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## A Critical Assessment of the United States Implementation of the OECD Guidelines for Multinational Enterprises

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# A CRITICAL ASSESSMENT OF THE UNITED STATES' IMPLEMENTATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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**Abstract:** As Western corporations continue to expand internationally in search of natural resources and greater economies of scale, they increasingly find themselves operating amidst the political unrest and social conflict that afflicts many developing nations. In such contexts, multinational enterprises often turn a blind eye to human rights abuses, and in the worst cases, become active participants. As a result, many have called for a global system of corporate governance. This Note focuses on the OECD's framework for influencing corporate behavior internationally: the "OECD Guidelines for Multinational Enterprises." After explaining the mechanics of the Guidelines, this Note provides a critical analysis of the United States' implementation by comparing U.S. methods with those of two other adherent states—the Netherlands and France. Ultimately, the Note concludes that U.S. practices leave much room for improvement and offers suggestions for a more robust implementation of the Guidelines.

## INTRODUCTION

In late 1990, a damage-claims inspector set out to make a routine trip to an oil well in Aceh, a remote province of Indonesia.<sup>1</sup> While driving on the road leading to "Well D2," he noticed several pigs rooting around in what appeared to be recently bulldozed soil.<sup>2</sup> Upon closer examination, the unnamed inspector made a gruesome discovery: "the pigs were rooting down there on a hip bone, around the white knobbly part."<sup>3</sup> What he observed were "obviously human bones."<sup>4</sup> Local villag-

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<sup>1</sup> Michael Shari et al., *What Did Mobil Know?*, BUS. WK. MAG., Dec. 28, 1998, at 68, 72.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

ers, when asked about the remains, told him that Indonesian security forces had captured and executed Acehenese villagers in retaliation for an attack on a nearby settlement which housed oil and natural gas company employees.<sup>5</sup> Along the same road just a few months later, a soil testing team found a shoe while excavating about two-and-a-half miles from the D2 well.<sup>6</sup> A machine operator jumped out, picked up the shoe, and collapsed in shock when he realized it was still on the foot of a detached human leg.<sup>7</sup>

Stories like these serve as troubling reminders of the intense suffering and horrific human rights violations individuals endure in developing nations around the world.<sup>8</sup> Yet, in the case of Aceh, there is an added element of concern for the international community: the events described above occurred on land owned in part by the multinational enterprise Mobil Oil, now ExxonMobil.<sup>9</sup> Although violence in Aceh has waned in the wake of the tsunami that struck Indonesia in 2004,<sup>10</sup> over fifteen years of human rights atrocities serve as a disturbing example of what can happen when multinational enterprises (“MNEs”) operate in the context of third-world political conflict, repression, and extreme poverty, often without the check of domestic monitoring and law enforcement.<sup>11</sup> ExxonMobil, as well as Unocal, Nike, Dole, Chevron, and many other multinational enterprises, have all been criticized for providing “poster cases” for the negative consequences of globalization and the shift towards transnational production.<sup>12</sup>

The international community has responded to the unique problem of influencing the behavior of multinational corporations with respect to human rights, as well as other areas of concern such as bribery, labor rights violations, and environmental degradation, in a variety of ways.<sup>13</sup> This note focuses on the corporate governance approach of the

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<sup>5</sup> *Id.*

<sup>6</sup> Shari et al., *supra* note 1, at 72.

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* at 68–74.

<sup>10</sup> Amnesty Int’l USA, Indonesia: Human Rights Concerns, <http://www.amnestyusa.org/countries/indonesia/summary.do> (last visited Jan. 5, 2006).

<sup>11</sup> *See* Shari et al., *supra* note 1, at 68–74.

<sup>12</sup> *See* Human Rights Watch, World Report 2002: Business and Human Rights, *available at* <http://www.hrw.org/wr2k2/business.html>.

<sup>13</sup> *See, e.g.*, United Nations, United Nations Global Compact: The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Jan. 6, 2005) [hereinafter U.N. Global Compact]; THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVISION 2000 17–27 (June 27, 2000), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter OECD GUIDELINES].

