finance*. GOV.UK. <https://www.gov.uk/government/publications/global-witness-complaint-to-the-uk-ncp-about-uk-export-finance/initial-assessment-global-witness-complaint-to-the-uk-ncp-about-uk-export-finance>

²¹² OECD Watch. (2022, April 14). *Global Witness vs. UK Export Finance*. <https://www.oecdwatch.org/complaint/global-witness-vs-uk-export-finance/>

Agreement's 1.5°C objective, and phase out all fossil fuel funding quickly.²¹³ This complaint concerns matters regarding chapters III and VI of the OECD Guidelines for Multinational Enterprises.

On March 16, 2020, the UK NCP acknowledged the complaints. The UK NCP addressed the complaint to United Kingdom Export Finance on March 27, 2020, and United Kingdom Export Finance accepted the request to reply. They responded by claiming that the OECD Guidelines do not cover its operations.²¹⁴

The UK NCP rejected the complaint on September 9, 2020, on the basis that the United Kingdom Export Finance is not a "multinational enterprise" and hence is not subject to the OECD Guidelines, given that²¹⁵:

- The export credit agencies do not have a separate corporate legal identity, but rather they exist as a government agency with the legal personality of the Secretary of State for International Trade, they are not a corporation.

- The export credit agencies do not technically engage in commercial activity, they are not strictly commercial.

- The export credit agencies main objective is to provide financial products that are not otherwise available on the private market²¹⁶.

It is important to note that whilst the UK National Contact Point does not consider the United Kingdom Export Finance as a “multinational enterprise”, export credit agencies have been the subject of NCP cases in other countries, such as the Dutch and the Danish NCPs, which have ruled that export credit agencies are subject to the OECD Guidelines. Similarly, to the UK, the Korean and Finnish NCPs have also determined that their export credit agencies are not covered by the Guidelines. The OECD Watch believes that export credit agencies do engage in and facilitate commercial activities covered by the OECD Guidelines, and that the rejection of complaints against export credit agencies creates a double standard for ECAs in comparison to other financiers engaged in similar types of activities.²¹⁷

²¹³ OECD Watch. (2022, April 14). *Global Witness vs. UK Export Finance*.
<https://www.oecdwatch.org/complaint/global-witness-vs-uk-export-finance/>

²¹⁴ *Ibid*

²¹⁵ *Ibid*

²¹⁶ UK Export Finance. (2020, March 9). *Our products*. GOV.UK.
<https://www.gov.uk/government/collections/our-products>

²¹⁷ OECD Watch. (2022, April 14). *Global Witness vs. UK Export Finance*.
<https://www.oecdwatch.org/complaint/global-witness-vs-uk-export-finance>

In my opinion, it is important, to compare cases that have been accepted and have been rejected so that we understand the reasoning behind them. At first glance, both cases seem similar, as both deal with Chapter VI, responsibility towards the Paris Agreement, and so on. But the truth of the matter is that the NCP must judge, during its initial assessment if the party in question is covered by the Guidelines. In this case, the UK NCP deemed that the United Kingdom Export Finance was not a multinational enterprise and therefore, the complaint was rejected. Had it not been rejected, due to it being such a similar case in terms of scope to Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) vs ING we might have seen a similar outcome in terms of offer of good offices, discussions, mediation and final assessment.

National Contact Points have been under scrutiny due to its underperformance in several criteria, but mainly civil society priorities.²¹⁸ Each NCP was graded on a set of 40 key performance indicators in various areas by the OECD Watch. The assessments do not provide a score or a ranking to the NCPs, but instead, give objective data on crucial elements of NCP organization and operation to civil society. The analysis showed that only one-third of NCPs, frequently follow up on closed complaints to see if corporations follow through on agreements and recommendations and only five governments have imposed sanctions on corporations who fail to participate in the NCP process in good faith.²¹⁹

In terms of something as simple as contact information, only 46 out of the 49 NCPs have their full contact information on their website, given that Jordan, Egypt and Tunisia do not have their contact information available (not available in the case of Jordan) making it harder for people to access this form of remedy.²²⁰

Another interesting fact is that only 41 out of the 49 countries have the Guidelines translated, meaning that these are not accessible to all, as people are not obligated to be fluent in a second language to understand a document of such a nature such as the Guidelines. Colombia, Egypt, Iceland, Jordan (not available in the case of

²¹⁸ Álvarez, L. (2021, October 11). *National Contact Points for Responsible Business Conduct: the road ahead for achieving effective remedies*. Nova Centre for Business, Human Rights and the Environment Blog. <https://novabhre.novalaw.unl.pt/national-contact-points-responsible-business-conduct-road-ahead/>

²¹⁹ Ingrams, M. G., & Wilde-Ramsing, J. (2020, December 14). '*NCP Evaluations*' show NCP system underperforming on criteria that are critical for civil society. OECD Watch. <https://www.oecdwatch.org/oecd-watches-ncp-evaluations-show-ncp-system-underperforming-on-criteria-that-are-critical-for-civil-society/>

²²⁰ *Ibid*

Jordan), Kazakhstan, Romania, Slovenia and Tunisia do not have the Guidelines translated, which making the access to the Guidelines hard for the general population.²²¹

Only one country has publicly disclosed their budget on their website, and that is Norway.²²² The Italian and Japanese NCP have this information partially available, but not on their websites. The Italy NCP has their budget published in the annual national publish law²²³, and the Japan NCP has their budget published on another government website.²²⁴ Jordan does not have an NCP website and besides that, has not disclosed budget information elsewhere.

