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Corporate environmental due diligence and accountability

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Preface

I would like to extend my thanks to my supervisor, Professor Ivar Alvik, for his support, as well as for his insightful and constructive feedback during my work on this project. I learned a lot from working with this thesis, and I owe a great deal to our discussions. I would also like to thank the department of petroleum and energy law at the University of Oslo for providing me the opportunity to write this thesis. The academic and social environment that one is allowed to be part of as a research assistant is an invaluable possibility to learn and develop as a lawyer and researcher. My parents further deserve a special thank you, as they are, as always, my biggest supporters.

The inspiration for this thesis has been my interest for the interplay between law, economics and development. I wanted to investigate the environmental norms that apply to multinational corporations' operations worldwide. To me this is an important topic because multinational enterprises are at the forefront of the global economy and their dealings with the environment will affect generations to come.

This is particularly relevant with regards to developing countries, as developing countries often are more dependent on foreign direct investment and are in a weaker position with regards to controlling the operations of multinational corporations. It is worth noticing that most of the world's natural resources are in the south, within the national jurisdictions of developing countries, whereas the majority of the world's multinational corporations have their headquarters in developed countries. This makes it relevant to question if these multinational enterprises carry some responsibility for their operations in developing countries, independently of national legislations.

For this reason I chose to focus my research on the OECD Guidelines for Multinational Enterprises, as the OECD is an organisation consisting of the economically advanced economies. Moreover, I wanted to investigate the potential tools for holding multinational corporations responsible for respecting the OECD Guidelines, and I looked in detail at the

environmental cases of three different OECD National Contact Points. Finally, I considered the practice of the Norwegian Council on Ethics, and their approach to corporations' environmental responsibilities. I found that there are universal values and norms in international law relating to the protection of the environment that can be extended to non-state actors such as multinational corporations. However, the accountability mechanisms for developing these norms are weak, inefficient or non-existent. This is an area of law that is still to be developed.

Thus I hope that people who read this thesis will take the opportunity to reflect upon the role of law in our societies and its potential for creating change. I would like to end with a quote from Professor Rosalyn Higgins, former President of the International Court of Justice:

> "Globalization represents the reality that we live in a time when the walls of sovereignty are no protection against the movements of capital, labor, information and ideas — nor can they provide effective protection against harm and damage."

Oslo, June 2016

Ragnhild Rath Moritz-Olsen

Content

Table of abbreviations

CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
FIVAS	Foreningen for Internasjonale Vannstudier (Norwegian Association for International Water Studies)
FIVH	Fremtiden I Våre Hender
ForUM	Forum for Utvikling og Miljø (Forum for Development and Environment)
FTSE	Financial Times Stock Exchange
GA	General Assembly
HIA	Health Impact Assessment
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
LO	Landsorganisasjonen i Norge (Norwegian Confederation of Trade Unions)
NBIM	Norwegian Bank Investment Management
NCP	National Contact Points
NGO	Non-Governmental Organization
NHO	Næringslivets Hovedorganisasjon (Confederation of Norwegian Enterprise)
OECD	Organisation for Economic Co-operation and Development
PSPC	Pilipinas Shell Petroleum Corporation
SEA	Strategic Environmental Assessments
SIA	Social Impact Assessment
TNC	Transnational Corporations
TSIA	Trade Sustainability Impact Assessment
UN	United Nations

UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNEP	United National Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WSSD	World Summit on Sustainable Development

1 Introduction

1.1 Topic of investigation

This thesis shall discuss the applicability of internationally-accepted environmental principles to transnational corporations (TNCs). At the heart of my research are the following two questions: 1) what normative guidelines are there for TNCs' environmental responsibility in a global context, and 2) is there any form of effective accountability for TNCs in this regard?

In order to answer these questions, the thesis is divided into two parts. The first part will examine the normative foundations for corporate environmental responsibility. It will start by analysing three principles of international environmental law and their potential applicability to TNCs. Then it will look at the OECD Guidelines for Multinational Enterprises (the Guidelines) and assess to what extent they reflect these same principles.

The second part considers two different accountability mechanisms for corporate environmental responsibility. It starts by an assessment of the structure and function of the OECD National Contact Points (NCPs), the accountability mechanism for the OECD Guidelines. The focus will be on three NCPs' implementation of the environmental principles outlined by the Guidelines. Thereafter, the Norwegian Council on Ethics and its interpretation of corporations' environmental responsibility will be assessed. The purpose of this part is to illustrate how corporate environmental principles may be implemented and to show some practical examples of such implementation.

The above outlined questions are relevant because they involve international norms relevant to TNCs' activities. In an increasingly globalised world economy where multinational enterprises are the main sources of international investment, it is important to question if there are global norms that apply to their operations, especially since not all states are fully able or willing to adequately regulate the activities of TNCs. This

is a particularly pressing issue in the field of international environmental law. The main reason for this is because the effects of environmental damages can be irreversible and consequently deprive possibilities from future generations. Thus in environmental law, as opposed to other areas of law, time is of an essence. In this field one may not have the luxury of waiting for binding, better and clearer norms to develop, because when they do it may be too late to change the course of history.

The increasing levels of investment by powerful TNCs into poor and often corrupt developing states are particularly problematic. Many developing states do not have effective legal institutions, so even if they have regulations, there may be no effective ways of implementing them. Moreover, developing countries are hard pressed to attract foreign investment in order to develop their economies, and this has been claimed to press down the level of regulation.[1]

For these reasons it becomes two highly relevant questions if there are international environmental standards that apply to TNCs' operations, and if there are any way of holding them accountable for these norms. Global minimum standards would also avoid the much discussed problem of the prisoners' dilemma, where the ethical multinational corporations are at a competitive disadvantage in comparison to less ethically developed competitors.

1.2 Method

At the centre of my reasoning in this thesis, is a methodological outlook inspired by Professor Rosalyn Higgins' idea of the international legal system as consisting of "participants", rather than the traditional "objects" or "subjects".[2] Under a traditional state-centric perception of international law, states are the subjects whereas other actors are mere objects of the law. According to Higgins, international law should rather be understood as a normative system consisting of a variety of participants, such as TNCs, NGOs, international organisations and individuals. This under-

1 Morgera (2009) 28

2 Higgins (1994) 49

standing of the international legal system does not dispute that states are the primary subjects of international law as such, but also opens the door for non-state actors to have varying levels of rights and duties under international law, according to their roles and capacities. Today I think it is fair to say that Higgins' outlook has received quite general acceptance among international scholars,[3] even though some embrace it more heartily than others.[4]

As this thesis aims to investigate internationally-accepted environmental principles, its primary sources can be found in a combination of hard- and soft-law instruments, but most of my main sources consist of non-binding instruments. Principles of international law can often be characterised as overarching principles which have a bearing on values to be taken into account in decision making, as opposed to legal rules which mandate a specific solution. [5] This understanding is especially true for international environmental law. It also means that the very distinction between hard law and soft law becomes more blurred in this field.

The Rio Declaration is a leading expression of universally recognised principles in international environmental law which is further referred to in the OECD Guidelines. As such it is central to this work. The environmental principles promoted by the UN Global Compact are central for the notion of corporate responsibility in this field. Furthermore, the UN Guiding Principles on Business and Human Rights have developed the notion of corporate due diligence obligations, and as such is also a central source in the following. In addition, there are also a number of cases decided by the International Court of Justice and other international tribunals which are central to the formulation of international environmental principles. In particular, I analyse the *Pulp Mills* case from the International Court of Justice (ICJ) in some depth.

My most important sources in the following are the OECD Guidelines, a number of complaints before the Dutch, British and Norwegian NCPs, as well as several cases from the practice of the Norwegian Council on

3 Thirlway (2014) 17-18

4 Clapham (2015) 1

5 Dworkin (1977) 24-26

Ethics. These guidelines and cases represent practical examples both of environmental normative standards that are applicable to TNCs, and of how these can be implemented. The OECD Guidelines are particularly significant for this thesis for two reasons. Firstly, the Guidelines contain relevant indications as to which international environmental standards that are extended to TNCs. This is because they represent the "up to date consensus of developed nations about the general principles of international business regulation".[6] Uniquely, in the field of corporate social responsibility, the OECD Guidelines have been endorsed by 45 governments,[7] mostly from developed countries, and are internationally recognised as recommended business ethics. Secondly, the Guidelines are backed by the OECD system of NCPs, which all countries adhering to the Guidelines are obliged to set up as a non-legal national complaint mechanism for individual complaints relating to the Guidelines.

These sources are, of course, a form of soft-law. Soft-law refers to non-binding statements, agreements and principles which can be understood to represent common opinions on normative standards or values. Due to the various international instruments that fall within the scope of the concept of soft-law, it can be difficult to make general assumptions with regard to their normative value. Resolutions from the General Assembly do for instance carry more legal weight in international law than recommendations from the World Bank's Inspection Panel or the OECD National Contact Points, but even so all of them fall into the soft-law category.

The OECD Guidelines, the complaints before the NCPs and the cases from the Norwegian Council on Ethics are generally seen to concern ethical and not legal obligations. Thus their significance as strictly legal

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6 Morgera (2006) 752

7 The countries adhering to the Guidelines are all 34 OECD-countries: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. And 11 non-OECD countries: Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

obligations is limited. Importantly though, they are of relevance to this thesis, as formulations of soft law. The main objective of this thesis is not to explore strictly legal obligations, but to investigate what we may consider normative expectations to corporate conduct stemming from a combination of general principles of international law and soft law instruments.

As was pointed out by legal theorist Georges Abi-Saab, soft-law sometimes allows for exploration of new areas for the expansion of law, by articulating a common interest or value and defining guidelines that states are encouraged to further in normative elaboration.[8] Thus soft-law can represent recognition by international community of the existence of a legal vacuum and the need for new legal rules, and can influence the practice of states and the development of new norms of international law.

On this basis, it cannot either be ruled out that the norms discussed in this thesis may in certain circumstances form into legal obligations of a more strict nature, for instance, as part of tort law relating to TNCs. However, as a starting point this is not their main function.

1.3 Outline

Chapter one will address the applicability of principles of international environmental law to TNCs. It aims to demonstrate that the principles of sustainable development, prevention and precaution contain universal elements that apply to multinational enterprises as participants in the international legal order.

Chapter two analyses the OECD Guidelines' environmental standards for TNCs. It illustrates that international environmental law defines and clarifies the content of corporate environmental obligations under the Guidelines.

Chapter three looks at the implementation of corporations' environmental responsibilities in the NCP system. It demonstrates that the NCP system is a partially functioning accountability mechanism, in need of reform.

[8] Morgera (2009) 47

Chapter four outlines the Council on Ethics' interpretation of TNCs' environmental obligations. It focuses on the Council's practices in relation to what kind of damage TNCs are responsible to avoid, and what they should undertake in order to avoid it.

The conclusion summarises the most important aspects of TNCs' environmental ethical responsibility, as well as their level of implementation.

2 Universal values and the new corporate accountability in international law

2.1 Introductory remarks

This chapter aims to illustrate that universal values in international environmental law may potentially be applicable to multinational enterprises. As mentioned, universally recognised values can be found in a combination of hard and soft-law instruments.

The present chapter first analyses the normative dimensions of the principles of sustainable development, prevention and precaution, and explains how these values may be applicable to TNCs. Subsequently, it explains that this is part of a global trend, illustrated by the UN Global Compact[9] and growing CSR movements. Finally, it looks at the implications of the human rights due diligence standards promoted by the UN Guiding Principles on Business and Human Rights for corporate environmental due diligence.

2.2 The normative dimensions of the principles of sustainable development, prevention and precaution and their potential applicability to TNCs

The 1972 Stockholm Conference on Human Environment and the 1992 Rio de Janeiro Earth Summit, the United Nations Conference on Environment and Development (UNCED), were significant turning points in international environmental law, largely because they adopted de-

[9] The UN Global Compact was launched in July 2000 by Kofi Annan, the UN Secretary General, as an attempt to draw corporations, governments, UN agencies and civil society into a co-operative framework in the areas of human rights, anti-corruption, labour and the environment. It is a purely voluntary initiative where corporations declare their commitment to advance UN goals, and submit yearly reports on their implementation of these goals into their business strategies. About 8000 companies from about 140 countries participate in the UN Global Compact.

clarations of basic environmental principles.[10] These conferences also established sustainable development as the missing link between environmental issues and development.[11]

International society has particularly recognised the Rio Summit as containing leading environmental principles and aspirations, which was reaffirmed by the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002. Its closing declaration confirmed the participants' support to the Rio Declaration and its implementation plan, Agenda 21.[12] Consequently, the 27 principles of the Rio Declaration and Agenda 21, a non-binding blueprint and action-plan for a global partnership for sustainable development, have been widely accepted as expressing universal environmental core values by international consensus.

In the following, three of the environmental principles which are promoted by the Rio Declaration and Agenda 21 will be outlined, and their applicability for TNCs will be discussed. These are 1) the principle of sustainable development, 2) the principle of preventive action, 3) the precautionary principle.

The Rio Declaration contains other important environmental principles, but this chapter focuses on these three because they are referred to in the OECD Guidelines for Multinational Enterprises, which is the topic of the next chapter. As the OECD Guidelines refer to these three principles, they are obviously considered potentially applicable to TNCs at some level by the OECD countries.

Furthermore, there are also traces of the principles of precaution, prevention and sustainable development in the three environmental principles that are listed by the UN Global Compact. This demonstrates that they are not just considered applicable to multinational enterprises by the OECD Guidelines, but also by high-level UN document. On this basis, it may be argued that these three principles may be particularly important in relation to TNCs' environmental responsibilities. This will be further discussed in the following.

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10 Sands et al (2012) 31 and 44

11 Platjouw (2015) 147

12 Johannesburg Declaration, point 8

2.2.1 The principle of sustainable development and its applicability to TNCs

Sustainable development is one of the most widely recognised principles in international law, and is considered part of customary international law.[13] As mentioned, it was the overarching theme at the 1992 Rio Summit, and was promoted as a goal in 10 out of 27 principles in the Rio Declaration.[14] It is also part of many treaties and other international instruments.[15] In addition, it is the overall goal behind the 2030 Agenda for sustainable development, which was passed by the General Assembly in September 2015, replacing the Millennium Goals and outlining 17 goals for sustainable development to be areas of priority until 2030.[16] Moreover, the ICJ referred to the principle in the *Gabčíkovo-Nagymaros Project* case, stating that "(o)wing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[17] The Court's statement reaffirms the importance of the principle of sustainable development in economic activities, giving it a general application to economic policies.

On the other hand, the ICJ does not elaborate on the substantive content of sustainable development, and leaves this as an open question. As sustainable development is a substantive principle of international environmental law, its normative implications are difficult to determine.

13 Gabčíkovo-Nagymaros, para 140

14 Principles 1, 4, 5, 7, 8, 9, 21, 22, 23, 24 and 27

15 Sands et al (2012) 206

16 A/RES/70/1

17 Gabčíkovo-Nagymaros, para 140

This applies generally, and not just in relation to multinational enterprises. In the following the normative applicability of the principle of sustainable development will be discussed. The focus will be on the universal values contained within the principle, which also are potentially applicable to TNCs. This discussion will form the background for the subsequent chapter, in which sustainable development will be discussed in light of the OECD Guidelines.

2.2.1.1 The normative dimensions of the principle of sustainable development

In 1987, the concept of sustainable development was officially defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[18] in "Our Common Future", a report produced by the World Commission on Environment and Development (the Brundtland Commission).[19] This definition contains two key concepts. First, it emphasises the concept of "needs", and in particular the essential needs of the world's poor and of future generations. Second, it proposes that even if the environment has a limited ability to satisfy the needs of present and future generations, this will vary in accordance with the state of technology and social organisation.[20]

On this basis, these two key concepts comprise four legal elements: 1) the principle of sustainable use and the need to exploit natural resources in a sustainable manner, 2) the principle of equitable use, which includes a fair division of the world's resources between states, 3) the principle of intergenerational equity and the need to preserve natural resources for future generations, and 4) the principle of integration and the need to ensure that environmental considerations are included into economic and other development plans, programmes and projects, as

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18 Our Common Future, part 1, para 1.1

19 The WCED was established by a General Assembly resolution as an independent expert group, had 21 members from 22 nations and concluded its work after three years with a unanimous report

20 Bugge (2008) 7

well as the need for social and economic development to be taken into account in the application of environmental objectives.[21] These four principles will be commented upon in the following, and their implications for TNCs will be analysed.