Organization for Economic Cooperation and Development (OECD). Specifically, it seeks to provide a critical analysis of the United States's implementation of the OECD Guidelines for Multinational Enterprises (the Guidelines) through its primary implementation mechanism: the national contact point (NCP). This Note first provides a backdrop to assessing implementation successes and failures by explaining exactly what the Guidelines are, how they address structural limitations of the international legal system, and the implementation mechanisms they include. Next, this Note considers the strengths and weaknesses of the U.S. NCP approach to implementation by comparing U.S. practices with those of two other adherents to the Guidelines—the Netherlands and France. Finally, the Note concludes by offering suggestions for improving implementation by way of the national contact point.

## I. BACKGROUND AND HISTORY

With the help human rights advocates, individual torture victims such as those in Indonesia, have made various attempts to influence the behavior of Western-based multinational corporations acting abroad.<sup>14</sup> Some alleged victims, including a group of Acehese villagers, have brought tort actions in U.S. federal court under the Alien Tort Claims Act.<sup>15</sup> A shareholder resolution on the issue of ExxonMobil's role in the violence in Aceh was also filed in 2001, receiving almost 8 percent of the votes cast.<sup>16</sup> Yet, at the international level, voluntary principles have been the primary vehicle for influencing MNE actions with respect to human rights.<sup>17</sup> In particular, individual states, non-governmental organizations such as Amnesty International, and inter-governmental organizations such as the United Nations (U.N.) and the OECD have promulgated guidelines and codes of conduct.<sup>18</sup> These rules and principles, although voluntary and non-binding, represent

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<sup>14</sup> Sunita Doddamani, *Fighting for the Right to Hold Multinational Corporations Accountable: Indonesian Villagers Battle Oil Giant Exxon Mobil*, 49 WAYNE L. REV. 835, 835 (2003).

<sup>15</sup> *Id.*

<sup>16</sup> Press Release, Int'l Labor Rights Fund, ExxonMobil Investors Tell Management to Review Relationship with Indonesia's Criminal Military (May 25, 2005), available at <http://www.laborrights.org/press/exxon052505.htm>.

<sup>17</sup> See, e.g., U.N. Global Compact, *supra* note 13; OECD GUIDELINES, *supra* note 13.

<sup>18</sup> Amnesty Int'l USA, Business and Human Rights: Human Rights Principles for Companies: A Checklist, <http://www.amnestyusa.org/business/checklist.html> (last visited Jan. 5, 2006); U.N. Global Compact, *supra* note 13; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Voluntary Principles on Security and Human Rights, <http://www.state.gov/g/drl/rls/2931.htm> (last visited Jan. 5, 2006); OECD Guidelines, *supra* note 13.

the international community's most widely-accepted attempt at achieving some level of global corporate governance.<sup>19</sup>

### A. *The OECD Guidelines for Multinational Enterprises*

In 1976, all thirty OECD members, plus nine non-member countries, adopted the Guidelines as "recommendations addressed by governments to multinational enterprises operating in or from adhering countries . . . ."<sup>20</sup> The Guidelines set forth voluntary principles and standards for responsible corporate conduct that are not enforceable at law.<sup>21</sup> At their broadest level, the Guidelines seek to ensure that MNEs act in accordance with government policies, and in doing so, "strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance [MNEs'] contribution to sustainable development . . . ."<sup>22</sup> Specific areas addressed in the Guidelines include: information disclosure, employment and industrial relations, the environment, bribery, consumer interests, science and technology, competition, and taxation.<sup>23</sup> There is no section solely dedicated to human rights violations, but MNEs are asked in the general policies chapter to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."<sup>24</sup>

The Guidelines are designed to influence the behavior of a specific type of non-state actor—the multinational enterprise.<sup>25</sup> As a private entity, a MNE cannot become a party to a binding instrument, i.e., a treaty under international law, for the very reason that it is not a state; only states may be parties to treaties.<sup>26</sup> The Guidelines address this structural problem by requiring adhering *states* to promote a set of principles, rather than seeking to hold *corporations* directly accountable for their actions.<sup>27</sup> Nevertheless, as a non-binding instrument, the

<sup>19</sup> See Amnesty Int'l USA, Business and Human Rights, *supra* note 18; U.N. Global Compact, *supra* note 13; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Voluntary Principles, *supra* note 18; OECD GUIDELINES, *supra* note 13.

