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REPORT ON OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2018)

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- How many have been settled?

Of those cases that were received and assessed, one was initially mediated to settlement in 2015 and agreement reached to resolve the complaint, however this was later withdrawn by the complainant. Following a period of consideration, the complainant decided to discontinue the complaint. The case was subsequently closed by the NCP in 2016.

- How many have been discontinued?

As well as the case noted above, eight cases have been closed and/or discontinued.

- How many are still in progress?

Two earthquake-related cases are still in progress, in that the NCP's assessment (communicated to the parties) found that some of the issues raised were material and substantiated and that the offer of good offices to the parties would be useful and further the purposes of the Guidelines. However, there has been no further contact from the claimants to date.

Information for the NZNCP is found on the website for the Ministry of Business, Innovation and Employment (MBIE).[4] The website page is brief but to an extent conveys the necessities. One particularly interesting point on the website is the heading: "Who is expected to follow the Guidelines?". Under this heading, it details, "multinational businesses are the main focus … it can also be applied to business with only domestic operations, that is part of an international supply chain".[5] This description is essentially outlining the scope of Guidelines as to who they apply to. Applicability and scope of the Guidelines is arguably an area where the NZNCP has had issues. This will be elaborated on further, when discussing what specifically is letting the NZNCP down.

[4] Ministry for Business Innovation and Employment [MBIE] "OECD Guidelines for Multinational enterprises" (19 May 2020) <www.mbie.govt.nz>.
[5] MBIE, above n 4.

It is also worth noting that there are only two specific instances available to read on the MBIE website, that of “Mr and Mrs C” and “Mr and Mrs Y”.

III The Utility of the OECD Guidelines as a Mechanism for Individuals to Seek Justice

Currently the Guidelines are the only are global corporate responsibility instrument that has been formally adopted by states.[6] Knowing this makes ensuring that the Guidelines are effective all the more important as they are our only deterrent, defence and source of remedy against irresponsible business conduct. Being the only instrument for global corporate responsibility is both an advantage and a disadvantage of the Guidelines. It means that there is no other fallback mechanism for complainants and thus there is a pressure and need to ensure the Guidelines are executed effectively. If NCPs fully embrace and adhere to the Guidelines, they have the advantage of being a clear and cohesive form of global soft law. It ought to be emphasised that the utility of the Guidelines as a mechanism for individuals to seek justice rests largely on the effectiveness of a country’s NCP.

Sanchez through looking at different NCPs identified that they have “different conceptions of their roles and powers” when handling complaints.[7] It is from NCP’s different interpretation of the procedural guidance in the Guidelines where the difference in NCPs utility and effectiveness arises. Nations sign up to promoting the Guidelines, which can give the Guidelines a form of legitimacy. The NCPs have the potential to supplement the judicial system as a state-based non-judicial grievance mechanism and provide a remedy for victims.

assessment phase. Outcome of specific instance Mr and Mrs C claiming against Southern Response and NZ Permanent Trustees Ltd. Mr and Mrs C's claim is an example of where the NZNCP has applied an unreasonably high threshold on claimants depriving them to the accessibility NCP's are supposed to provide stipulated by procedural guidance. The NZNCP is not alone in this flaw. OECD Watch reported that from June 2012 to May 2014, there has been a trend among NCPs to reject cases at the initial assessment phase when successful mediation is unlikely and only accept relatively easy cases that can be solved through mediation and dialogue.[8] Mr and Mrs C's specific instance is a pertinent example of the NZNCP applying an unreasonably high threshold. The NZNCP rejected the claim on the basis that that the complaint was not against a multinational enterprise, as the company Southern Response is a Crown-owned company. Whilst Southern Response is a Crown-owned company, there is nothing in the Guidelines that would prevent it being classified as a multinational enterprise. Guidelines state explicitly "a precise definition of multinational enterprise is not required", this gives multinational enterprise a broad and inclusive meaning.[9] The Guidelines further explain that ownership of a multinational enterprise may be "private, state or mixed".[10] Surely the suggestion of state ownership is sufficient

is far more likely outcome of an NGO filed complaint.[11] Thus, maybe the earthquake claims brought by WeCan already had the odds stacked against them from the beginning.