The principle of sustainable use contains the notion that sustainable development does not impose absolute limits on economic development. It recognises that growth is necessary but wants economic development to respect planetary boundaries.[22] New and more sustainable technology may increase the level of sustainable economic development. This is exactly the point in "Our Common Future", which states that economic growth has to become more sustainable, less material- and energy-intensive and more equitable in its impact in order to avoid environmental problems and depletion of natural resources.[23]

The principle of equitable use outlines that eradication of poverty and equitable sharing of resources is essential to achieve sustainable development. In "Our Common Future" it is stated that the principle of sustainable development requires that the basic needs of "all" people are met and that everyone should have opportunities to improve their lives.[24] The principle of sustainable development consequently entails the equal division of the world's resources.

The principle of intergenerational equity promotes a responsibility for present generations to safeguard and preserve the earth for future generations. This was acknowledged by the ICJ in its Advisory Opinion on "the legality of the threat or use of nuclear weapons", in which the importance of the living space, quality of life and health of generations unborn were highlighted.[25] Noteworthy, the Brundtland report's definition of sustainable development refers to future generations' "own needs", recognising that future generations may have other aspirations than present generations and that safekeeping their opportunities is an es-

21 Sands et al (2012) 207

22 Bugge (2008) 8

23 Ibid

24 Our Common Future, part 1, para 1.3 no 27

25 The legality of the threat or use of nuclear weapons, para 29

sential aspect of sustainable development.[26]

The principle of integration, which was promoted as fundamental to sustainable development at the Johannesburg Summit, includes the balancing of economic development, social development and environmental protection.[27] Importantly, the integration of these three elements is the defining characteristic of sustainable development.[28] Sustainable development is therefore accomplished when everything is taken care of – the environment is protected, the economy is developed, and social equity is achieved.[29]

In conclusion, the principle of sustainable development contains four normative elements: the principles of sustainable use, equitable use, intergenerational equity and integration. These four principles are the universally recognised values within the principle of sustainable development. As such, these values are potentially applicable to TNCs as participants in the international legal system.[30] However, these values are all rather abstract and vague, and therefore their exact implications for participants in international law, including TNCs, are unclear.

2.2.1.2 The problem of balancing the three elements in sustainable development

As the principle of integration does not prescribe a way to resolve conflicting priorities between economic, social and environmental concerns, the principle of sustainable development is generally abstract and open for political decisions.[31] In the following it will be discussed if the principle of sustainable development entails that environmental arguments should prevail in certain situations, before its applicability to TNCs will be commented upon.

The implications of integrating these three pillars are disputed, as is

26 Bugge (2008) 7
27 Winter (2008) 26
28 Voigt (2015) 31
29 Platjouw (2015) 181
30 Higgins (1994) 49-50
31 Ibid

the normative value of the concept sustainable development.[32] Some scholars have described sustainable development as "a fine phrase without meaning".[33] Other scholars argue that a certain degree of indeterminacy is a precondition for any usage of the principle of sustainable development. For instance, Bruno Simma observes that it is "the very lack of conceptual rigor which permitted the entire world community to embrace it"[34], regarding this to be an advantage. Christina Vogt agrees, arguing that the substance of sustainable development is likely to be determined by a continuing process, without any final definition, and views this as a necessary characteristic for a concept that is meant to evolve with changing scientific insights and technological innovations.[35]

Voigt claims that there exists a general consensus as to the core of sustainable development, and that this may determine the outcome of the integration of environmental, economic and social elements in cases of conflicting priorities. There are situations in which environmental concerns ought to trump the other two. This solution follows from the core of sustainable development, which "is about defining a safe operating space for humanity."[36] Voigt argues that the aim of integrating the three pillars of sustainable development should be environmental integrity. This entails that in cases where to give priority to economic or social concerns would threaten "life-supporting ecological systems", which are "a prerequisite for any economic endeavour and for human life in general", environmental concerns should prevail. [37] Protection of unique and irreplaceable ecosystems can thus be described as the core of the principle of sustainable development, and it is the basis for its normative value.

In this perspective, the threshold is high for situations in which environmental concerns should generally be considered to be more impor-

32 Voigt (2015) 31
33 McCloskey (1999) 157
34 Simma (2004) vi.
35 Voigt (2015) 31
36 Ibid 32
37 Ibid

tant than economic and social concerns. It would potentially only apply to cases of serious environmental risks towards essential ecosystems. Such cases are therefore likely to be rare, but it may potentially apply to ecosystems that are especially important. Imagined examples may for instance be rainforests with high levels of biological diversity, which also provide fresh water reservoirs and produce large amounts of oxygen, or areas of mangrove forests that prevent erosion and stabilise land-masses. As such, it is possible to find situations in which the environment is particularly important, but it is still questionable what legal implications this should have for participants in the international system. An example of this is the decision in the *Gabčíkovo-Nagymaros Project* case, in which the ICJ recognised the importance of the principle of sustainable development, but only gave it effect by ordering the parties to work together to solve their differences.[38]

Seemingly, Voigt's interpretation of the principle of sustainable development includes an ecosystem approach to environmental issues. The ecosystem approach entails decision-makers to take a holistic perspective on the environment, focusing on the function of ecosystems as a whole and their carrying-capacities.[39] This holistic approach can be contrasted to a more narrowly focused biological and usually single-species-oriented approach.[40] The ecosystem approach further takes into consideration ecosystems as "complex adaptive systems", recognising that everything within them is interconnected and consequently that the system as a whole is unpredictable.[41] In the ecosystem approach these characteristics about ecosystems must be taken into consideration in decision-making processes.[42] If the ecosystem approach is applied as the basis for environmental assessments, it seems easier to argue that sustainable development holds normative boundaries.

Furthermore, the understanding of sustainable development found

38 Gabčíkovo-Nagymaros, para 140-141
39 Platjouw (2015) 29
40 Ibid 31
41 Ibid 29
42 Ibid

in general international law seems to support both the idea of it containing a core of sustainability, as well as a holistic approach to economic activities.[43] For instance, the frequently applied terms "sustainable utilization" and "sustainable use" in international law entail such an understanding. Article 2 of the Biodiversity Convention, for example, describes sustainable use as "use…in a way and at a rate that does not lead to long-term decline of biological diversity".[44] In addition, the terms "conservation" of natural resources, "maximum or optional sustainable yield" or "optimum sustainable productivity" are found in other agreements such as the 1982 UN General Assembly resolution about the World Charter for Nature, the 1958 Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas, and the 1982 UN Convention on the Law of the Sea.[45] Moreover, the idea of "sustainability" can be traced back to the Pacific Fur Seal arbitration from 1893,[46] and was referred to in the Shrimp/Turtle case.[47] The usages of the concept of sustainability in international law can thus be taken to reflect the notion that sustainable development ultimately protects essential ecosystems.

In conclusion, the principle of sustainable development can be interpreted to have a core of "sustainability", meaning that it protects essential ecosystems from potentially destructive activities. However, as the principle contains no procedural obligations and is highly abstract, its outcome is generally likely to be decided by political considerations.

2.2.1.3 TNCs and sustainability: the UN Global Compact as example

As mentioned, the exact implications of the principle of sustainable

[43] In his separate opinion in the Gabčíkovo-Nagymaros Project case, Judge Weeramantry presented "sustainability" as a universal values found in multiple cultures and societies: Separate opinion by Judge Weeramantry, Gabčíkovo-Nagymaros, section A. (e)

[44] Birnie et al (2009) 199

[45] Ibid

[46] Sands et al (2012) 206

[47] Ibid 208

development are generally difficult to define. This abstract and vague notion of the principle applies to both states and TNCs. The concept may also have different implications for multinational enterprises than for states, as TNCs are a different group of international participants than states.

The UN Global Compact, the previously mentioned voluntary UN initiative, is an example of the applicability of the principle of sustainable development to TNCs. Referring to "corporate sustainability" and the 2030 UN Development Goals as leading objectives for business' practices,[48] the Compact places the principle of sustainable development at the heart of TNCs' agendas. The Compact encourages TNCs to align strategies and operations with "universal principles" relating to the environment, human rights and others.[49] It states that "corporate sustainability" starts with a principled approach to doing business, which as a minimum means to meet fundamental responsibilities in for instance area, of labour, human rights, anti-corruption and environment.[50] The UN Global Compact wants multinational enterprises to follow universally accepted standards for protection of the environment wherever they operate, and to establish a "culture of integrity".[51]

As stated, the UN Global Compact bases itself around ten core principles, in addition to the 2030 Development Goals. Three of these ten principles concern the environment, and principle 9 is related to the principle of sustainable development, whereas principles 7 and 8 include elements of the precautionary and preventive principles. The latter two will be commented upon below. Here it will only briefly be noted that the Global Compact extends elements of all of these principles (sustainable development, prevention and precaution) to TNCs, and as such is an interesting example of the universality of these three environmental principles.

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48 https://www.unglobalcompact.org/what-is-gc/our-work/sustainable-development (10 November 2015)

49 https://www.unglobalcompact.org/what-is-gc (22 November 2015)

50 https://www.unglobalcompact.org/what-is-gc/mission/principles (22 November 2015)

51 Ibid

Principle 9 in the Global Compact encourages businesses to promote "development and diffusion of environmentally friendly technologies."[52] As discussed above, this is part of the principle of sustainable development and can be described as the principle of sustainable use. Thus the Compact has taken one aspect of the concept of sustainable development and made it applicable to companies.

The commentary to principle 9 on the webpages of the Global Compact, points to Agenda 21 from the Rio Summit and its definition of environmentally friendly technologies. This is interesting as it demonstrates the relevance of these non-binding international instruments in relation to multinational enterprises. Agenda 21 states that environmentally friendly technologies entails that all resources should be used in a more sustainable manner, and consequently TNCs should recycle more of their waste and products, in addition to handle residual wastes in an acceptable manner.[53] It involves a requirement of TNCs to organise their activities in as a sustainable manner as possible, ensuring know-how and good managerial procedures. Furthermore, the Compact makes some recommendations as to how TNCs should incorporate sustainability into their business practices, such as, for instance, changing the process or manufacturing technique and reuse materials on site, as well as promoting research for better technology and employ environmental technology assessments.[54]

In conclusion, the principle of sustainable development has been interpreted as applicable to TNCs by the UN Global Compact. The Compact has focused particularly on the principle of sustainable use as part of sustainable development, and promotes multinational enterprises' responsibility to apply and develop environmentally friendly technologies and management systems. Thus the principle of sustainable development appears to contain some universal values that are applicable to corporate activities. As the Compact is one of the largest voluntary initiatives for

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52 https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-9 (23 November 2015)

53 Ibid

54 Ibid

corporate social responsibility in the world, this may illustrate a global trend.

2.2.2 The principle of preventive action and its applicability to TNCs

The principle of preventive action is of increasing importance in international environmental law, as was confirmed by the arbitral tribunal in the *Iron Rhine* case, which stated that "(t)oday, in international environmental law, a growing emphasis is being put on the duty of prevention."[55] The principle requires the prevention of injury to the environment, and to reduce, control and limit activities that may cause such damage.[56] Its basis is that it is better to prevent environmental damage than to repair it.[57] Thus the preventive principle implies actions to be taken at an early stage, if possible, before damage has occurred.[58]

The preventive principle can sometimes be confused with the precautionary principle, but they are distinct, as they differ in their understanding of risks. Preventive obligations are activated by certainties, based on cumulative or empirical experiences of risks posed by activities.[59] As such, prevention seeks to avoid risks for which the cause-and effect relationship is already known.[60] Precaution, on the other hand, comes into play when the risk is uncertain and scientific knowledge cannot provide reliable answers.[61]

In the ICJ *Pulp Mills* case between Uruguay and Argentina, the Court explained the preventive principle as a customary rule, which "has its origins in the due diligence that is required of a State in its territory."[62] Thus the preventive principle is based on the evaluation of environmental

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55 Iron Rhine, para 222

56 Sands et al (2012) 200

57 ILC's general commentary to their 2001 Draft articles on Prevention of Transboundary Harm, para 2

58 Sands et al (2012) 201

59 De Sadeleer (2002) 74

60 Ibid 75

61 Ibid

62 Pulp Mills, para 101

risks, and contains a standard of due care or due diligence. The ICJ explained due diligence as "an obligation which entails (…) a certain level of vigilance (…) and (…) the monitoring of activities...."[63] Moreover, in the ILC's commentary to their 2001 Draft articles on Prevention of Transboundary Harm from Hazardous Activities, the duty of care was explained as to "avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects…",[64] as well as "reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them" in the particular instance.[65]As such, due diligence is a standard of conduct rather than result.

The principle of prevention, including its due diligence standard, is potentially applicable to TNCs as it is not connected to state sovereignty but has as its objective to prevent environmental harm.[66] An example of this is the UN Global Compact, the already described UN voluntary initiative for TNCs. Its principle 8 states that "businesses should undertake initiatives to promote greater environmental responsibility".[67] In the commentary to the principle on the Compact's webpage, with reference to the Rio Declaration and Agenda 21, it is outlined that "business has the responsibility to ensure that activities within their own operations do not cause harm to the environment".[68] The commentary lists "assessment or audit tools (such as environmental impact assessment, environmental risk assessment, technology assessment, life cycle assessment)"[69] as some of the key tools for TNCs to fulfil this responsibility. Hence, the UN Global Compact contains elements of the preventive

63 Ibid, para 197

64 ILC's general commentary to their 2001 Draft articles on Prevention of Transboundary Harm, para 4

65 Ibid commentary to article 3 para 10 and 11

66 Sands et al (2012) 201

67 https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-8, (3 November 2015)

68 Ibid

69 Ibid

principle as outlined above.

In the following the preventive principle and its due diligence standard will be outlined. Due diligence will be presented mainly as a relative and procedural duty of care, but with potentially substantive and objective standards. Its implications for TNCs will be briefly commented upon, but will be discussed in detail in the subsequent chapter in light of the OECD Guidelines.

2.2.2.1 Due diligence in the preventive principle

As illustrated above, due diligence or a duty of care is central to the preventive principle, and is thus potentially applicable to TNCs in this regard. However, it is difficult to deduct any particular obligations from the concept of due diligence by itself. For instance, article 2(1) of the 1991 Convention of Transboundary Environmental Impact Assessment states that "all appropriate measures (shall be taken) to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities." On this basis, the due diligence obligation entailed by the preventive principle seems to be highly subjective, as the meaning of "all appropriate measures" will differ in different circumstances. A relative concept of preventive due diligence includes varying responsibilities for different TNCs to prevent environmental damage, depending on their size and resources. This would potentially make it hard to establish fixed standards for corporate conduct based on the preventive principle.

Looking to general international law and corporate law, where the concept of due diligence is also applied, both of these fields seem to apply a relative notion of the concept. Originating in Roman tort law,[70] due diligence is an established concept in international law and is applied in relation to state responsibility.[71] But there no agreement as to whether it should be based on objective or relative criteria,[72] so it generally has to be determined on the basis of the particular requirements of an interna-

70 McCorquodale/Bonnitcha (2013) 4

71 Higgins (1994) 147-149

72 Barnidge (2006) 83-84

tional obligation. Such a relative notion of due diligence has been severely criticised by Ian Brownlie, who asserted that objective responsibility provided a better basis for maintaining good standards.[73]

Originating in American securities law and investors' need to calculate the risk associated with investing in a company,[74] corporate due diligence involves risk assessments in areas such as finance, taxation, real estate, pension, IT, business and environment.[75] The purpose of corporate due diligence is to have an open exchange of information about risks associated with an agreement. However, the scope and in-depth research to be included in commercial due diligence is not prescribed, and can be agreed between the parties.[76] Corporate due diligence can therefore be categorised as a container concept which entails relative substantive standards.