<sup>20</sup> THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: FREQUENTLY ASKED QUESTIONS, [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_2349370\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_2349370_1_1_1_1,00.html) (last visited Jan. 5, 2006) [hereinafter FREQUENTLY ASKED QUESTIONS].

<sup>21</sup> See OECD GUIDELINES, *supra* note 13, at 17.

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.* at 20–27.

<sup>24</sup> *Id.* at 19.

<sup>25</sup> See FREQUENTLY ASKED QUESTIONS, *supra* note 20.

<sup>26</sup> See MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 18 (4th ed. 2003).

<sup>27</sup> See FREQUENTLY ASKED QUESTIONS, *supra* note 20.

Guidelines cannot be enforced through legal action against a MNE or applied as law in any international court.<sup>28</sup> Moreover, the Guidelines do not apply to multinationals that are based in a non-adhering nation and operate in a non-adhering nation or nations.<sup>29</sup>

### B. *Implementation of the Guidelines*

The institutional framework for promoting and implementing the Guidelines consists of two major elements: NCPs and the OECD's Committee on International Investment and Multinational Enterprises (CIME).<sup>30</sup> NCPs are at the heart of implementation: they promote the Guidelines, handle inquiries about their application, and help resolve problems that arise in specific instances of implementation.<sup>31</sup> As a practical matter, NCPs frequently handle complaints submitted against companies for alleged violations of the Guidelines' principles.<sup>32</sup> In addition, NCPs gather information on national experiences with the Guidelines, meet annually to share experiences, and report annually to the CIME.<sup>33</sup>

The CIME is responsible for overseeing the effectiveness of the OECD Guidelines, clarifying the meaning of specific provisions, reviewing and exchanging views on the Guidelines, and responding to various requests from adhering nations.<sup>34</sup> Additionally, the Guidelines are periodically reviewed in accordance with terms set by the CIME.<sup>35</sup> These reviews tend to provide guidance to NCPs; establish mechanisms for promoting transparency, accountability, and best practices; consult the business community, labor organizations, and non-member countries for feedback on ways to improve the Guidelines and their implementation; and incorporate public opinion input on MNE governance offered via the Internet.<sup>36</sup>

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<sup>28</sup> *See id.*

<sup>29</sup> Examples of nations which do not adhere to the Guidelines include China, Malaysia, Russia, and India, among others. *Id.*; OECD WATCH, FIVE YEARS ON: A REVIEW OF THE OECD GUIDELINES AND NATIONAL CONTACT POINTS 11 (2005) [http://www.oecdwatch.org/docs/OECD\\_Watch\\_5\\_years\\_on.pdf](http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf) [hereinafter FIVE YEARS ON].

<sup>30</sup> OECD GUIDELINES, *supra* note 13, at 32.

<sup>31</sup> Joachim Karl, *The OECD Guidelines for Multinational Enterprises*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 89, 92–93 (Michael K. Addo ed., 1999).

<sup>32</sup> *See* FIVE YEARS ON, *supra* note 29, at 11.

<sup>33</sup> FREQUENTLY ASKED QUESTIONS, *supra* note 20.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> OECD GUIDELINES, *supra* note 13, at 6.