The decision made by the NZNCP with Mr and Mrs C's claim is more concerning in light of a case decided by the Norwegian NCP – the 2009 case of ForUM and Friends of the Earth *Norway v Cermaq ASA*, where a complaint was filed against Cermaq ASA for multiple breaches of the Guidelines relating to fish farming and fish feed.[12] However, the principle that can be derived and applied to the Mr and Mrs C case is that the Norwegian Government is the majority shareholder of Cermaq ASA.[13] This case did take a while to be fully concluded, from lodging the complaint in May 2009 to the joint statement being signed in August 2011. During the May 2009 to August 2011 period, the Norwegian NCP was reorganised with a new independent panel of experts who formed the main body who met with all the parties in April 2011.[14] Both parties successfully participated in mediation and were invited to meet again in April 2012 to give an update of the implementation of the joint statement.[15] However, one year after the agreement was reached, the complainants commissioned a study to analyse the impact of the agreement. Sadly, it confirmed that Cermaq ASA still had plenty of work to do before it can be called a leader in responsible business conduct.[16] Specific facts of this case aside, it is the acceptance of this case in the first place that distinguishes it from how Mr and Mrs C's complaint was treated.

In light of the Norwegian case, and then how Mr and Mrs C were treated, it calls into question the principle of "functional equivalence". The Guidelines stipulate "NCPs will operate in accordance with core criteria of accessibility, transparency and accountability to further the objective of functional equivalence".[17] That means, regardless of how a NCP is structured, all NCPs should operate to a functional equivalent. It is evident through the divergent position the NZNCP reached that it is not operating at functional equivalence in

[11] Joris Oldenziel and Joseph Wilde-Ramsing "10 Years on: Assessing the Contribution of the OECD Guidelines on Multinational Enterprises to responsible business conduct" OECD Watch (2010) <oecdwatch.org> at 11.
[12] OECD Watch "*ForUM and Friends of the Earth Norway vs Cermaq ASA*" <oecdwatch.org>.
[13] OECD Watch, above n 12.
[14] OECD Watch, above n 12.
[15]

accordance with the core criteria. Rejecting Mr and Mrs C's claim meant the NZNCP was not meeting the core criteria of accessibility or taking the correct interpretation of multinational enterprise provided for by the Guidelines. Without functional equivalence there is "a lack of consistency, of equal treatment and of predictability of the NCP mechanism as a whole, affecting all interested parties".[18] Bernadette Maheandiran has identified that a central issue is the Guidelines "lack clarity over which process to apply in addressing specific instances and the ensuing effects".[19] It is the lack of clarity that is creating inconsistencies amongst NCPs, and Maheandiran points out that "fair procedure would require that cases with like facts are treated the same".[20]

The NZNCP should better acquaint itself with itself with its role to avoid future outcomes that are divergent to other NCPs and do not achieve functional equivalence. The NZNCP's current position on their role and powers regarding complaints creates an uneven playing field. When considering Mr and Mrs C's claim, the NZNCP should have looked to the "Guiding Principles for Specific Instances", which assist the implementation of the Guidelines.[21] The "Guiding Principles for Specific Instances" outlines that NCPs should be impartial, predictable, equitable and compatible with the Guidelines. It is arguable that rejecting Mr and Mrs C's claim on the fact that Southern Response is not a multinational enterprise, as it is government owned, the NZNCP was not acting in a predictable manner (by not following the similar Norwegian case *ForUM v Cermaq ASA*) and in a way that is not compatible with the Guidelines, as the NZNCP was not upholding functional equivalence. Commentary given in the Guidelines on making an initial assessment encourages NCPs to consult other NCPs "In making such an evaluation NCPs could take into account practice among other NCPs" and also, "how similar issues have been or are being treated in other domestic or international proceedings".[22] Granted, the issue in the Norwegian case is not materially similar to that of

assessment stage by the NZNCP that is failing complainants. This outcome also emphasises the need for an appeal mechanism where a claimant believes an NCP reached an incorrect decision.