Consequently, in line with the concept of due diligence both in international and corporate law, the preventive principle's contains a relative duty of care. Harmful activities should be prevented or mitigated to the best of parties' abilities. This suggests that according to the preventive principle, one cannot be required to regulate activities of which one is not and could not reasonably have been aware.[77] Thus preventive due diligence obligations for TNCs seem to be highly variable, and will for instance have to be determined in relation to corporations' experience and resources. Hereupon, a central question in the following is if any objective criteria apply to the due diligence standard in the preventive principle.

2.2.2.2 Significant risks and environmental impact assessments

In the Rio Declaration, the most notable reference to the principle of prevention is in principle 17, which states that environmental impact

73 Ibid 85
74 Lambooy (2010) 3
75 Ibid 6
76 Ibid 9
77 Birnie et al (2009) 148-153

assessments (EIAs) "shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment…"[78] As such, international environmental law places special requirements on "significant" environmental risks, if these are "likely" to have adverse environmental impacts. Environmental impact assessments, as will be discussed below, may potentially establish more fixed procedural due diligence obligations for TNCs and other international entities. This is the most concrete measure contained in the preventive principle.

The Rio Declaration does not define what is meant by "significant" environmental damage. Thus the exact requirements for when EIAs should be undertaken are unclear and based on the parties' discretion. On the other hand, the wording of principle 17 in the Rio Declaration, which refers to "likely" adverse impacts, sets a low threshold of proof for when EIAs are necessary.[79] This is also in line with other formulations, such as article 7 of the ILC's Articles on Prevention of Transboundary Harm, referring to "possible transboundary harm", or article 206 of the 1982 UN Convention on the Law of the Sea, which refers to there being "reasonable ground for believing that planned activities (…) may cause substantial pollution of or significant harmful changes to the marine environment".[80] Consequently, it may be assumed that where activities with a known risk of potentially significant pollution are involved, the necessity of an EIA may be presumed, even if the actual risk is small.[81]

This is supported by the ICJ *Pulp Mills* judgment in the Pulp Mills on the River Uruguay,[82] which is the most significant authority on EIAs in general international law.[83] In the case, the Court suggested that if satisfactory due diligence was to be conducted, there should be a low threshold for when to undertake EIAs. It stated that "due diligence, and

78 Rio Declaration principle 17

79 Boyle (2011) 228

80 Ibid

81 Ibid

82 The case concerned the construction of a wood pulp mill in Uruguay, from which effluents would be discharged into the River Uruguay, which forms the border with Argentina.

83 Boyle (2011) 227

the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."[84] A similar threshold was adopted by the tribunal in the *MOX Plant* case, between the UK and Ireland, in which the lack of conclusive scientific evidence convinced the tribunal that further environmental assessments were necessary, ordering the parties to investigate more.[85] Similarly, in the *Land Reclamation* and *Southern Bluefin Tuna* cases, the International Tribunal for the Law of the Sea set a low threshold for something to constitute risks of harm to the maritime environment, finding that this "could not be excluded".[86]

Judge Weeramantry, in his separate opinion in the ICJ's *Gabčíkovo-Nagymaros Project* case, reasoned in a similar manner, stating that "environmental law in its current state of development would read into treaties, which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme."[87] By this, Weeramantry appeared to reaffirm that there is a low threshold for when EIAs should be conducted, and by including them in treaties in which they are not explicitly mentioned, he confirmed the importance of EIAs in international law. Interestingly, Weeramantry further commented that EIAs included a duty to undertake "continuous monitoring" of projects, finding that this duty increased with the scale and length of the project.[88]

The need for "continuous monitoring" of big projects was confirmed by the ICJ in the *Pulp Mills* case. It was found that EIAs should be conducted prior to the implementation of a project, but also included a duty

84 Pulp Mills, para 204

85 MOX Plant case order, 13

86 Boyle (2011) 228-229

87 Gabčíkovo-Nagymaros, Judge Weeramantry, separate opinion section B a)

88 Ibid

of continuous monitoring after operations have started and, "where necessary", throughout the life of a project.[89] As such, the threshold for risks to constitute sufficient grounds for EIAs to be undertaken seems to be low in international environmental law.

By this, the ICJ appears to address the fact that what is objectively foreseeable may vary over time, and environmental risks are by their nature unpredictable. Science deals in probabilities based on assumptions, but these assumptions may be wrong or our scientific understanding may change. Judge Weeramantry touched upon these concerns in his separate opinion in the *Gabčíkovo-Nagymaros Project* case, stating that "…EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring."[90] Hence, a project's magnitude and size have implications for the level of preventive due diligence that it entails. Weeramantry further pointed out the environment's complexity and that it is impossible to anticipate every possible environmental danger.[91] On this basis, the Court's inclusion of a duty of continuous monitoring of industrial activities, where necessary, is in line with the precautionary principle. This will be further discussed below.

In addition, the low threshold for undertaking EIAs, as well as the higher duty of care associated with larger industrial projects, illustrate that it is important to take into consideration that the existence of risk is not only a scientific question. Scientific probabilities represent risks to actual human societies, and this will also have to be part of any risk assessment.[92] In short, whether a risk can be characterised as significant will depend on the combined assessment of probability of damage oc-

89 Pulp Mills, para 205

90 Gabčíkovo-Nagymaros, Judge Weeramantry, separate opinion section B a)

91 Ibid

92 Birnie et al (2009) 148

curring and the magnitude of eventual damage.[93]

In conclusion, EIAs are central to the preventive principle and should be undertaken in cases where there are probable environmental risks which potentially may cause significant damage. The threshold for risks to qualify as "significant" appears to be low in international jurisprudence. This implies that there is a general duty of conducting EIAs in international environmental law. Hence, EIAs are in many cases a procedural requirement under the due diligence obligations of the preventive principle. As discussed in the subsequent chapter, TNCs may also have some responsibilities to undertake EIAs independently of national legislation. It seems likely that the same standards apply to TNCs' EIAs as to states', as EIAs can be interpreted as an expression of a universal standard.

2.2.2.3 The link between EIAs and substantive obligations

As mentioned, EIAs potentially represent procedural standards in international environmental law. The object of an EIA is to represent a procedure which serves to provide information about the likely impacts of proposed projects on the environment, so as to inform the process of decision-making as to whether the project should be allowed to proceed, and if so on what terms.[94] On this basis, EIAs are fundamental to any regulatory system which seeks to identify environmental risks and promote sustainable development.[95] Thus EIAs may potentially form a way of evaluating if substantive environmental principles have been respected.

This functional role of EIAs was emphasised in the joint dissenting opinion of Judges Simma and Al-Khasawneh in the *Pulp Mills* case, in which procedural obligations were promoted as essential indicators of whether substantive obligations were or were not breached.[96] The two judges commented that substantive principles can be extremely elastic

93 De Sadeleer (2002) 80

94 Tromans (2012) 1

95 Boyle (2011) 230

96 Pulp Mills, joint dissenting opinion of Simma and Al-Khasawneh, para 26

and frequently are in tension with one another. Consequently, compliance with procedural standards should be taken to indicate parties' respect for substantive standards.[97] However, Simma and Al-Khasawneh observed that the interdependence between procedural and substantive obligations was not recognised by the Court in the *Pulp Mills* case.[98] The Court found that there is a functional link between procedural and substantive obligations, but concluded that as long as compliance with substantive obligations had been assured or at least not proven to be failed; breaches of procedural obligations did not matter very much and could be compensated by an appropriate declaration to that effect.[99] Procedural and substantive obligations still retain separate areas of responsibility, according to the Court.[100]

Thus the interrelationship between procedural and substantive environmental obligations appears to be disputed in international law. Nonetheless, it seems clear that non-compliance with procedural obligations such as EIAs may potentially have negative implications for parties' substantive obligations. This implies that if TNCs have not undertaken satisfactory EIAs, they may be in breach of their preventive due diligence obligations.

2.2.2.4 The required content of EIAs

As a consequence of the discussion above, the required content of EIAs becomes a question, as this may be essential for whether the preventive principle's due diligence obligations has been fulfilled. This was also the central issue in the *Pulp Mills* case, as both parties agreed that an EIA had been carried out, but not if it was satisfactory. [101] In the following, EIAs' potential minimum standards as addressed in the *Pulp Mills* case will be outlined.

In the *Pulp Mills* case, the Court noted that general international law

97 Ibid
98 Ibid, para 27
99 Ibid
100 Pulp Mills, para 78
101 Boyle (2011) 230

does not specify the scope and content of an EIA.[102] On this basis, the ICJ found that "it is for each state to determine in its domestic legislation or in the authorisation process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[103] This paragraph makes two important points. First, EIAs can be required either by law or as part of an authorisation process, but the important point is that there should be some means to ensure that an EIA is carried out.[104] Secondly, and importantly for this thesis, even if the ICJ stated that the "specific content" of EIAs should be determined by states, it did not say that this is for the state to decide in its sole discretion.[105] On the contrary, the Court recognised that there must be an EIA and that this should have regard "to the nature and magnitude of the proposed developments and its likely adverse impact on the environment". Consequently, the ICJ hinted that there are minimum standards to the content of EIAs in international law.

This is in line with the ILC's commentary to their 2001 Draft articles on Prevention of Transboundary Harm from Hazardous Activities. The commentary finds that the specifics of what ought to be the content of an assessment should be left to the states, but emphasises that such assessments "should contain an evaluation of the possible transboundary harmful impact of the activity".[106] Moreover, the commentary highlights that such assessments "should include the effects of the activity not only on persons and property, but also on the environment of other states".[107] On the basis of the *Pulp Mills* case and the ILC commentary, it seems like international law at a minimum requires that an EIA assesses possible effects on people

[102] Pulp Mills, para 205
[103] Ibid
[104] Boyle (2011) 231
[105] Ibid
[106] 2001 Draft articles on Prevention of Transboundary Harm, commentary to article 7, para 7
[107] Ibid, para 8

and property, as well as the environment likely to be affected.[108]

Furthermore, in the *Pulp Mills* case, the Court pointed out that even if the 1987 UNEP Goals and Principles[109] were not binding on the parties they, as "guidelines issued by an international technical body", had to be taken into account.[110] This implies that the ICJ considers universal non-binding instruments, which have been authorised by international bodies and have widespread acceptance among global society, as potentially relevant guidelines to the content of EIAs. The ICJ appeared to prefer the UN-endorsed Goals and Principles to the 1991 Espoo Convention[111] for instance, as neither Argentina nor Uruguay were parties to this regional convention. [112] However, the Court found that the UNEP Goals and Principles contained little indication as to the minimum core components of EIAs,[113] its principle 5 only providing that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance".[114] On this basis, the Court seemed originally to look for potential international minimum standards for EIAs, implying that these would have been relevant. But as these were unclear, it turned to national law. Still, there are potential minimum standards for EIAs in international law.

According to principle 4 in the 1987 Goals and Principles of Environmental Impact Assessment, an EIA should "at a minimum" include:

> "(a) a description of the proposed activity,
>
> (b) a description of the potentially affected environment, including specific information necessary for identifying and assessing the

[108] Boyle (2011) 231

[109] The UNEP Goals and Principles for environmental impact assessments were developed by and expert working group and then adopted by the governing council of the United National Environmental Programme (UNEP) in its resolution 14/25 in 1987. They were also endorsed by the UN General Assembly later the same year.

[110] Pulp Mills, para 205

[111] Convention on Environmental Impact Assessments in a Transboundary Context

[112] Ibid

[113] Pulp Mills, para 205

[114] UNEP Goals and Principles, principle 5

> environmental effects of the proposed activity,
>
> (c) a description of practical alternatives, as appropriate,
>
> (d) an assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects,
>
> (e) an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures,
>
> (f) an indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information,
>
> (g) an indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives,
>
> (h) a brief, non-technical summary of the information provided under the above headings."[115]

By this, the UNEP Goals and Principles clearly suggest that there are international minimum requirements for EIAs, but its formulations are vague, as was found by the ICJ. Principle 4 can still be taken to contain certain guiding criteria, it does for instance imply that alternatives should be investigated, potential long and short term consequences assessed, an assessment of the efficiency of possible mitigation measures should be undertaken, and an outline of scientific uncertainties should be set up.

In the *Pulp Mills* case, Argentina further argued that Uruguay failed to conduct sufficient due diligence with regards to the location of the plant,[116] and the ICJ referred to principle 4 of the UNEP Goals and Principles in its consideration of the claim.[117] Finding that Argentina

[115] Ibid principle 4

[116] Pulp Mills, para 207

[117] Ibid, para 210

failed to prove that Uruguay had not considered alternative locations, the Court noted that a satisfactory EIA would have to assess the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.[118] Thus the ICJ did set some minimum requirements for the content of an EIA. But the Court found that it could not conclude in the matter, as the parties were unable to agree on the scientific facts of the case.[119]

This approach by the Court was severely criticised by Judges Simma and Al-Khasawneh in their dissenting opinion, which argued that the ICJ should have consulted independent experts and concluded on the scientific facts.[120] The two Judges claimed that the Court failed to apply the principle of precaution.[121] This will be further discussed below in relation to the precautionary principle. As such, courts and compliance mechanisms' ability to assess and determine the scientific facts of cases is essential to their possibilities of analysing the content of EIAs.

Another disputed element in relation to the quality of Uruguay's EIA was the consultation of affected populations.[122] Both parties agreed that consultation of the affected populations should form part of EIAs. But Argentina argued that international law also instated specific requirements on EIAs in this regard, basing its claim on the UNEP Goals and Principles, the Espoo Convention and the 2001 ILC's Draft Articles on Prevention of Transboundary Harm.[123] UNEP Goals and Principles' principle 8 states that "(b)efore a decision is made on an activity, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment

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118 Ibid, para 211

119 Ibid, para 214

120 Pulp Mills, joint dissenting opinion of Simma and Al-Khasawneh, para 4-9

121 Ibid, para 21-23

122 In the UN Declaration on the Rights of Indigenous Peoples article 19, it is required that states should consult and cooperate in good faith with indigenous people potentially affected by measures prior to their taking place, in order to obtain their free, prior and informed consent. This will not be addressed in relation to EIAs in this chapter, as the discussion is not limited to indigenous peoples' rights.

123 Pulp Mills, para 215

on the EIA".[124] The ICJ dismissed Argentina's claim, stating that none of the above mentioned instruments gave grounds for any legal obligation to consult affected populations in international law.[125] The Court further found that Uruguay had undertaken consultations.[126]

Consultation of affected people is a human rights aspect in the EIA procedure, illustrating the occasional overlap between human rights and environmental issues.[127] This nexus will be further commented upon below. For the moment it will only briefly be mentioned that Allan Boyle, an environmental law scholar, in his comments to the Pulp Mills case, stated that "there should have been no difficulty persuading the court of the general principle that public consultation is a necessary element of the EIA process" and observed that he found the ICJ's decision in this matter surprising.[128]

2.2.2.5 The principle of cooperation as part of the preventive principle

The principle of cooperation has been applied as part of the preventive principle in international jurisprudence, and may also be part of the EIA procedures. Parties may, for instance, be ordered to cooperate in their assessments of scientific evidence.