## II. DISCUSSION OF ISSUES

### A. OECD National Contact Points

As mentioned above, NCPs are the primary mechanism for implementing the OECD Guidelines for multinational enterprises.<sup>37</sup> Most importantly, they must “further the effectiveness of the Guidelines” and “operate in accordance with core criteria of visibility, accessibility, transparency and accountability . . . .”<sup>38</sup> The Guidelines additionally require that all NCPs be functional equivalents, although individual NCPs retain some discretion as to the exact manner in which they provide information, promote awareness, and handle implementation in specific instances.<sup>39</sup> NCPs also may take a variety of institutional forms, but are most often composed of a government office headed by a senior government official.<sup>40</sup> For instance, the U.S. NCP is the Office of Investment Affairs, a part of the Bureau of Economic and Business Affairs located in the Department of State.<sup>41</sup> In contrast to the U.S. institutional arrangement, other adhering nations such as the Netherlands and France use interdepartmental offices, which assign different government ministries various bureaucratic roles.<sup>42</sup>

NCPs must engage in promotional and informational activities, as well as encourage implementation of the Guidelines in specific instances.<sup>43</sup> Promotional activities may be as simple as posting a web link to the OECD Guidelines on a national government website, but many NCPs have been more proactive in their approach.<sup>44</sup> For instance, the American, Swedish, Korean, Polish, Spanish, Hungarian, Canadian, German, Australian, and British NCPs have all trained their embassy and consular staffs in compliance and application of the Guidelines.<sup>45</sup> The Canadian NCP has sent representatives to appear before the Parliamentary Sub-Committee on Human Rights and International Devel-

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<sup>37</sup> *See id.*

<sup>38</sup> *Id.* at 35.

<sup>39</sup> *Id.* at 35,60.

<sup>40</sup> *See id.* at 35.

<sup>41</sup> Bureau of Economic and Business Affairs, U.S. Dep’t of State, OECD: U.S. National Contact Point, <http://www.state.gov/e/eb/oeecd> (last visited Jan. 5, 2006).

<sup>42</sup> OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2005 ANNUAL MEETING OF THE NATIONAL CONTACT POINTS: REPORT BY THE CHAIR 29, 31 (2005), <http://www.oecd.org/dataoecd/20/13/35387363.pdf> [hereinafter REPORT BY THE CHAIR].

<sup>43</sup> OECD GUIDELINES, *supra* note 13, at 35–36.

<sup>44</sup> REPORT BY THE CHAIR, *supra* note 42, at 8; OECD GUIDELINES, *supra* note 13, at 35.

<sup>45</sup> REPORT BY THE CHAIR, *supra* note 42, at 8–9.

opment, and the Italian NCP cooperated with the Milan Chamber of Commerce to offer a training course for public utility workers.<sup>46</sup>

Implementation in specific instances has been the most important and visible role for NCPs in recent years.<sup>47</sup> As amended in 2000, the OECD Guidelines state that NCPs will “contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances” by: (1) making an initial assessment as to whether the issue(s) raised merits further examination; (2) offering good offices for the parties involved; (3) issuing a statement if an agreement is not reached and making recommendations on how the Guidelines should be implemented; (4) protecting sensitive business and other information; and (5) making publicly available the results of the implementation proceedings without violating due confidentiality.<sup>48</sup> It is vital that NCPs provide a “forum for discussion” and facilitate “access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.”<sup>49</sup> They must consider requests for implementation brought by non-governmental organizations (“NGOs”), employee and labor organizations, representatives from corporations, and other concerned parties.<sup>50</sup> In most cases, issues will be addressed by the NCP in whose country the issue has arisen, although cooperation between NCPs is encouraged by the Guidelines.<sup>51</sup>

### B. *Implementation in Specific Instances by the U.S., Dutch, and French National Contact Points*

Sixteen requests for implementation in specific instances have been filed with the U.S. NCP since June of 2000, when the NCP mechanism first was established by amendment to the Guidelines.<sup>52</sup> Requests for implementation are usually initiated by way of complaints in letter form, addressed to the NCP and sent by a concerned party such as a trade union or NGO.<sup>53</sup> These sixteen instances represent the greatest number filed with any of the thirty-nine adherent countries.<sup>54</sup> However, extremely brief descriptions of only half of those instances—

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 14.

<sup>48</sup> OECD GUIDELINES, *supra* note 13, at 36–37.

<sup>49</sup> *Id.* at 36.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 32, 60.