Only 17 out of 49 NCP engage in a follow-up of the recommendations made and agreements reached in Final Statements for all complaints reaching that stage which is incredibly important to understand if the recommendations and criteria agreed upon are being met and held. These 17 countries are Australia, Belgium, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Latvia, Norway, Poland, Switzerland, the Netherlands, and the United Kingdom.²²⁵

Because of this research, we can realize that there are many points in which National Contact Points all over the world are lacking development and are underperforming, making this grievance mechanism harder to access and, when it is accessible, challenging to ensure that it is accessible to all, as seen by the lack of translated pages and guidelines across the various National Contact Points.²²⁶

²²¹ Ingrams, M. G., & Wilde-Ramsing, J. (2020, December 14). *'NCP Evaluations' show NCP system underperforming on criteria that are critical for civil society*. OECD Watch.
<https://www.oecdwatch.org/oecd-watches-ncp-evaluations-show-ncp-system-underperforming-on-criteria-that-are-critical-for-civil-society/>

²²² *Ibid*

²²³ di Iorio (rd), M., & Chiara (rd), D. (2020, December). *Gazzetta Ufficiale Della Repubblica Italiana*. Istituto Poligrafico e Zecca dello Stato S.p.A.
https://www.gazzettaufficiale.it/do/atto/serie_generale/caricaPdf?cdimg=20A0734000100030110001&dg u=2020-12-31&art.dataPubblicazioneGazzetta=2020-12-31&art.codiceRedazionale=20A07340&art.num=3&art.tiposerie=SG

²²⁴ 中間公表 令和2 年度事業一覧. (2020). Ministry of Foreign Affairs of Japan.
https://www.mofa.go.jp/mofaj/ms/fa/page22_003697.html#section8

²²⁵ Ingrams, M. G., & Wilde-Ramsing, J. (2020, December 14). *'NCP Evaluations' show NCP system underperforming on criteria that are critical for civil society*. OECD Watch.
<https://www.oecdwatch.org/oecd-watches-ncp-evaluations-show-ncp-system-underperforming-on-criteria-that-are-critical-for-civil-society/>

²²⁶ *Ibid*

6. Conclusion

The OECD Guidelines for Multinational Enterprises are a vital and handy document that is unique and groundbreaking. This chapter will conclude this study by summarizing the findings in relation to the topic, Investor Responsibility to Respect the Environment under the OECD Guidelines for Multinational Enterprises. It will also review its limitations and propose opportunities for future studies.

As we have seen, due diligence is a big part of the OECD Guidelines. Investors must always do their due diligence to uncover possible risks and obligations before making a financial commitment. As we have seen, the OECD Guidelines do due diligence well. They have made it into a continuous process since enterprises and investors must constantly identify, prevent, mitigate and account for negative consequences their investments may have, or their organization may have. It is an attempt to avoid risks regarding responsible business conduct.

Investors have a responsibility to respect the environment. As we have discussed, investors must understand and own up to what kind of companies and investments they are funding with their funds and what environmental issues are arising from that poor funding.

As discussed, the OECD Guidelines are a soft law instrument, but in my view, they have hard consequences. Besides the network effect idea that was looked at, they have unique grievance mechanisms that aid in the compliance and enforcement of the recommendations of the OECD Guidelines.

National Contact Points and the Investment Committee serve to help governments, multinational enterprises, and complainants such as NGOs better uphold the recommendations stated in the OECD Guidelines. National Contact Points are a unique grievance mechanism that works to aid enterprises when it comes to complying with the recommendations of the OECD Guidelines.

However, as we saw in the cases in Chapter 5, National Contact Points do not always decide in the same way, and their decision may vary from country to country. In *Global Witness v UK Export Finance*, the UK National Contact point did not consider them a multinational enterprise. However, export credit agencies have been considered in countries such as the Netherlands and Denmark. If such were the case, the UK National Contact Point would have accepted the complaint. This case might have had a

similar outcome to Oxfam Novib, Greenpeace Netherlands, BankTrack, and Friends of the Earth Netherlands (Milieudefensie) v ING.

For this reason, I believe the Investment Committee should be consulted more often. For such matters, clarification matters, that one such approach the Investment Committee and then the OECD could ensure that all over the National Contact Points, there was a fair characterization of all types of multinational enterprises.

An interesting continuation of this study would be to understand how other legal instruments affect investor responsibility regarding the environment and compare those instruments and their compliance mechanisms to that of the OECD Guidelines.

There is still a lot to improve in terms of investor responsibility. One limitation is that it is a soft law instrument, and sanctions are not in place. Therefore, we must rely on the grievance mechanisms available, which I am confident work, but there is room for improvement.

Thankfully, our society is becoming more environmentally aware every day and when it comes to socially responsible investing, so are the investors.

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