In the *Pulp Mills* case, the Court drew parallels between an appropriate due diligence standard and the principle of cooperation, as cooperation can be necessary in order to fulfil the preventive principle.[129] However, the Court's comments in this regard were made on the basis of an international treaty between the Argentina and Uruguay, finding that there was an obligation to notify and inform the potentially affected party as soon as a preliminary assessment was possible.[130] Some of the ICJ's

124 UNEP Goals and Principles, principle 8 and 9
125 Pulp Mills, para 216
126 Ibid, para 217
127 Boyle (2011) 231
128 Ibid
129 Pulp Mills. para 102
130 Ibid. para 105

remarks can be interpreted in a wider context, such as the Court's observation that the obligation to notify was an essential part of the preventive due diligence procedure, as this would allow the parties to cooperate in the assessment of risks associated with the plan and to negotiate possible changes.[131] The Court concluded that such notification should take place before the state concerned authorised the environmental viability of the plan, and that the authorisation process should take "due account" of the EIA submitted to it. It was found that Uruguay had failed to fulfil its obligations under the treaty between the parties.

The ICJ, in the *Pulp Mills* case, appeared to establish an obligation to notify and inform potentially affected states to be part of the preventive principle. The Court seemed to ground this obligation partly on the basis of a specific treaty between the parties and partly on the basis of the principle of cooperation in international law. As such, the Court affirmed the importance of the principle of cooperation in international environmental law. The Stockholm Declaration's principle 24 established that "international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing,"[132]and principle 27 of the Rio Declaration states that "(s)tates and people shall cooperate in good faith and in a spirit of partnership..."[133] Moreover, this is in accordance with principle 12 in the UNEP Goals and Principles, which includes an obligation to consult and notify potentially affected states.[134]

The ICJ's approach in the *Pulp Mills* case is in line with other cases in international environmental law, such as the *MOX plant* case between the UK and Ireland, the *Lac Lanoux* case between Spain and France, as well as the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia. The arbitral tribunal in the *MOX plant* case "identified the duty to cooperate as a fundamental principle in the regime of the prevention of pollution" under the United Nations Convention on the Law of the

131 Ibid. para 115

132 Stockholm Declaration, principle 24

133 Rio Declaration, principle 27

134 UNEP Goals and Principles, principle 12

Sea and general international law.[135] The parties were ordered to cooperate and enter into consultations forthwith to exchange information, monitor risks and devise measures to prevent pollution.[136] Similarly, in the *Gabčíkovo-Nagymaros Project* case, the parties were judged to "look afresh" on the environmental concerns relating to the power plant, implying a duty to cooperate in order to prevent environmental damage.[137] Thus the Court in effect interpreted the treaty in question so as to contain a requirement of a continuing environmental impact assessment regarding the impacts of the project to be carried out by the parties.[138]

In the 1957 *Lac Lanoux* case, France was considered to have fulfilled its duty to cooperate by notifying Spain about its planned water projects in advance.[139] This latter case suggests that the duty to cooperate in order to prevent environmental damage does not stretch beyond making an honest attempt at such. This can further be supported by the WTO *Shrimp/Turtle* cases, in which the US' restrictions first were considered illegal on the basis of their lack of effort to find a solution, and then were viewed as acceptable after they had made attempts towards an agreement.[140]

However, in the *Pulp Mills* case, the ICJ restricted the right to information and consultation to states, and did not extend it to affected peoples. The ICJ's approach can be interpreted as implying that environmental decisions should be a state matter, and does not directly include individual rights. This does not mean that affected individuals cannot be heard in environmental decisions, but they do not have a right to be heard and states do not have an obligation to consult them under international environmental law. Consequently, if and to what extent individuals should be consulted is left to the states' discretion. Thus the EIA process should include consultations with potentially affected states, but

135 MOX Plant, join declaration of judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus, 1

136 Sands et al (2012) 205

137 Gabčíkovo-Nagymaros, paras 125-154

138 Sands et al (2012) 619

139 Ibid 307

140 Ibid 824

the rights of individuals in this process are uncertain.
In conclusion, EIAs are central to the preventive principle and should be undertaken in cases of foreseeable risks of significant environmental damage. The threshold for environmental risks to qualify as significant is low, as environmental risks are unpredictable and potentially very harmful to human societies. There seems to be minimum requirements as to the content of EIAs in international law, and international non-binding instruments authorised by international bodies, such as the UNEP Goals and Principles, function as guidelines to their required content. EIAs should contain assessments of the effects of industrial activities on humans, property and the environment, and the level of details required for an EIA to be satisfactory will vary in accordance with the potential magnitude of environmental damage. In this regard, the precautionary principle will apply. EIAs should also include assessments of alternative technical opportunities or locations. Finally, EIAs likely contain an obligation to consult with potentially affected states, which is connected to the duty to cooperate in international environmental law. But it is uncertain whether the duty to consult also includes potentially affected peoples or interested individuals. The potential applicability of these minimum standards for EIAs to TNCs will be discussed in the subsequent chapter.

2.2.3 The principle of precaution[141] and its applicability to TNCs

The precautionary principle is set out in principle 15 of the Rio Declaration: "…where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing

[141] There has been some debate as to whether there is a distinction between the precautionary principle and the precautionary approach, but in this thesis they will be considered to have the same meanings: Birnie et al 155

cost-effective measures to prevent environmental degradation."[142] The precautionary principle is meant to provide guidance to the application of international environmental law in cases of scientific uncertainty.[143] It will only come into play where there is uncertainty with regards to a potential threat of "serious or irreversible damage"[144], setting a potentially high threshold. In the following its normative dimensions and potential applicability to TNCs will be outlined.

Precaution represents a new way of dealing with potential or hypothetical future threats, evidencing a paradigm shift in international environmental law.[145] Previously in international environmental law no action would be required if there was no evidence that a damage would occur, but in the mid-1980s this changed and the precautionary approach was for the first time introduced in international legal instruments.[146] Thus, on the basis of the precautionary principle, all risks which may lead to serious damage to environment, human health and safety have to be taken into account, regardless of their degree of certainty.[147]

However, the problem when dealing in uncertainties is that environmental issues invariably raise competing and often equally compelling scientific claims.[148] As discussed, risk is a complicated concept and it entails evaluation of probability and scale of harm, as well as the causes of harm and effects of activities, substances or processes, and their interactions over time.[149]

As mentioned, in the *Pulp Mills* case, the parties presented the ICJ with competing scientific evidence. The Court solved this issue by concluding that the parties had an obligation to cooperate to prevent environmental damage, and did not find that there was sufficient evidence

142 Rio Declaration, principle 15
143 Sands et al (2012) 218
144 Rio Declaration principle 15
145 De Sadeleer (2002) 91
146 Sands et al (2012), 218
147 De Sadeleer (2002) 91
148 Sands et al (2007) 4
149 Birnie et al (2009) 153

to prove the existence of a serious environmental risk.[150] This approach was, as discussed, criticised by Judges Simma and Al-Khasawneh, who found that the ICJ should have consulted their own experts rather than rely on evidence provided by the parties.[151]

The precautionary principle was relied on by Hungary in the *Gabčíkovo-Nagymaros Project* case, but the ICJ made no reference to it, save from the dissenting opinion of Judge Weeramantry.[152] Similarly, as mentioned, in the *MOX Plant* case, the United Kingdom and Ireland disagreed about the scientific facts. Ireland submitted that on the basis of the "prudence and caution", referring to the tribunal in the *Southern Bluefin Tuna* case, the precautionary principle ought to influence the tribunal's approach to the case and favour provisional measures.[153] The UK, on the other hand, argued that in order for provisional measures to be awarded there had be proof of a real risk of danger, not purely a hypothetical one, using the *Southern Bluefin Tuna* case as an example where evidence supported that there was a real risk. In addition, the UK claimed that any risk would have to be imminent.[154] The International Tribunal for the Law of the Sea did not find it proven that there was a serious risk which prompted urgent measures, and found that caution and prudence instead required the parties to cooperate in exchanging information about risks and finding solutions to deal with them.[155] In contrast, in the *Land Reclamation* and *Southern Bluefin Tuna* cases provisional measures were granted, as serious risks were established.[156]

Consequently, conflicting scientific facts is a problematic element for the implementation of the precautionary principle. Hereupon, the implications of the precautionary principle are still uncertain, despite it being widely applied in national, EU and international law,[157] and its legal

150 Pulp Mills,l para 266
151 Pulp Mills, joint dissenting opinion of Simma and Al-Khasawneh, para 6-8
152 Birnie et al (2009) 159
153 Foster (2011) 47
154 Ibid
155 Ibid
156 Birnie et al (2009) 158
157 De Sadeleer (2002) 92

status is an open question. For instance, the WTO Appellate body, in the *Beef Hormones* case, stated that the precautionary principle's status in general international law is unclear.[158] Case-law suggests that cases of scientific uncertainty can be solved by resorting to the principle of cooperation, by concluding that the conflicting parties have to cooperate to find an agreement.

In relation to the applicability of the principle of precaution to TNCs, it may be difficult to find concrete measures that TNCs should undertake in order to comply with the principle. However, this is related to the nature of the principle and is not unique for TNCs.

In general, the precautionary principle contains universal elements relating to risk assessments, which may potentially also apply to multinational enterprises. The essence of the precautionary principle seems to be that possible risks should not be dismissed on the basis of uncertainty, but they should still be monitored and assessed. Consequently, the precautionary principle can potentially apply to TNCs' operations and management schemes, in addition to how they respond to risks identified by EIAs.

Principle 7, in the UN Global Comact, includes the precautionary principle, stating that "(b)usinesses should support a precautionary approach to environmental challenges".[159] The commentary to the principle refers to the Rio Declaration's principle 15, explaining precaution as "the systematic application of risk assessment, risk management and risk communication."[160] As such, it links precaution to the preventive principle and EIA procedures, but extends the duty of care to include cases where there is "reasonable suspicion of harm" on the basis of scientific evaluation. The core values contained in the principle of precaution is thus potentially applicable to TNCs in the UN Global Compact.

Furthermore, the commentary to the Compact's principle 7 points out that political consideration also plays a part when deciding on ac-

158 Birnie et al (2009) 160

159 https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7 (26 November 2015)

160 Ibid

ceptable risks.[161] Interestingly in this regard, information and consultation are part of concrete measures suggested by the commentary to principle 7 on how TNCs can implement the precautionary principle.[162] This implies that due to the difficulties associated with risk assessments, potentially affected stakeholders and the public at large should be allowed to participate in decisions of acceptable risks. As mentioned, risks must be evaluated in their societal context.

2.2.4 Concluding remarks to TNCs and the principles of sustainable development, prevention and precaution

The three environmental principles of sustainable development, prevention and precaution contain universal elements which may potentially apply to TNCs. As illustrated above, these three environmental principles are reflected in the UN Global Compact's list of ten universal principles which apply to multinational corporations. The principles of the UN Global Compact reflect norms which have universal consensus, and are based on the Rio Declaration on Environment and Development and other fundamental international instruments.[163] This implies that there is a global trend towards applying these three environmental principles to TNCs in the form of corporate social responsibility (CSR), as the UN Global Compact is one of the leading CSR initiatives in the world.

Importantly, CSR is not philanthropy, in the sense of contributing gifts from profit, but involves the exercise of social responsibility in *how* profits are made.[164] Typically, CSR represents a shift towards the notion that corporations owe responsibilities to a broader range of stakeholders on ethical grounds, including communal concerns such as protection of the environment, instead of simply pursuing profit maximisation for shareholders within the obligations of the law.[165] As such corporate responsibility involves a responsibility *beyond the law*, as it often places

[161] Ibid
[162] Ibid
[163] https://www.unglobalcompact.org/what-is-gc/mission/principles (12 January 2015)
[164] McBarnet (2007) 9
[165] Ibid

more comprehensive responsibilities on corporations than many national laws.

The increasing popularity of CSR movements in recent years suggests that both business and society have started to accept that TNCs have a responsibility to respect international minimum standards of conduct. Interestingly, there are more than 300 codes of voluntary CSR in the world, covering all major global economic sectors.[166] In 2001, 73 percent of the companies listed on UK's FTSE (Financial Times Stock Exchange) had codes of conduct or statements of business principles. By 2004, the number had increased to 91 percent.[167] Similarly, in the US all of the Fortune 500 companies have introduced codes of conduct.[168] This will be further discussed below.

The principles of sustainable development, prevention and precaution are potentially applicable to TNCs. As discussed above, the three principles contain overlapping elements and in some aspects complement each other. Both sustainable development and precaution are substantive principles, which outline few concrete measures. In contrast, the preventive principle and the subsequent EIAs have strong procedural elements. The principles of sustainable development and precaution may in effect guide the risk assessments and due diligence standard of EIAs. As such, due diligence is central to TNCs potential environmental responsibility, containing elements of all the above mentioned principles.

Sustainable development entails that risks which may lead to destruction of essential ecosystems are unacceptable, evaluating ecosystems as a whole, whereas precaution implies that such risks should be taken into consideration even if they are uncertain, as long as there is a realistic possibility of them occurring. Both the principles of prevention and precaution contain elements of the principle of cooperation, as outlined above.

Risk assessments are also essential to all of these principles. Generally, risks cannot be assessed in a vacuum but have to be viewed in correlation

166 Langford (2014) 1

167 McBarnet (2007) 10

168 Ibid 10

with their potentially adverse impacts on society. On this basis, environmental principles and human rights overlap, as it becomes a question of whether potentially affected people and other interested individuals should have a say in environmental risk assessments. The UN Global Compact encourages such an approach, but the ICJ did not find it to be a compulsory element to EIAs in the *Pulp Mills* case. This will be further discussed in relation to the OECD Guidelines in the following chapter.

2.3 The notion of corporate accountability for the environment and its basis in international law

The notion that corporations have some responsibility for conducting their business in accordance with international norms finds resonance in international environmental law.

As early as in 1972 during the UN Conference on Human Development there were discussions about the role of economic actors in the protection of the environment.[169] The preamble to the Stockholm Declaration makes a subtle reference to the responsibility of business in its proclamation number 7: "(t)o achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts."[170] A similar perspective on the responsibility of multinational corporations to participate in the protection of the environment was fronted in recommendation number 10 in General Assembly resolution 44/228, which "(s)tresses that large industrial enterprises, including transnational corporations, are frequently the repositories of scarce technical skills for the preservation and enhancement of the environment, that they conduct activities in sectors that have an impact on the environment and, to that extent, have specific responsibilities and that, in this context, efforts need to be encouraged and mobilized to

[169] Morgera (2009) 11

[170] http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 (8 April 2015)

protect and enhance the environment in all countries"[171] The wording of GA resolution 44/228 seems to indicate that TNCs ought to have some responsibility towards preservation of the environment in international environmental law.

On the other hand, the Rio Declaration failed to address the specific contribution of TNCs to the protection of the environment.[172] The Rio Declaration's principle 16 instead instated the polluter pays principle, making it the states' responsibility to hold polluters liable for "the cost of pollution" with "due regard to the public interest and without distorting international trade and investment."[173]

In contrast, Agenda 21, the implementation plan for the Rio Declaration, has a whole chapter dedicated to the role of business in the protection of the environment. Chapter 30 of Agenda 21 is considered one of the most important guidelines to corporate environmental accountability. Multinational corporations are encouraged "to operate responsibly and efficiently and to implement longer-term policies (to protect the environment)."[174] Furthermore, chapter 30 states that "business and industry, including transnational corporations, and their representative organizations should be full participants in the implementation and evaluation of activities related to Agenda 21."[175] Agenda 21 further exhorts business to "recognize environmental management as among the highest corporate priorities and as a key determinant to sustainable development."[176] Chapter 30 also establishes two programme areas where the private sector should take a particular responsibility: "A. Promoting cleaner production" and "B. Promoting responsible entrepreneurship." The first focuses on efficient resource utilization and the latter on the implementation of sustainable development policies by enterprises.[177]

171 A/RES/44/228, para 10

172 Morgera (2009) 12

173 http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 (24 March 2015)

174 Agenda 21, chapter 30, para 1

175 Ibid, para 3

176 Ibid, para 3

177 Morgera (2009) 13

Thus, Agenda 21 appears to recognise the universal values represented by international environmental norms, and their applicability to business entities.