<sup>52</sup> REPORT BY THE CHAIR, *supra* note 42, at 14.

<sup>53</sup> *See* FIVE YEARS ON, *supra* note 29, at 11, 33.

<sup>54</sup> REPORT BY THE CHAIR, *supra* note 42, at 14.



whether actively taken up by the U.S. NCP or not—have been made available by the United States for publication in OECD reports on Guideline-related activities.<sup>55</sup> As a result, the data available for analysis of U.S. implementation is extremely scarce.<sup>56</sup> The names of the parties requesting implementation are often not revealed in U.S. NCP or OECD documents, although various NGOs sometimes indicate in their own public materials that they have made requests for implementation.<sup>57</sup> Moreover, the U.S. NCP routinely withholds company names and details pertaining to complaints, and does not make its annual reports to the CIME publicly available.<sup>58</sup>

Two of the eight total instances submitted to the OECD for publication were classified as “ongoing” as of June 2005, leaving a mere six published cases where the U.S. NCP has concluded its involvement.<sup>59</sup> As a result, these six completed cases provide a weak basis, but the only available one, for an assessment of U.S. NCP implementation successes and failures.<sup>60</sup> Further frustrating the analysis is the fact that the U.S. NCP did not issue a final statement explaining what resolution had been achieved and how the NCP had contributed to that solution in any of the six concluded cases.<sup>61</sup> Rather, in half of those cases, it simply recorded that the “parties reached an agreement.”<sup>62</sup> In the remaining instances, the U.S. NCP determined either that a U.N. panel had adequately addressed all issues, that a U.N. Security Resolution was sufficient, or that the parties’ issues were being addressed appropriately through “other means.”<sup>63</sup>

All but one recorded instance dealt with issues arising under the “Employment and Industrial Relations” section of the OECD Guidelines (excluding the issue addressed by a U.N. Security Resolution discussed above), suggesting that the scope of U.S. NCP implementation activities is extremely limited.<sup>64</sup> Specifically, these requests involved questions of freedom of association, collective bargaining, and employee representation.<sup>65</sup> Although it is not stated in the *OECD June 2005*

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<sup>55</sup> *Id.* at 55–56.

<sup>56</sup> *See id.*

<sup>57</sup> *See* FIVE YEARS ON, *supra* note 29, at 5, 33.

<sup>58</sup> *See id.* at 33; REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>59</sup> REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See* REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>65</sup> *See id.*

*Report by the Chair*, it can reasonably be inferred that most, if not all, of the employee and industrial relations implementation requests were filed by trade unions.<sup>66</sup> The single remaining instance that did not fall under that section touched on three different chapters of the Guidelines: “General Policies,” “Information and Disclosure” and “Combating Bribery.”<sup>67</sup> However, this particular instance involved a request to investigate the conduct of an international ship registry, and the U.S. NCP simply found that the relevant issues had been “effectively addressed through other appropriate means . . . .”<sup>68</sup> Thus, the U.S. NCP cannot credibly claim to have brokered a resolution between a MNE and complainant outside of the realm of employment and industrial relations conflicts.<sup>69</sup>

The data available on the activities of the Netherlands NCP is similarly scarce.<sup>70</sup> The OECD’s *June 2005 Report by the Chair* provides brief records of the Dutch NCP’s involvement in fourteen specific instances.<sup>71</sup> Twelve of these cases have been classified as concluded, but agreements were reached in only five.<sup>72</sup> Thus, the Dutch NCP can be said to have successfully brokered settlements in roughly five cases of specific implementation to date.<sup>73</sup> Additionally, the Dutch NCP issued joint press releases with the parties involved in a sixth case, and a statement discussing lessons learned and a travel advisory were released in two other instances.<sup>74</sup> These public statements, although not necessarily evidence of the Dutch NCP’s positive influence, at the very least helped further the NCP’s goal of meeting the openness and transparency requirements set forth in the Guidelines.<sup>75</sup> In another five concluded cases, the Dutch NCP determined that the issue involved did not merit further examination for various reasons, including a “lack of an investment nexus” or because formal legal proceedings had resolved the concerns.<sup>76</sup> The twelfth concluded case simply required that the

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<sup>66</sup> FIVE YEARS ON, *supra* note 29, at 33; *see* REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>67</sup> REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>68</sup> *Id.* at 56.