Research has also confirmed the notion that that the domestic implementation of the Guidelines remains a challenge in a number of countries and that "international law is limited in its reach into domestic spheres for stimulation of implementation".[33] From this perspective, Cernic suggests that problems with the Guidelines are all "surmountable by strengthening existing system of NCPs".[34] Trouble with domestic implementation of the Guidelines could be traced back to their voluntary nature. Throughout the guidelines the word "recommendation" is used when referring to the specific conduct the Guidelines

Attaching more resources to the NZNCP may increase its legitimacy and should improve

important so that NCPs can fulfil their main objective, to further the effectiveness of the Guidelines".[41]

Maheandiran, in her call for clarity of the OECD Guidelines argues that as[42]

> … one of the only multilaterally endorsed codes promoting corporate responsibility with a dispute resolution mechanism, clarity on the point of whether NCPs are empowered to determine when a corporation has breached the Guidelines, as with the UK NCP, or to mediate between the parties, as with the Canadian NCP, is essential to the continued legitimacy of the system.

E Increase NCP transparency

Transparency is one of the core criteria for an effective NCP. Transparency is an area in

to both parties. OECD Watch has identified this as an issue, especially for NGOs when NCPs base their final decision on information that is only shared between the company and the NCP.[44] Deciding a case based on information that one party has not accessed and had the opportunity to provide a counter argument is unfair.[45] Whilst there is no evidence of this occurring in with the NZNCP, it ought to be clarified an ensured that information is always shared between both parties.

In the specific instance complaint of Mr and Mrs Y against MNE X, in the final statement the NZNCP held, in the concluding paragraph, that "in the circumstances, no purpose would be served by identifying the parties concerned, so their identities have been anonymised". Whilst it is entirely understandable to have the complainant's identity anonymised as to assist complainants feeling secure in their complainants and encourage them coming forward, sharing the identity of complainants would be undesirable given complaints may contain very personal sufferings or other personal details. However, it is in the interest of the NZNCP in (h)se

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vs3 (d))10a)4 n, potential claimant could then be aware that this MNE has already had a(i).1 ( )]TJ 0.00.Sc complair

help them achieve this responsible business conduct and the complainant, the person, an individual or family has the Guidelines to protect them. It is from this perspective of the Guidelines assisting the MNEs to achieve responsible business conduct and the Guidelines protecting claimants from breaches of responsible business conduct that it appears fully justified to identify the MNE in all final statements, increasing the transparency.

F Encourage remedy

Each NCP is at its core is a grievance mechanism for complainants to seek a remedy. However, OECD Watch found that of the 250 complaints filed between 2000 and 2015, only 14 per cent had any beneficial results that provided some measure of remedy.[46] For our NZNCP to make the contribution to global governance that it has the potential to, the government must be more explicit in recognising that providing effective access to remedy

G Promotion

Promotion can seem a peculiar notion in the realm of law. However, promotion is central to the Guidelines, captured under the core principle of visibility. The NZNCP annual reports consistently indicated no dedicated budget to carry out promotional activities but indicated that financial resources are allocated on an ad hoc basis when requested by the NCP.[47] As consequence, there is a real lack of promotional activities or any promotion of the Guidelines by the NZNCP. The annual report provides for space where an NZNCP can record the promotional events or activities it undertook. The NZNCP has not held any promotional events since 2011.[48] However the promotional activities that have been recorded for 2008, 2009,2010 and 2011 are dubious at best. In each of those reports the NCP

years. In the 2011 Annual Report, under "information and promotion" it was stated "we aim to raise awareness of the Guidelines in at least one way (typically, a newsletter) each year".[50]

I Should the New Zealand government be responsible for the maladministration of the NZNCP?

I pose this question in response to Scott Robinson's discussion on the matter in his article.

Robinson concludes that there does not seem to be any review mechanism, "neither domestically nor internationally, capable of attributing internationally wrongful conduct to an OECD Member State on account of its NCP."[57] Robinson thus claims that states themselves are responsible for their ineffective NCPs and suggests that the OECD "must do more to mandate a more cohesive, competent and proactive effort by states and their NCPs when handling specific instances".[58] Robinson's observations resonate with the current position in New Zealand as the annual reports perhaps highlight the little attention and funding the NZNCP receives. If it can be shown that the Government, by way of international law, is responsible for the NZNCP's maladministration, maybe it can be held accountable.

VI Concluding Comments

While the NZNCP does not appear to be performing as well as it could be, it is important to keep in mind that this judgement is made by looking at a limited number of resources from MBIE about the NZNCP. However, ideas and critiques raised in this essay stand and are directly relevant to improving the NZNCP. A proactive approach, rather than a going through