Furthermore, at the Summit on Sustainable Development in Johannesburg in 2002, there was a greater focus than in the past on the responsibility of business in the protection of the environment. There was a broad coalition of non-governmental organizations at the conference which presented a suggestion for a convention on binding corporate accountability, and the European Union expressed support for corporate responsibility at the international level.[178] In the Johannesburg WSSD political declaration, there are two references to corporate environmental responsibility. The first reference is in paragraph 27, which says: "(w)e agree that in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies."[179] The second reference is in paragraph 29 and reads: "(w)e agree that there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment."[180]

The WSSD plan of implementation also refers three times to corporate participation in maintaining the environment. Paragraph 18 encourages states to "enhance corporate environmental and social responsibility and accountability".[181] It further encourages industry to adopt voluntary measures of self-regulation and to engage in dialogues with the communities in which they operate. Moreover, paragraph 49 states that governments should "actively promote corporate responsibility and accountability, based on the Rio principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public - private partnerships and appropriate national regulations, and support conti-

178 Ibid 14

179 Johannesburg Declaration, para 27

180 Ibid, para 29

181 WSSD plan of implementation, para 18

nuous improvement in corporate practices in all countries."[182] Finally, paragraph 140 (f) says that governments should "promote corporate responsibility and accountability and the exchange of best practices in the context of sustainable development, including, as appropriate, through multi-stakeholder dialogue, such as through the Commission on Sustainable Development, and other initiatives."[183]

From the above described declarations and statements one can conclude that substantial references to corporate responsibility and accountability for environmental protection exist in international environmental law. These soft-law instruments potentially express consensus within the society of states with regards to the future development of international law.

2.4 The concept of due diligence in the UN Guiding Principles and its implications for corporate environmental due diligence

The UN Guiding Principles for Business and Human Rights were unanimously endorsed on 16 June 2011 by the 47 countries of the UN Human Rights Council, as the first UN approved guidelines for corporations' human rights obligations. As such, they are non-binding guidelines that have been approved by an authoritative international body, potentially representing a model for TNCs' responsibilities for international minimum standards.[184] This further supports the notion that environmental due diligence standards, as outlined above, are applicable to TNCs.

The UN Guiding Principles consist of a three-pillar framework, which first reaffirms states' duties to protect individual human rights, thereafter outlines that business has a responsibility to "respect" human rights, and

[182] Ibid, para 49

[183] WSSD plan of implementation, para 140 (f)

[184] The 2011 version of the OECD Guidelines for Multinational Enterprises contains a human rights chapter, which is based on the UN Guiding Principles' three-fold framework. This illustrates the wide acceptance of the UN Guiding Principles as ethical norms for corporate behaviour.

finally establishes that both states and TNCs should cooperate and contribute to secure victims of abuses access to effective remedies. In the following only corporations' responsibility to "respect" human rights will be addressed and compared to the environmental due diligence standard of EIAs discussed above.

Moreover, the UN Guiding Principles support the notion that universal minimum standards are applicable to multinational enterprises, referring to "global standard(s) of expected conduct".[185] Principle 12 in the Guiding Principles refers to internationally recognised human rights, which "at a minimum" should be understood to include the Universal Declaration of Human Rights and its main instruments of codification: the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the ILO core conventions.[186] This suggests that widely accepted international norms can potentially apply to TNCs, and is in line with the reasoning of the UN Global Compact, as discussed above.

Principle 17 in the UN Guiding Principles explains human rights due diligence as a method to "identify, prevent, mitigate and account for" how TNCs address their adverse human rights impacts.[187] Thus the concept of human rights due diligence is quite similar to the environmental due diligence already discussed, as they both aim to identify, prevent and mitigate risks. Furthermore, principle 18 clarifies that human rights due diligence should investigate both "actual" and "potential" adverse impacts, implying that TNCs should take an approach similar to the one entailed by the precautionary principle, as explained above, to possible risks.[188]

Principle 17 letter b) in the UN Guiding Principles states that corporate human rights due diligence "…vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the

[185] Commentary to the UN Guiding Principles, part II., A., principle 11
[186] UN Guiding Principles, part II., A., principle 12
[187] Ibid principle 17
[188] Ibid principle 18

nature and context of its operations".[189] This establishes a relative and flexible standard for TNCs' human rights due diligence obligations, which adapt to specific circumstances. In this regard, EIAs may have clearer minimum standards, as implied by the ICJ in the *Pulp Mills* case, such as a description of practical alternatives, assessments of long- and short-term effects, indications of gaps in knowledge, ongoing monitoring etc. However, these minimum standards are vague and party to discretion.

The UN Guiding Principles' principle 17 letter c) states that human rights due diligence "(s)hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."[190] Thus both environmental and human rights due diligence processes appear to encourage continuous monitoring of risks, recognising that risks may change. The commentary to the Guiding Principles outlines risk assessments as "...assessing the human rights context prior to a proposed business activity, where possible, identifying who may be affected, cataloguing the relevant human rights standards and issues".[191] Consequently, there are similarities between the environmental and human rights due diligence processes, and they are both intended to prevent adverse effects but also to monitor projects for changing risks in the future.

During risk assessments business should, according to the commentary, pay "special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men."[192] In the commentary to the Guiding Principles it is outlined that "(s)everity of impacts will be judged by their scale, scope and irremediable character."[193] Thus both the human rights and environmental due diligence processes appear to encourage business actors to prioritise the most serious and irreversible risks, as

189 Ibid principle 17 letter b)

190 Ibid principle 17

191 Commentary to the UN Guiding Principles on Business and Human Rights, principle 18

192 Commentary to the UN Guiding Principles, principle 18

193 Ibid principle 14

well as encourage a wider conception of risks, seeing them in a broader societal context.[194]

Principle 18 clarifies that human rights risks assessments should "involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation."[195] In the commentary to the UN Guiding Principles business are encouraged to "seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagements."[196] It is mainly in "situations where such consultation is not possible" that "business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society."[197]Thus dialogue is promoted as the best way of assessing potential human rights impacts and to evaluate which risks are more serious than others.

The assessment of risks in a societal context is further supported by principle 21 in the UN Guiding Principles, which reaffirms that TNCs have a responsibility to communicate "externally" risks of adverse human rights impacts, such that affected stakeholders and others may be aware.[198] The information should be sufficient to evaluate whether the preventive action taken by the TNC is appropriate.[199] This suggests that consultation with stakeholders is essential to the evaluation of risks in the UN Guiding Principles, which may be taken to strengthen the argument that it also should be part of environmental due diligence process.

In contrast, principle 19 of the UN Guiding Principles extends business' responsibility for adverse human rights impacts to also include supply chains.[200] The commentary to principle 19 emphasises business'

194 Lindsay et al (2013) 43

195 Guiding Principles on Business and Human Rights, part II., A., principle 18 letter b)

196 Commentary to the UN Guiding Principles, principle 18

197 Ibid

198 UN Guiding Principles, part II., A., principle 21

199 Ibid

200 Ibid principle 19

responsibility to use their leverage to avoid adverse human rights impacts by their business partners. [201] As such, human rights due diligence also includes potential responsibility on the basis of complicity. This has not been discussed in relation to environmental due diligence above, as the *Pulp Mills* case concerned direct responsibility for states and not TNCs. Thus due diligence obligations for supply chains is uncertain in relation to TNCs. Complicity may also be more relevant with regards to human rights than to environmental due diligence, as TNCs often will be directly responsible for environmental damage, whereas human rights violations are more an issue in relation to supply chains.

In conclusion, there are similarities between environmental and human rights due diligence processes, suggesting that potentially global standards are developing in these two fields. Interestingly, Robert McCorquodale and others recently stated in an article that the human rights due diligence, outlined in the UN Guiding Principles, is likely to develop into a binding legal duty of care under tort law for both management and corporations.[202] This may be equally relevant in relation to environmental protection as to human rights.

[201] Commentary to UN Guiding Principle 19

[202] Lindsay et al (2013) 53

3 Environmental principles in the OECD Guidelines for Multinational Enterprises

3.1 Introductory remarks

The present chapter aims to outline the substance of corporations' environmental duty of care in the context of the 2011 version of the OECD Guidelines for Multinational Enterprises, focusing on the principles of sustainable development, prevention and precaution. It compares the OECD Guidelines' environmental due diligence obligations with the global standards discussed in the previous chapter, illustrating that the OECD Guidelines represent the same universal environmental values. As such, the OECD Guidelines potentially contribute to and clarify the content of corporations' environmental due diligence obligations globally, as well as in OECD countries, and vice versa.

On this basis, this chapter argues that the OECD Guidelines are an exemplification of a global standard of corporate environmental due diligence obligations, which potentially could be implemented and clarified by the system of OECD National Contact Points. The functioning of the NCP system will be discussed in the subsequent chapter, and will not be commented upon in the present chapter.

3.2 Environmental due diligence in the OECD Guidelines

The introductory paragraph in the OECD Guidelines' chapter VI, the chapter addressing OECD's environmental recommendations to TNC, starts by stating that:

> "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take *due account* of the need to protect the environment, public health and safety, and generally to

> conduct their activities in a manner contributing to the wider goal of sustainable development."[203] (Emphasis added.)

The phrase "due account" can be interpreted as a form of due diligence obligation or duty of care in relation to TNCs' environmental responsibilities. This is further supported by chapter II in the Guidelines, which at a general basis encourages multinational corporations to "(c)arry out risk-based due diligence…"[204] Thus corporations' environmental obligations in the OECD Guidelines should be evaluated on the basis of a due diligence standard.

3.2.1 The general concept of due diligence in the Guidelines

The OECD Guidelines contain a general concept of due diligence, which applies to seven of the eight areas[205] covered by the Guidelines.[206] This concept provides the basis for the more specific due diligence standards that apply in the various areas. The Guidelines' general concept of due diligence will be briefly commented upon in the following, and thereafter the more specific obligations associated with environmental due diligence in chapter VI will be discussed.

Overall, in the OECD Guidelines, due diligence is described as procedures through which enterprises can "…identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems".[207] Due diligence should go "beyond simply identifying and managing material risks to the enterprise itself…"[208] Consequently, corporate due diligence in the OECD Guidelines centres around identi-

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[203] OECD Guidelines (2011), chapter VI, introduction

[204] Ibid chapter II, para 10

[205] The eight areas are: disclosure, human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumer interests, science and technology, competition, and taxation.

[206] Ruggie/Nelson (2015) 6, the exception being taxation issues, for which it was not considered appropriate

[207] Commentary to the OECD Guidelines (2011), chapter II., para 14

[208] Ibid

fication, prevention and mitigation of potential risks in seven regulatory areas of the Guidelines, entailing broad assessments of such risks. This understanding of the concept of due diligence is similar to the one found in EIAs and the UN Guiding Principles, as described previously, as they all place significant emphasis on the prevention of potential risks as part of corporate management practices.

Moreover, the Guidelines say that "(t)he nature and extent of due diligence depend on the circumstances of a particular situation."[209] Stating that "small- and medium-sized enterprises may not have the same capacities as larger enterprises", the Guidelines encourage these to observe its standards to the "fullest extent possible."[210] In addition, they observe that due diligence obligations will vary on the basis of the "severity of (potentially) adverse impacts."[211] As such, the OECD Guidelines promote a relative concept of due diligence, in which its standards depend on the resources available to TNCs in specific circumstances. It further underlines the already discussed correlation between stricter due diligence standards and cases of potentially serious risks. Hereupon, the core of due diligence in the OECD Guidelines is that corporations should prevent risks to "the fullest extent possible".

Importantly, the Guidelines' general concept of due diligence differ from the environmental duty of care outlined in the previous chapter, as it promotes responsibility for supply chains on the basis of "business relationship(s)."[212] The commentary to chapter II encourages TNCs to "use their leverage[213] to mitigate any remaining impacts to the greatest extent possible."[214] In situations where enterprises have a large number of suppliers, TNCs should identify areas of significant risks and prioritise these.[215]

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209 Ibid, chapter I, para 10

210 OECD Guidelines (2011), chapter I., para 6

211 Commentary to the OECD Guidelines (2011), chapter II., para 15

212 OECD Guidelines (2011), chapter II, para 12

213 Leverage is defined as "the ability to effect change in the wrongful practices of the entity that causes the harm."

214 Commentary to the OECD Guidelines (2011), chapter II., para 19

215 Ibid 16

In conclusion, the due diligence process outlined in the OECD Guidelines shares certain characteristics with the environmental due diligence that is part of EIA processes, as well as the UN Guiding Principles on Business and Human Rights. All of these standards appear to prescribe relative duties of care which have focus on prevention and mitigation of risks, and encourage stricter obligations in cases of serious or significant risks. As such, this illustrates the applicability of the environmental due diligence concept to TNCs, as it can be seen as a continuation of already existing standards. However, the environmental due diligence obligation entailed by international law contained more detailed minimum criteria than the ones found in the general concept of due diligence in the OECD Guidelines, and no responsibility for supply chains. This will be further discussed below.

3.2.2 The specific concept of environmental due diligence in the Guidelines

Chapter VI outlines that "due account" should be taken of the "need to protect the environment, public health and safety…"[216] This includes a wide conceptualisation of environmental damage, addressing not just adverse impacts on the environment per say, but also on human health and safety. Human health and safety appears to include societal and possibly human rights issues, but this is not further defined in chapter VI. The discussion in the following will be limited to cases of overlap between human rights and environmental procedural requirements. Other issues that this broadly defined scope raises will not be addressed.

As mentioned, the introductory paragraph to chapter VI establishes that

> "(e)nterprises should, *within the framework of laws, regulations and administrative practices in the countries in which they operate*, and in consideration of *relevant international agreements, principles, objectives, and standards* take due account…"[217] (Emphasis added.)

[216] OECD Guidelines (2011), chapter VI, introduction

[217] OECD Guidelines (2011), chapter VI, introduction

Hereupon, corporate environmental due diligence standards should first and foremost operate in accordance with national legislation in countries in which the TNC is operating. This illustrates the important role of domestic law in relation to regulation of multinational corporations' activities, and that nation-states are the only entities which can place binding obligations on multinational enterprises within their territories.

Nonetheless, the introductory paragraph also encourages TNCs to take due account of "relevant international agreements, principles, objectives, and standards". Thus multinational corporations' environmental due diligence obligations should also be interpreted in light of international instruments. This is further emphasised by the commentary to chapter VI, which states that:

> "(t)he text in the Environment Chapter broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflects standards contained in such instruments as the ISO Standard on Environmental Management Systems."[218]

Consequently, international instruments are relevant to the assessment of corporations' environmental due diligence obligations in chapter VI. This is supported by the commentary to chapter VI, which points out that the Guidelines are not intended to reinterpret any existing instruments or to create new commitments,[219] and as such should be understood as an expression of already existing international standards. Importantly, the commentary states that although none of the instruments are explicitly addressed to enterprises "enterprise contributions are implicit in all of them".[220]

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[218] Commentary to the OECD Guidelines (2011), chapter VI, para 60

[219] Ibid, para 70

[220] Ibid, para 68

On the other hand, the commentary remarks that the Guidelines are aimed at TNCs, and consequently do not completely mirror any existing instruments.[221] This suggests that the Guidelines should be interpreted in accordance with international instruments as far as possible, but that some variances may be acceptable as they apply to multinational corporations instead of states.

For instance, chapter VI's paragraph 6, outlines that TNCs should, "where appropriate", seek to improve the environmental performance of its supply chain.[222] Consequently, under the OECD Guidelines, environmental due diligence includes an obligation for TNCs to contribute where possible to improve their supply chains' environmental performance. This stands in contrast to the environmental due diligence standards that apply to states, demonstrating that such obligations differ slightly when interpreted as applying to multinational enterprises.

The commentary to chapter VI specifically highlights the Rio Declaration, including Agenda 21, and the Aarhus Convention as leading instruments for environmental due diligence under the OECD Guidelines.[223] The Rio Declaration and its significance in environmental law have already been discussed, and it is unsurprising that it is reflected in the OECD Guidelines' environmental chapter.