<sup>69</sup> *See id.* at 55–56.

<sup>70</sup> *See id.* at 51–53.

<sup>71</sup> *Id.*

<sup>72</sup> REPORT BY THE CHAIR, *supra* note 42, at 51–53.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See* FIVE YEARS ON, *supra* note 29, at 33; REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>76</sup> REPORT BY THE CHAIR, *supra* note 42, at 51–53.

Netherlands NCP act as a mediator between a Dutch NGO and the Chilean NCP.<sup>77</sup>

The French NCP has been the third-most active in taking up specific instances for consideration, cataloguing nine of twelve total cases in the OECD report.<sup>78</sup> Five of the nine recorded cases have been concluded, and in only one of those five has a final agreement been reached by the parties.<sup>79</sup> However, the French NCP did issue press releases in relation to four concluded instances, furthering the OECD's goal of transparency for NCP implementation activities.<sup>80</sup> Lastly, the scope of French implementation has been limited to mostly employment and industrial relations cases, much like U.S. and Dutch activities.<sup>81</sup>

### III. ANALYSIS

Although the information available concerning specific activities of the U.S. NCP is minimal, indications five years after the establishment of the NCP implementation mechanism suggest that there is much room for improvement.<sup>82</sup> An extrapolative analysis of the most active NCPs—the U.S., Dutch and French—reveals that *all* NCPs probably have had a limited impact on MNE behavior.<sup>83</sup> The total number of cases the three nations have actively undertaken is quite small, and implementation in areas outside of labor relations has not been substantial.<sup>84</sup> The weak cumulative effect of NCP action can be, in part, attributed to the inherent limitations of the Guidelines and the associated difficulty of altering the behavior of private actors in the international arena.<sup>85</sup> However, the U.S. NCP's approach has some severe shortcomings even when measured against the Guidelines' own requirements for NCPs.<sup>86</sup>

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<sup>77</sup> *Id.* at 52.

<sup>78</sup> *Id.* at 14, 47–48.

<sup>79</sup> *Id.* at 47–48.

<sup>80</sup> *See id.*

<sup>81</sup> REPORT BY THE CHAIR, *supra* note 42, at 47–48, 51–53, 55–56.

<sup>82</sup> *See* FIVE YEARS ON, *supra* note 29, at 5; *see* REPORT BY THE CHAIR, *supra* note 42, at 47–48, 51–53, 55–56.

<sup>83</sup> *See* FIVE YEARS ON, *supra* note 29, at 5; *see* REPORT BY THE CHAIR, *supra* note 42, at 43–56.

<sup>84</sup> *See* FIVE YEARS ON, *supra* note 29, at 47–48, 51–53, 55–56.

<sup>85</sup> *See id.* at 5, 7.

<sup>86</sup> *See* REPORT BY THE CHAIR, *supra* note 42, at 47–48, 51–53, 55–56; OECD GUIDELINES, *supra* note 13, at 36.

A comparative analysis of U.S., Dutch, and French NCP activities shows that the United States has primarily failed to “operate in accordance with [the] core criteri[on] of . . . transparency . . . .”<sup>87</sup> The very problem of a lack of openness has made it difficult both to assess why the U.S. NCP has failed to bring about settlements between parties in failed cases, and how success was achieved in resolved cases.<sup>88</sup> What is clear, however, is that the U.S. NCP, at a minimum, should reach a level of transparency achieved by the Dutch NCP and thus better meet its core responsibilities under the Guidelines.<sup>89</sup>

As Appendix A demonstrates, the U.S. NCP has opted to publish summaries of only half of the instances filed with it.<sup>90</sup> Rather than err on the side of openness as the Guidelines suggest, the U.S. NCP neither releases specifics concerning cases it has addressed, nor publishes its annual reports to the CIME.<sup>91</sup> Moreover, the U.S. NCP has made it clear that it has no intention of ever acknowledging that a particular MNE has breached the Guidelines, regardless of the egregiousness of the behavior.<sup>92</sup> It appears that the U.S. NCP’s emphasis on maintaining the confidentiality of the parties involved has been taken to such an extreme that it far outweighs any value placed on open and transparent NCP procedures.<sup>93</sup>

Although under the Guidelines NCPs have flexibility as to how they handle implementation in specific instances, this does not justify institutional laziness on the part of the U.S. NCP, or worse, willful disregard for Guideline requirements.<sup>94</sup> The “Procedural Guidance” section of the OECD Guidelines states that “if the parties involved do not reach agreement on the issues raised, [the NCP will] issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.”<sup>95</sup> As discussed above, OECD annual reports indicate that the U.S. NCP has never issued a final statement concerning an instance of specific implementation, yet there are no sanctions

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<sup>87</sup> OECD GUIDELINES, *supra* note 13, at 35; FIVE YEARS ON, *supra* note 29, at 33; REPORT BY THE CHAIR, *supra* note 42, at 47–48, 51–53, 55–56.

<sup>88</sup> See REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>89</sup> See FIVE YEARS ON, *supra* note 29, at 33; REPORT BY THE CHAIR, *supra* note 42, at 51–53, 55–56.

<sup>90</sup> See REPORT BY THE CHAIR, *supra* note 42, at 55–56.

<sup>91</sup> See FIVE YEARS ON, *supra* note 29, at 25, 33.

<sup>92</sup> *Id.* at 23.

<sup>93</sup> See *id.* at 25.

<sup>94</sup> See OECD GUIDELINES, *supra* note 13, at 35.

<sup>95</sup> *Id.* at 36.

for such inaction provided for in the Guidelines.<sup>96</sup> Moreover, the U.S. NCP website does not provide access to or make mention of any sort of press release or final report relating to an implementation case.<sup>97</sup>

In direct contrast, the Dutch NCP has issued at least four final statements after concluding its involvement in implementation instances.<sup>98</sup> Specifically, in December of 2002, a resolution was negotiated and a joint statement issued by the Dutch NCP, Adidas, and the India Committee on the Netherlands (“ICN”) concerning an issue stemming from Adidas’s outsourcing of soccer ball production in India.<sup>99</sup> The joint statement explained the relevant issue (Adidas’s conformity with the OECD Guidelines), discussed how the Dutch NCP helped each party clarify its point of view, and finally, stipulated the common ground and agreed upon changes that each Adidas and the ICN will make.<sup>100</sup> In this case, the Dutch NCP fulfilled its responsibility under the Guidelines to make public the results of an implementation proceeding and in doing so, allowed the concerned public and complainant NGO to see that it had provided good offices for an interest group and MNE in dispute.<sup>101</sup> Thus, the Dutch NCP provided a “forum for discussion,” facilitated “access to consensual and non-adversarial means . . . to assist in dealing with the issues,” and ultimately brought about a solution to a corporate governance problem in the case of Adidas and India.<sup>102</sup>

In light of the more transparent and seemingly more effective practices of the Dutch NCP, it is clear that the U.S. NCP would benefit from changes to its approach to implementation in specific instances.<sup>103</sup> As the analysis above suggests, the U.S. NCP must work to fundamentally increase the openness of its operations by issuing statements after concluding its involvement in disputes, whether a resolution has been reached or not.<sup>104</sup> If a solution has not been reached, the U.S. NCP should explain why, as the Guidelines require,

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<sup>96</sup> REPORT BY THE CHAIR, *supra* note 42, at 55–56. See generally OECD GUIDELINES, *supra* note 13.

<sup>97</sup> See Bureau of Economic and Business Affairs, *supra* note 41.

<sup>98</sup> See REPORT BY THE CHAIR, *supra* note 42, at 51–53.

<sup>99</sup> See *id.* at 51.