In contrast, the Aarhus Convention is a regional human rights treaty promoted by the United Nations Economic Commission for Europe (UNECE)[224] which is widely ratified in Europe.[225] It aims to secure the right of everyone to receive environmental information that is held by public authorities, to promote public participation in environmental decision-making, as well as to ensure access to justice for denials of these rights. Consequently, the Aarhus Convention provides procedural envi-

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221 Ibid

222 OECD Guidelines (2011), chapter VI, para 1

223 The commentary also mentions ISO Standard on Environmental Management Systems, but this will not be addressed in this thesis, as the focus is on norms that can be derived from international environmental law.

224 http://ec.europa.eu/environment/aarhus/index.htm, (2 December 2015)

225 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en, (2 December 2015)

ronmental rights to individuals, and links human rights to environmental protection. The implications of the Aarhus Convention for environmental due diligence obligations will be discussed below.

The discussion of corporations' environmental due diligence obligations under the OECD Guidelines, in the following, will focus upon the principles of sustainable development, prevention and precaution, as these are promoted in chapter VI.

3.3 Sustainable development as part of environmental due diligence in the OECD Guidelines' chapter VI

Chapter VI, as mentioned, starts by stating that TNCs should "…take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to *the wider goal of sustainable development*."[226] (Emphasis added.)

Sustainable development is the overarching goal underlying chapter VI, and requires particular attention by multinational enterprises. This is supported by the commentary to chapter II, which observes that TNCs activities should be conducted in accordance with the principle of sustainable development, and that the key to achieve sustainable development is "…links among economic, social, and environmental progress…"[227]

The Guidelines define sustainable development as the balancing of economic, social and environmental concerns, but offer no further guidance as to the integration of these factors. As such, the implications of the principle of sustainable development in the context of the OECD Guidelines are uncertain.

However, chapter VI gives some indications as to how sustainable development should be integrated into corporate practices. Paragraph 1 in chapter VI recommends corporations to "(e)stablish and maintain a system of environmental management appropriate to the enterprise", including regular monitoring, collection and evaluation of environmental

[226] OECD Guidelines (2011), chapter VI, introduction

[227] Commentary to the OECD Guidelines (2011), chapter II, para 3

impacts of activities, as well as the establishment of measureable objectives.[228] The commentary to chapter VI emphasises that "sound environmental management is an important part of sustainable development", underlining that this is increasingly perceived as both a business responsibility and opportunity.[229] It goes on to say that "(i)mproving environmental performance requires a commitment to a systematic approach and to continual improvement of the system."[230] Hence, sustainable development entails that environmental due diligence includes a responsibility for TNCs to maintain sound management systems, which is in accordance with the already discussed holistic ecosystem approach.

Moreover, chapter VI's paragraph 6 encourages TNCs to "(c)ontinually seek to improve corporate environmental performance", for instance by adopting "technologies and operating procedures in all part of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise",[231] and by developing more environmentally friendly technology.[232] Thus, similar to the UN Global Compact, the OECD Guidelines appear to promote the principle of sustainable use, which, as discussed, forms part of sustainable development.

On the other hand, the Guidelines do not explicitly establish that there are limits to the principle of sustainable development, as discussed above in relation to its core. It states that corporations should attempt to establish "measurable objectives", and "where appropriate, targets for improved environmental performance and resource utilisation", which should be periodically reviewed.[233] Thus the Guidelines suggest that TNCs should aim to operate in a sustainable manner, meaning with regards to long-term objectives. The idea of planetary boundaries is implicit in the concept of sustainability, and consequently the OECD Guidelines indirectly imply that multinational enterprises should attempt to conduct

228 OECD Guidelines (2011), chapter VI, para 1

229 Commentary to the OECD Guidelines (2011), chapter VI, para 61

230 Ibid

231 OECD Guidelines (2011) ,chapter VI, para 6 letter a)

232 Ibid, para 6 letters b) and d)

233 Ibid, para 1 letter b)

their activities within planetary boundaries. However, the Guidelines do not set explicit boundaries. As discussed above, this can also be because planetary limits alter in accordance with new scientific understanding and improved technology, and it is not possible to arrive at a fixed definition of what constitutes sustainable development. Hereupon, the OECD Guidelines appear to strongly suggest that multinational enterprises should organise their activities such that these are conducted in a sustainable manner, and as such implement the principle of sustainable development.

In conclusion, the principle of sustainable development entails that TNCs should maintain sound environmental management systems and employ environmentally friendly technologies in accordance with best practices. Multinational enterprises should continually seek to develop better technology and to conduct their activities in a sustainable manner. But the Guidelines include few concrete measures in relation to multinational enterprises' sustainable due diligence obligations.

3.4 The preventive principle as part of environmental due diligence in the OECD Guidelines' chapter VI

In the following the preventive principle will be discussed in the context of the OECD Guidelines. The focus will be on its application to TNCs.

Chapter VI, in the Guidelines, does not explicitly use the term "preventive principle" but there are references to the principle in paragraph 3, which recommends enterprises to:

> "(a)ssess, and address in decision-making, the *foreseeable* environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full cycle with a view to *avoiding* or, when unavoidable, *mitigating* them. Where these proposed activities may have *significant* environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate *environmental impact assessment*."[234] (Emphasis added.)

[234] OECD Guidelines (2011), chapter VI, para 3

Paragraph 3 summarises the essence of the principle of prevention, as explained previously. In short, the preventive principle includes a duty to do one's best to prevent and mitigate foreseeable adverse environmental impacts prior to and during industrial activities. This is exactly what is prescribed by paragraph 3, as if refers to a duty of care in decision-making in relation to "foreseeable" adverse impacts, to avoid them, if possible, and if unavoidable, to mitigate them.

Noteworthy, chapter VI defines environmental risks as including adverse impacts relating to "environmental, health, and safety…" Consequently, similar to chapter VI's notion of due diligence in its introductory paragraph, this seems to extend the definition of environmental damage to involve effects on human societies.

The principle of prevention in paragraph 3 is generally rather vague and abstract, and its most concrete measure is the EIA prescribed in cases of potentially severe environmental damage. Chapter VI[235] states that "environmental impact assessment(s)" should be undertaken in cases where there are potentially "significant" adverse risks associated with corporations' activities, or where this is required by the host state. The broad definition of risks described above also applies in relation to EIAs. Thus chapter VI appears to extend the normally limited scope of EIAs, as assessments limited to serious environmental damage, excluding effects on social, economic and cultural spheres,[236] to include impacts on health and safety. However, it contains no further explanations as to how this concept of risk should apply, and it is unclear what it specifically entails.

This ambiguity is potentially problematic, as lack of clarity about the different components in an EIA can generate deficiencies in the final product.[237] Moreover, there exists a range of different EIA-like procedures addressing social elements, which may cause confusion.[238] For instance, strategic environmental assessments (SEAs) assess the environmental impacts of policies and programs, rather than specific development

[235] which is similar to the Rio Declaration's principle 17

[236] Montini (2013) 250

[237] Ibid

[238] COIEL: EIAs in practice (2010) 1

projects; the trade sustainability impact assessments (TSIAs) seek to identify the potential economic, social and environmental impacts of a trade liberalization agreement, health impact assessments (HIAs) assess the impacts on human health of proposed activities; and social impact assessments (SIAs) manage the social consequences of planned policies, programmes and projects.[239]

Furthermore, chapter VI does not offer any guidance as to when environmental risks should be categorised as "significant" or "serious", which could make it difficult for TNCs to set a threshold for when to conduct EIAs. However, considering that chapter VI is to be interpreted in light of relevant international instruments, the threshold for environmental risks to qualify as significant in corporate practices should be based on international standards. As stated, international law implies a low threshold for environmental risks to qualify as significant. This entails that TNCs should undertake EIAs in cases concerning bigger projects, as risks are unpredictable and big projects normally have considerable potential to affect the environment.

In conclusion, the scope and implications of the preventive principle in the Guidelines are uncertain and vague. The principle's most concrete measure is the EIAs, which makes them central to the Guidelines' environmental due diligence obligations for TNCs.

3.4.1 EIAs in the OECD Guidelines

In the following EIAs will be discussed in the context of the OECD Guidelines. For clarity, it will be distinguished between substantive and procedural elements relating to EIAs in the OECD Guidelines. The discussion will be focused on EIAs' procedural elements, even if these two occasionally overlap, as this is what is prescribed by international minimum standards, as discussed previously. Moreover, the discussion in this thesis bases itself on the presumption that EIAs' main function is to lead to better-informed and more transparent decision-making

[239] Ibid 3

processes,[240] in which procedural elements play the bigger part.

The commentary to chapter VI states that:

> "(e)nvironmental assessments made by the enterprise may contain a broad and forward-looking view of the potential impacts of an enterprise's activities and of activities of sub-contractors and suppliers, addressing relevant impacts and examining alternatives and mitigation measures to avoid or redress adverse impacts."[241]

As such, chapter VI gives some guidance with regards to the content of EIAs: EIAs should be broad and forward-looking, address potential impacts of the business enterprise, as well as potential impacts of its supply chain, in addition to examine alternative measures and how to prevent or mitigate adverse impacts. Thus the EIA procedure outlined by the OECD Guidelines reflects some of the international minimum standards that are established by the 1987 UNEP Goals and Principles.

Both the UNEP Goals and Principles and chapter VI entail that EIAs should address the potential impacts of the proposed activities. Moreover, chapter VI's phrase "broad and forward-looking" implies assessments of long- and short-term, cumulative, direct and indirect effects, similar to the UNEP Goals and Principles.[242] In addition, both instruments suggest that alternative measures should be assessed.[243]

In contrast, the UNEP Goals and Principles also recommend that EIAs should contain indications of gaps in knowledge and uncertainties.[244] This is not reflected in chapter VI. Furthermore, chapter VI hints at a potential responsibility for supply chains, which is not reflected in international environmental law.

Additionally, chapter VI seemingly views EIAs mainly as instruments of risk assessments "ex ante", meaning prior, to industrial activities.[245]

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240 Montini (2013) 249

241 Commentary to the OECD Guidelines (2011), chapter VI, para 67

242 UNEP Goals and Principles principle 4 letter (d)

243 Ibid, principle 4 letter (c)

244 Ibid, principle 4 letter (e)

245 Commentary to the OECD Guidelines (2011), chapter VI, para 67

This stands in contrast to the "continuous" due diligence obligations that were promoted both by the *Pulp Mills case*[246] and the UN Guiding Principles,[247] as illustrated above. However, considering that chapter VI is to be interpreted in accordance with relevant international instruments, it seems plausible to extend a continuous environmental duty of care also to TNCs under the OECD Guidelines. This is also in line with chapter VI paragraph 6, which encourages multinational enterprises to "continually" seek to improve their environmental performance.

In conclusion, the EIAs prescribed by chapter VI mostly seem to be in concurrence with international environmental law. Thus the OECD Guidelines appear to support the UNEP Goals and Principles as international minimum standards for EIAs, expressing universal values that are also potentially applicable to TNCs.

3.4.2 EIAs and public participation in the OECD Guidelines

As mentioned, in the *Pulp Mills* case, the ICJ concluded that there is no requirement under international environmental law to consult potentially affected people, despite this not being disputed by the parties. Nonetheless, international jurisprudence has found notification and information to be part of the principle of cooperation. In the following, participation of affected peoples and other interested parties will be discussed in context of chapter VI.

Chapter VI does not explicitly link EIA processes and public consultation and participation, but generally encourages this. In paragraph 2 enterprises are recommended to:

> "a) provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and

[246] Pulp Mills, para 205

[247] UN Guiding Principles principle 17

> b) engage in adequate and timely communication and consultation with the communities directly affected by the environment, health and safety policies of the enterprise and by their implementation."[248]

Consequently, chapter VI outlines that TNCs should actively engage in dialogue with the public at large about its environmental performance, as well as in "adequate and timely" communication and consultation with potentially affected people. The phrase "adequate and timely" implies that such communication should be undertaken at an early stage in the formation of company policies, so as to allow for the consultation to be taken into consideration in risk assessments. Moreover, it further implies that dialogue between the parties has to be sincere, meaning that there must be an actual dialogue, in which parties' opinions are heard. This reflects the already discussed notion that risks should be assessed in a societal context and should not exclusively be based on scientific facts.

Chapter VI, as stated, should be interpreted in accordance with relevant international instruments, and in particular the Rio Declaration and the Aarhus Convention. Principle 10 in the Rio Declaration confirms the importance of public participation in environmental risk assessments, stating that "(e)nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes…"[249] Thus the Rio Declaration supports affected peoples' access to environmental information, as well as their right to participate in environmental decision-making processes. The latter is relevant in relation to EIAs, as EIA is a decision-making process which maps out how industrial projects should be conducted. Consequently, the Rio Declaration indicates that consultation of affected communities should be part of EIA procedures.

In relation to the OECD Guidelines, this argument is further strengt-

[248] OECD Guidelines (2011), chapter VI, para 2 letter a) and b)

[249] Rio Declaration principle 10

hened by chapter VI's reference to the Aarhus Convention. Hence, the Aarhus Convention establishes a link between EIAs' procedural requirements and human rights.

Article 6(2) in the Aarhus Convention states that "(t)he public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner".[250] "The public concerned" is, in article 2(5), defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."[251] Consequently, the Aarhus Convention contains a right to environmental information for anyone with an interest in environmental decisions, including affected communities.

In this regard, the Aarhus Convention goes longer than any other human rights treaty in securing individual access to environmental information and participation in decision-making processes.[252] The case-law of the European Court of Human Rights (ECHR) is, for instance, firmly grounded within individual rights and does not extend a general right to information to the public at large, nor does it apply to general decisions concerning the environment.[253] Even so, the practice of the ECHR has been strongly influenced by the Aarhus Convention. [254]

Consequently, the Aarhus Convention gives rights to environmental information and participation in decision-making that are not found in other human rights treaties, but are referred to in the non-binding Rio Declaration in international environmental law. Thus it represents an area where human rights and environmental procedural principles overlap.

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250 Aarhus Convention article 6
251 Ibid, article 2(5)
252 Boyle (2010) 7
253 Ibid 24
254 Ibid 7

The basis for this overlap between the fields of human rights law and environmental protection is, as discussed, that risks assessments have to be conducted on the basis of potential effects on the environment and ecosystems, as well as for current and future human societies. In order to undertake fair risk assessments affected communities and other humans should be allowed to have their opinions heard.

The reasons for this is outlined in the preamble to the Aarhus Convention, which observes that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations",[255] and "to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights".[256] By this statement, the Aarhus Convention seems to imply that there is a right to a healthy environment in international law, and that this strengthens the role of individuals in environmental risk assessments.

On this basis, statements which emphasise the correlation between environmental risks and human development can be found in both environmental and human rights law. This can be interpreted as to imply that potentially affected communities should be consulted in assessments of environmental risks, such as in EIA procedures.

Furthermore, the importance of individual participation in environmental decision-making can be supported by both the 1966 UN Covenant on Civil and Political Rights' and the Covenant on Economic Social and Cultural Rights' articles 1(2), which recognise a right for all *peoples* to "freely dispose of their natural wealth and resources".[257] (Emphasis added.) This may be taken to suggest that people should have a voice in

[255] Aarhus Convention, preamble

[256] Aarhus Convention, preamble

[257] UN Covenant on Civil and Political Rights' and Covenant on Economic Social and Cultural Rights' articles 1(2)

the decisions concerning exploitation of the environment.