<sup>100</sup> NETHERLANDS NAT’L CONTACT POINT, JOINT STATEMENT BY THE NCP, ADIDAS AND ICN: AGREEMENT BETWEEN ICN AND ADIDAS IN NCP PROCEDURE 1–3 (2002), <http://www.oecd.org/dataoecd/33/43/2489243.pdf> [hereinafter NETHERLANDS NAT’L CONTACT POINT].

<sup>101</sup> See *id.*

<sup>102</sup> OECD GUIDELINES, *supra* note 13, at 36; see NETHERLANDS NAT’L CONTACT POINT, *supra* note 101.

<sup>103</sup> See FIVE YEARS ON, *supra* note 29, at 33.

<sup>104</sup> See *id.*

so that future complainants and corporations can learn from past mistakes.<sup>105</sup> The quality and detail of such public releases also must sufficiently allow outside observers and interested parties such as U.S.-based MNEs and NGOs to understand how implementation proceedings work.<sup>106</sup> If the NCP implementation mechanism is to have any real impact on MNE behavior, corporations and potential complainants must understand exactly how confidentiality will be protected, when and how mediation shall proceed, and what benefits they stand to receive by reaching out to an NCP for assistance.<sup>107</sup>

Moreover, the U.S. NCP should work to increase the public nature of its implementation proceedings so that it can employ the “mobilization of shame” in order to affect corporate behavior.<sup>108</sup> The more negative publicity and NGO scrutiny to which corporations are subject, the more likely they are to change their undesired practices.<sup>109</sup> The non-binding and discretionary nature of the Guidelines makes public criticism all the more important as a tool for bringing about corporate reform.<sup>110</sup> Although the confidentiality of sensitive business information must be maintained as the Guidelines stipulate, the U.S. NCP must work to strike a better balance between confidentiality and public accountability required for the mobilization of shame.<sup>111</sup>

## CONCLUSION

In a world where MNEs are often faced with a choice between employing responsible business practices and suffering a reduction in profit margins due to competitive disadvantage, voluntary guidelines such as the OECD Guidelines may simply be inadequate. While the voluntary aspect of the Guidelines contributes to their broad acceptance and addresses the problem of influencing private actors through international law, it also means that corporations can “opt out” of compliance if it makes economic sense to do so. Nonetheless, without a viable system for instituting binding, global business regulations, voluntary guidelines and principles represent the best method presently available for altering MNE behavior. Therefore, it is important that the

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<sup>105</sup> See *id.*; see OECD GUIDELINES, *supra* note 13, at 36.

<sup>106</sup> See FIVE YEARS ON, *supra* note 29, at 33.

<sup>107</sup> See *id.*

<sup>108</sup> See Robert Charles Blitt, *Who Will Watch the Watchdogs?: Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 290 (2004).

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* See generally OECD GUIDELINES, *supra* note 13.

<sup>111</sup> See OECD GUIDELINES, *supra* note 13, at 61.

U.S. NCP meet its responsibilities under the Guidelines and thus set an example for other OECD members and Guidelines adherents. Increased transparency and more all-around effort on the part of the U.S. NCP must be employed if the United States has any hope of making the OECD Guidelines a truly useful tool for influencing corporate practices around the globe.

#### APPENDIX

Appendix A: Implementation in Specific Instances*							
NCP	Total Specific Instances	Published Specific Instances	Ongoing	Concluded	Parties Reached Agreement	Total Final Statements Issued	Relevant Guidelines Chapters
United States	16	8	2	6	3	0	Employment & Industrial Relations (6) General policies (1)
Netherlands	14	14	2	12	5	4	Employment & Industrial Relations (14) General policies (1) Environment (1) Supply Chain (1)
France	12	9	4	5	2	4	Employment & Industrial Relations (5) General policies (2) Environment (2) Competition (1) Information and Disclosure (1)

\* OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2005 ANNUAL MEETING OF THE NATIONAL CONTACT POINTS: REPORT BY THE CHAIR 47-48, 51-53, 55-56 (2005), <http://www.oecd.org/dataoecd/20/13/35387363.pdf>.