Other principles and notions in international law may also be relevant in relation to EIAs and public participation. According to Professor Ruggie, TNCs depend upon a form of social contract in order to operate effectively without meeting local resistance, which "can be granted only by communities."[258] The preface to the OECD Guidelines contains similar notions, pointing to the Guidelines as a tool "to strengthen the basis of mutual confidence between enterprises and the societies in which they operate…"[259]

This further follows from the preventive principle's linkage to the principles of good neighbourliness and cooperation. The latter has been discussed above. Article 74 in the UN Charter explains the principle of good neighbourliness as that "due account needs to be taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters",[260] entailing that due diligence obligations should consider neighbourly needs. This is further expressed in UNEP's 1978 Draft Principles on Shared Natural Resources, which states that "(e)xchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness…"[261] Consequently, dialogue is at the heart of the principle of good neighbourliness. Briefly, the principle of good faith entails an obligation to act truthfully, and the ICJ has observed that it governs the creation and performance of legal obligations, but does not in itself constitute a binding obligation.[262]

Thus, for enterprises, the principle of good neighbourliness can be interpreted as to apply between them and local communities, instead of between nation-states. TNCs are in neighbourly relationships with the communities in which they operate, which support the necessity of a

[258] Ruggie (2013) 10
[259] OECD Guidelines (2011) preface
[260] UN Chater article 74
[261] UNEP Draft Principles on Shared Natural Resources, principle 7
[262] Nuclear test case (Australia and New Zealand v. France), para 49

social licence as well as for dialogue with affected peoples. These obligations are further strengthened by the principles of cooperation and good faith.

Arguments in favour of the need for corporations to obtain a social licence in order to operate can be extracted from examples of corporate activities which have failed due to unrest among local populations. For instance, in Peru in 2004, TNC Newport was forced to close down its mining operations due to local opposition. 10 000 people laid siege to its mine. Despite several attempts, Newport failed to renew relations with the local population. Thus, in 2011, the single biggest investment in Peru's history at 4.8 billion dollars was suspended when the government imposed a state of emergency due to public safety concerns.[263] Another example is Royal Dutch Shell's in Ogoniland in Nigeria. In 1993, 300 000 Ogoni, more than half of the region's population, demonstrated publicly against Shell. Shell was forced to suspend its operations in the area, and fifteen years later the Nigerian government revoked the company's licence to operate the concession. Nigeria's President stated that "there had been a total loss of confidence between Shell and the Ogoni people."[264]

In conclusion, there are strong implications for that public consultation should be part of the EIA procedures under the OECD Guidelines, even if this is not explicitly stated.

3.5 The precautionary principle in the OECD Guidelines' chapter VI

In the following section, the precautionary principle in the OECD Guidelines will be analysed. The focus will be on its implications for TNCs. Chapter VI recommends multinational enterprises to:

> "(c)onsistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-

263 Ruggie (2013) xxxviii

264 Ibid

effective measures to prevent or minimise such damage"[265]

This recommendation reflects the precautionary principle in the Rio Declaration principle 15, which, importantly, is directly referred to in chapter VI.[266] Chapter VI explicitly states that the Guidelines are only intended to recommend how the precautionary approach should be implemented at the level of enterprises, and that they do not reinterpret any existing instruments.[267] Moreover, it is outlined that the development of the precautionary approach is still at an early stage, and thus "some flexibility" is needed in its application.[268] This latter point seems to confirm that the status and implications of precaution are still unclear in international law, as mentioned above.

As stated, the precautionary principle entails a method to address environmental risks which are uncertain, meaning that it cannot be scientifically proven that they are likely to occur. Both principle 15 in the Rio Declaration and chapter VI refer to uncertain "threats of serious damage". The Rio Declaration's principle 15 and the commentary to chapter VI[269] also adds "irreversible" to this description, indicating that precaution applies to risks of a potentially serious nature.

The formulation of threats in chapter VI prescribes that risk assessments should take "human health and safety" into account. A similar formulation is not found in the Rio Declaration's principle 15, which simply refers to scientific assessments. Chapter VI can thus be interpreted as indicating a broader kind of risk assessment, in which the potential impacts on human societies has to be taken into consideration. It underlines the importance of public participation and consultation in risk assessments, such as EIAs.

On the other hand, chapter VI also highlights the importance of scientific facts in risk assessments, emphasising that risks should be

265 OECD Guidelines (2011), para 4

266 Commentary to the OECD Guidelines, chapter VI, para 68

267 Ibid, para 70

268 Ibid

269 Commentary to the OECD Guidelines (2011), chapter VI, para 69

"consistent with (…) scientific and technical understanding". This entails that in order for the precautionary approach to apply, uncertain risks still have to be reasonable and not just hypothetical. In other words, it has to be theoretically possible that they could occur. This is in line with the general perception of the precautionary principle in international law, which was discussed previously.

As mentioned, an essential issue associated with the preventive principle is the burden of proof and conflicting scientific evidence. International jurisprudence has solved this issue by either resorting to the principle of cooperation, ordering the parties to cooperate to find solutions, or by appointing independent experts. Chapter VI gives no clear indications as to how this issue is to be solved in the OECD Guidelines. In light of the "flexibility" and emphasis on "specific context(s)"[270] that chapter VI cautions in the interpretation of the precautionary approach, it seems like this is an open question. Consequently, their approach to conflicting scientific evidence will have to be decided by the OECD National Contact Points in each specific case.

Both chapter VI and principle 15 in the Rio Declaration dismiss costs as a valid reason to postpone preventive measures in cases of serious risks that are theoretically possible but not necessary likely to occur. This means that TNCs cannot delay measures on the basis of economic concerns, in situations where the criteria for precaution are fulfilled.

In conclusion, the precautionary principle in chapter VI appears to imply that risk assessments should pay significant attention to human and societal needs. It reflects the already discussed necessity of potential risks to be scientifically possible, not just hypothetical. If risks are found, economic costs are not a valid reason to postpone preventive measures. But chapter VI does not outline any solution to the issue concerning conflicting evidence.

3.6 Concluding remarks

The overarching standard of chapter VI is that TNCs should take "due

[270] Ibid, para 70

account"[271] to the environment, public health and safety. This implies that a form of environmental due diligence obligation is applicable to multinational enterprises. The principles of sustainable development, prevention, with its subsequent EIA procedures, and precaution are part of this entailed environmental due diligence standards, as they are explicitly or implicitly referred to in chapter VI.

Sustainable development, as part of chapter VI, generally encourages multinational enterprises to maintain good environmental management systems, as well as to continually work to apply more environmentally friendly technology in their operations. However, it contains few measurable objectives.

Chapter VI's notion of the precautionary approach mostly reaffirms the Rio Declaration's concept of precaution. It entails that serious risks should be taken into consideration, even if they are not likely to occur, as long as they are theoretical possible.

Prevention is a central theme in chapter VI, establishing a general duty for multinational enterprises to prevent and mitigate adverse impacts of their activities. In this regard, EIAs are the most concrete measure that is proposed by the OECD Guidelines. TNCs' have a duty, at their own initiative, to undertake EIAs if risks could have significant environmental, health, or safety impacts. As chapter VI is to be interpreted in light of relevant international instruments, it seems plausible to apply a low threshold for risks to qualify as significant, following international standards. But this is rather unclear in the Guidelines. The commentary to chapter VI outlines similar minimum standards for the content of EIAs as the ones found in international environmental law.

The wording of chapter VI, in view of the Rio Declaration, the Aarhus Convention and international instruments, appears to promote consultation with potentially affected communities as part of EIA's risk assessments. In this regard, chapter VI exceeds international minimum standards.

Consequently, chapter VI contains procedural requirements for EIA procedures. Even so, the effectiveness of EIAs as a preventive measure is

[271] OECD Guidelines (2011), chapter VI introduction

questionable. As stated, EIAs do not prohibit certain types of developments, but should contribute to more informed and transparent decision-making processes.[272] The implications of the environmental norms described in the previous two chapters are so vague and unclear that without any form of accountability mechanism, they are unlikely to lead to any concrete measures on behalf of TNCs.

[272] Montini (2013) 249

4 The OECD National Contact Points and environmental complaints

4.1 Introductory remarks

This chapter starts by discussing the OECD National Contact Point (NCP) system, focusing on both its flaws and potential. An assessment of the NCP system is central to this thesis because it illustrates the effectiveness of the system as a mechanism for corporate environmental accountability.

Thereafter, the chapter looks at a selection of environmental complaints brought before the Norwegian, British and Dutch National Contact Points (NCPs). It tries to illustrate that these cases contain elements of the environmental due diligence process outlined above and consequently that these standards are applicable to TNCs. The NCP system can potentially contribute to the development of corporate environmental due diligence procedures, as well as to hold corporations accountable for violations of the OECD Guidelines.

The Norwegian, British and Dutch NCPs were chosen because these are three well-functioning compliance mechanisms, and illustrate the potential of the NCP system as a compliance system. In addition, these three NCPs demonstrate that the NCP system already is a partially functioning mechanism for corporate accountability. However, the system faces considerable challenges, which is illustrated by the fact that 14 NCPs have never received a single complaint and several others only one.[273]

4.2 The National Contact Points

4.2.1 Handling of complaints

In year 2000, the revised OECD Guidelines established a duty for all adhering governments to set up National Contact Points as "forum(s)

[273] Ruggie/Nelson (2015) 20

for discussion" for matters relating to the Guidelines.[274] Thus all the 45 adhering governments have a NCP. NCPs are supposed to be effective, impartial and should provide an "adequate level of accountability" for TNCs.[275] Governments can use different forms of organisation to fulfil these objectives,[276] and in the NCP system there are six different models of organisation.[277] The basic premise of NCPs is to handle individual complaints relating to violations of the OECD Guidelines by TNCs. Complaints are normally processed by the NCP of the country in which the issues have arisen, but the home country NCPs can cooperate with the host country NCP to solve complaints.[278] If an enterprise's activities take place in several adhering countries all the host NCPs should agree on one that will take the lead in assisting the parties.[279] Concerning issues arising in non-adhering countries, the home NCP can choose to pursue the complaint where this is "relevant and practicable".[280]

According to the Procedural Guidance, the consideration of a complaint before a NCP is composed of three stages. First, NCPs should make an initial assessment of whether the issues raised give grounds for further

274 OECD Guidelines (2011), chapter I, para 11

275 Procedural Guidance OECD guidelines (2011), A. 1

276 Ibid, A. 2

277 The NCPs can be monopartite, meaning that they are composed of one or more representatives of a single Ministry. This is the most normal structure of the National Contact Points and has been used by 20 adhering countries. The second most popular form of organizing the NCPs is an interagency structure, meaning that the NCP consists of one or more representatives of two or more Ministries, which has been used by 9 countries. Tripartite is the third most used form of structuring the NCPs and has been used by 5 states, meaning that the NCP is composed of one or more representatives of one or more Ministries, business associations, and trade unions. The fourth most popular form of establishing the NCPs, which is used by 4 countries, is to have an independent expert body, meaning that the NCP include independent experts. Additionally, two countries have chosen a quadripartite structure, meaning that the NCP is composed of one or more representatives of one or more Ministries, business associations, trade unions, and NGOs. Finally, one country preferred a bipartite structure for its NCP, meaning that the National Contact Point consists of one or more representatives one or more Ministries, as well as representatives of business associations or trade unions

278 Commentary to the OECD guidelines (2011), para 23

279 Ibid, para 24

280 Ibid, para 39

examination.[281] Thereafter, if the complaint is taken further, the NCPs should offer its "good offices" to help the parties to resolve the issues. [282] In this second stage the NCPs can choose freely how they want to assist the parties, and different NCPs have different procedures.[283] The US' NCP, for instance, only proceeds if both parties to complaints consent to mediation, and it does not make assessments of whether violations of the Guidelines have occurred.[284] The Norwegian and British NCPs, on the other hand, conduct a thorough examination of the facts described in the complaint, if mediation fails, and assess whether or not the Guidelines have been breached.[285] Finally, NCPs should make a statement or report of its conclusions in the proceedings, which at a minimum should describe the issues raised and the reasons for the NCPs decision.[286]

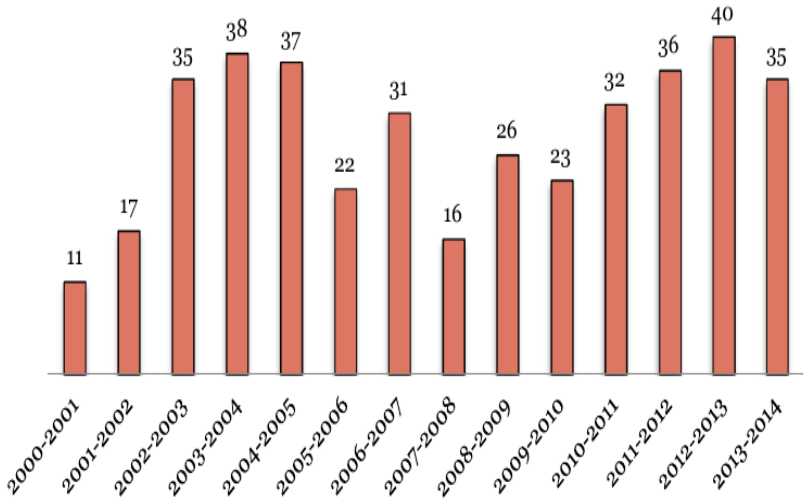
4.2.2 Admissibility and environmental/human rights complaints in the NCP system

Figure 1: Overview of cases submitted to the OECD (2000-2014)[287]

See next page.

281 Amendment OECD, (25 May 2011), Procedural Guidance, C
282 Ibid
283 Ibid
284 Sanchez (2015) 98-99
285 Ibid 104
286 Commentary to the OECD guidelines (2011), para 31-36
287 Ruggie/Nelson (2015) 8

Figure 1: Overview of cases submitted to the OECD (2000-2014)



During its first 15 years, the NCP system received around 250 complaints or "specific instances" filed by communities, individuals and NGOs.[288] As illustrated by figure 1, the number of cases has increased since the Guidelines' latest update in 2011. The overview implies that there is a correlation between updates of the Guidelines (in 2000 and 2011)[289] and number of submitted complaints.[290]

This suggests that revision of the Guidelines leads to renewed interest and awareness of the NCP system. Seemingly, civil society has an interest in the system. However, the figure also shows that interest declined sometime after the year 2000 update had taken place. Declining interest may imply that the public is not satisfied with the NCP system's handling of complaints. Dissatisfaction with the NCP system, more specifically with the UK's NCP, was the topic of a recent article in the British news-

[288] Remedy Remains Rare (2015), 19

[289] OECD's webpage: http://mneguidelines.oecd.org/text/ (23 October 2015)

[290] Ruggie/Nelson (2015) 13

paper "The Guardian".[291] The article pointed out that filing a complaint before an NCP was a resource-demanding and time-consuming process for small resource-constrained NGOs, which yielded little results, as the NCPs' findings were extremely vague and inconclusive.[292] This will be further addressed in the next section.

Figure 2: Admissibility of cases in the NCP system[293]

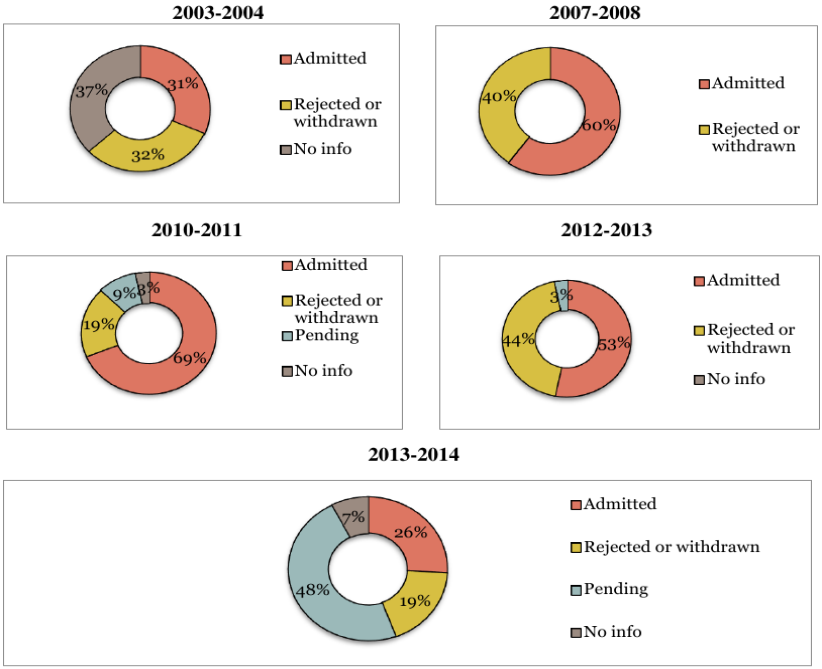


Figure 2 shows that there recently has been an increase in pending cases before the NCP system, and that the admissibility rate is lower in the most recent cycle (2013-2014). This can possibly be attributed to the fact

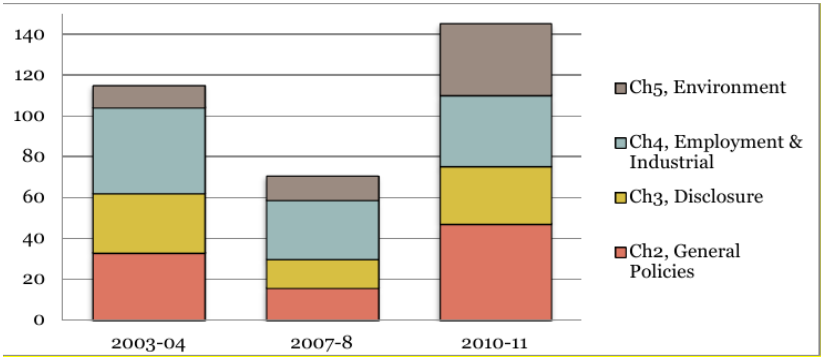
[291] Haigh (2015)
[292] Ibid
[293] Ruggie/Nelson (2015) 9

that no determination had been made on admissibility at the time.[294]

However, the OECD Watch's[295] recent report "Remedy Remains Rare" found that the rate of rejection of cases had increased since the updated version of the Guidelines in 2011.[296] The report concluded that about 52% of all complaints had since 2011 been rejected by the NCP system, compared to 43% before 2011.[297]

As illustrated by figure 3, under the 2000 version of the Guidelines complaints were mostly submitted in relation to chapters concerning environment, employment and industrial relations, disclosure and general policies. The number of environmental complaints appeared to be increasing before 2011, possibly reflecting a growing acceptance for the Guidelines' applicability to environmental matters.

Figure 3: Provisions most cited under the 2000 Guidelines[298]



This trend changed after the revision of the Guidelines in 2011, when a human rights chapter was included in the Guidelines for the first time.[299]

294 Ibid 8

295 A global network of NGOs that seeks to hold companies accountable for their adverse impacts around the globe with more than 80 members in 45 countries

296 Remedy Remains Rare (2015) 19

297 Ibid 19

298 Ruggie/Nelson (2015) 13

299 As mentioned, this human rights chapter is based on the three-fold framework of the

All internationally recognised human rights apply under the human rights chapter, instead of merely those ratified by the host government, as previously was the case. This opens the door for a whole new set of complaints. For example, issues relating to community consultations, impeding or destroying livelihood, health and housing, and privacy rights have increased under the 2011 Guidelines.[300]

After the revision human rights cases have become a big category of complaints under the Guidelines. For instance, in 2012-2013, 32 out of 38 complaints submitted addressed human rights issues, and in 2013-2014, it was 27 out of 34 cases.[301] John Ruggie and Tamaryn Nelson suggest that the human rights chapter has influenced the variety of cases brought before the NCP system.[302] They find that there are brought more human rights cases than other forms of complaints, and that these have a higher admissibility rate.[303] Ruggie and Nelson also observe a greater diversity of human rights cases than in the past, a diversification of industries against which cases are submitted, as well as a growing role of the Guidelines' due diligence provisions.[304]

The focus on human rights issues in complaints may be explained by several reasons. For instance, human rights obligations may encompass other areas of the Guidelines. Applicants may choose to submit cases concerning areas of overlap between human rights, environment or labour rights as a human rights complaint. Cases regarding health or destruction of livelihood, which as mentioned have increased under the Guidelines, may also concern environmental issues that possibly are consumed by the broad human rights category. If so, this trend may delay the development of environmental due diligence obligations in the NCP system. At the same time, the 2011 revision seems to have provided a new revitalisation for the NCP system.

UN Guiding Principles

300 Ruggie/Nelson (2015) 14

301 Ibid 14

302 Ibid 13

303 Ibid

304 Ibid

The large number of human rights complaints may further show that corporations' responsibilities in the human rights sphere are more established and known internationally, both among TNCs and NCPs. The prominence of the UN Guiding Principles as recommendations endorsed by the UN Human Rights Council is likely to have brought attention to business' human rights responsibilities. For instance, the Norwegian government recently published a plan outlining recommendations for TNCs' human rights obligations, on the basis of the UN Guiding Principles.[305] The Norwegian NCP offers courses for TNCs about their human right responsibilities.[306] Thus, at least in Norway and possibly also other places, human rights due diligence appears to be generally more promoted than other due diligence processes. If true, this illustrates the influence of international authoritative bodies in international practices, and suggests that a similar endorsement of business' environmental due diligence obligations may contribute to promote and clarify TNCs' environmental responsibilities.

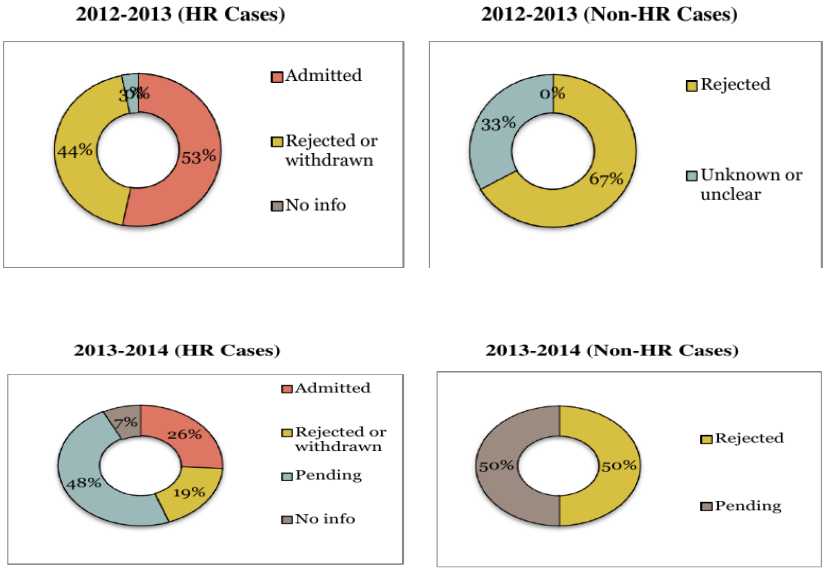
Figure 4: Admissibility of human rights cases comparatively to other cases under the 2011 Guidelines[307]

See next page.

[305] https://www.regjeringen.no/no/dokumenter/hplan-naering-mr/id2457944/ (11 November 2015)

[306] http://www.responsiblebusiness.no/2015/11/25/pamelding-human-rights-due-diligence-2016/ (2 January 2016)

[307] Ruggie/Nelson (2015) 16-17



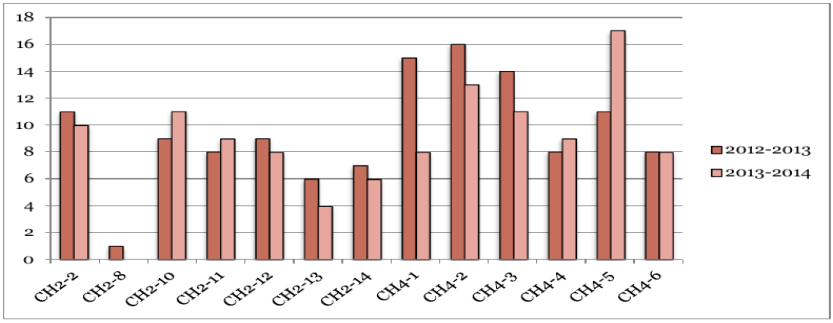
The increasing applicability of human rights due diligence processes can further be illustrated by figure 5 below, which shows that in 2013-2014, chapter 4 provision number 5 was the most cited (this is the due diligence provision in the Guidelines' human rights chapter).

Figure 5: All human rights provisions cited under the 2011 Guidelines[308]

See next page.

[308] Ibid 24

Figure 5: All human rights provisions cited under the 2011 Guidelines



4.2.3 Effectiveness of the NCP system and implications for environmental complaints

In "Remedy Remains Rare", the OECD Watch found that of the 250 cases filed by communities, individuals and NGOs to the NCPs, only 35 cases (14%) had some beneficial results that included some measure of remedy. The report defined remedies as: a statement (either by the NCP or company) acknowledging wrongdoings (20 cases (8%)), or an improvement in corporate policy and/ or due diligence procedure (20 cases (8%)), or directly improved conditions for victims of corporate abuses (3 cases (1%)), or compensation for harm (0%).[309] Noteworthy, out of 103 complaints submitted between January 2012 and May 2015, only 10 (10%) resulted in remedies, compared to 17% of cases prior to 2012.[310]

Furthermore, "Remedy Remains Rare" identified other weaknesses with the complaint procedures to the NCPs. Accessibility was outlined as the most problematic aspect for complainants.[311] Complainants face difficulties such as lack of knowledge of the OECD Guidelines, demanding burden of proofs, as well as risks of reprisals from companies and local governments. Especially burdensome standards of proof were a barrier, and 43 out of the 250 cases brought before the NCP system (17%) have

[309] Ibid 19

[310] Ibid

[311] Remedy Remains Rare (2015) 21-22

been rejected on the basis of insufficient evidence.[312] As outlined above, a number of cases have also been rejected due to the refusal of one of the parties to participate in mediation.[313] NCPs also have limited available resources, and often impose all expenses associated with cases on the parties.[314]

The OECD Watch further concluded that some NCP structures contribute to a perceived lack of independence and impartiality. As mentioned, the NCPs can be organized in a number of ways, for instance as independent entities, units within one ministry, or with representatives from different ministries, business and stakeholder groups. Statistics suggest that structure plays a role in the success of the NCP, and 27 of the 35 cases (77%) that the OECD Watch's report found to have some elements of remedy-related measures were produced by NCPs with some level of independence (UK 11 cases, France 6, Netherlands 4, Norway 4, Belgium 1, Denmark 1.)[315]

Another problem with the NCP process was lack of transparency. NCPs could for instance base decisions on information that has not been shared with both parties.[316] In addition, some NCPs require complete confidentiality regarding all communication between the NCP and the parties, including the content of the complaints. This can discourage parties from using the NCPs.[317]

Additional problems were found to be that NCPs flaunt the indicative timelines provided in the Procedural Guidance,[318] many NCPs are not committed to making statements of non-compliance with the Guidelines when mediation fails,[319] and NCPs are not adequately following up on the outcomes of final statements and agreements.[320] As such, the NCP

312 Ibid 22-24
313 Ibid 28
314 Ibid 22-24
315 Ibid 34-35
316 Ibid 35
317 Ibid 37
318 Ibid 40
319 Ibid 41
320 Ibid 47

system generally struggles to become an efficient accountability mechanism. However, there are significant differences between the NCPs in different countries and even variances from case to case.

With regards to environmental complaints, they will suffer the same difficulties and issues as other NCP complaints. But, as illustrated in the cases below, it is possible to identify certain environmental standards of corporate due diligence in the NCP system. If more cases were assessed by the NCP it would be easier to identify clearer guidelines as to corporate environmental due diligence. Importantly though, the substantive norms appear to be in place, suggesting that the problem is a flawed and inefficient system of compliance, rather than lack of material standards.

4.3 Environmental cases before the Norwegian NCP

The Norwegian National Contact Point is an independent body, consisting of four experts with extensive experience in law and business. The experts are appointed by the Ministry of Foreign Affairs and the Ministry of Trade and Industry based on proposals from the Norwegian Confederation of Trade Unions (LO), the Confederation of Norwegian Enterprise (NHO), and Forum for Environment and Development (ForUM) on behalf of civil society.[321]

Following the initial assessment, in stage two in the complaint process, if mediation fails, the Norwegian NCP's will make an assessment as to whether or not the Guidelines have been breached. Their mandate also allows the final statement to include recommendations for future behaviour for the company.[322]

The environmental chapter of the OECD Guidelines has been part of five, out of a total of 15 cases, which have been brought before the Norwegian NCP since 2011.[323] These will be commented upon in the following. The aim is to illustrate the normative standards promoted by these

[321] http://www.responsiblebusiness.no/ansvarlignaringsliv-no/files/2015/10/about_the_ncp_model.pdf (12 January 2016)

[322] Ibid

[323] http://www.responsiblebusiness.no/klagesaker/ (22 September 2015) including cases before 2011

cases, as well as the workings of the NCP system.

4.3.1 The complaint against Cermaq ASA

In 2009, the Norwegian Society for the Conservation of Nature/Friends of the Earth Norway and Forum for Environment and Development (ForUM) brought a case against Cermaq ASA. The Norwegian company, operating in Chile and Canada, was accused of violating environmental standards of the OECD Guidelines. Its activities were claimed to be harmful to the livelihood of indigenous populations in both Canada and Chile, as escaped salmon from the company's fish farms caused diseases to spread into rivers and destroyed local ecosystems.[324]

Mediation was successfully concluded in 2011. Thus the Norwegian NCP never made an independent assessment of the complaint, and the parties' agreed statement is the source for considerations of the case. Joint statements are interesting, as they contain concessions as to what environmental responsibilities companies admit to in relation to the Guidelines.

Cermaq's concessions, with regards to its environmental due diligence under the OECD Guidelines, can be structured around the already discussed notions of sustainability, prevention and precaution.

The principle of sustainable use appears to be the overarching goal for the joint statement between Cermaq ASA, Norwegian Society for the Conservation of Nature/Friends of the Earth Norway and ForUM. This is in line with chapter VI in the OECD Guidelines, as described above. The parties agreed that "(t)he *sustainable use* of natural resources, *including* the precautionary principle and accountability in meeting social and environmental challenges, is crucial for the aquaculture industry's future."[325] (Emphasis added.) Precaution was thus referred to as a way of achieving sustainable development. This will be further commented upon below.

Cermaq conceded that the Chilean aqua-cultural industry should

[324] Norges Naturvernforbund and others (2009)

[325] Cermaq and others (2011) 1

have been operated in "a more sustainable manner".[326] It was agreed that "(w)here government regulation does not ensure the sustainability of aquaculture, the industry should take its share of responsibility."[327] By this, the company seemed to acknowledge a responsibility to develop the sustainability of Chilean aquaculture. The company further emphasised that since 2007 it had undertaken "constructive measures" and contributed to develop "knowledge" about how the industry could be made more "sustainable".[328] Cermaq confirmed that its activities "should be organised so as not to undermine the potential for future production based on the same resources",[329] a statement which contains the essence of the principle of sustainable use.

In the joint statement, Cermaq appeared in particular to focus on its ability to contribute with scientific resources, research and information to the Chilean aqua-cultural industry.[330] For instance, Cermaq stated that it would contribute to the development and use of "environmentally friendly technology".[331]

Cermaq looked to "best practices" in a global context in order to define standards for its operations in Chile, stating that "the dissemination of *best practice* across its operations *globally* is important to ensure sustainability and improvement of operating procedures."[332] (Emphasis added.) The company confirmed the relevance of the OECD Guidelines, the UN Global Compact, the eight ILO Conventions and the UN Declaration of Indigenous Peoples as guidelines for its operations.[333]

The company further considered its home-country's regulatory framework for aquaculture industry as "a starting point for efforts to influence legislation in Chile."[334] As a general principle, this makes logical

[326] Ibid
[327] Ibid
[328] Ibid
[329] Ibid 2
[330] Ibid 1
[331] Ibid 2
[332] Ibid
[333] Ibid 2-3
[334] Ibid 2

sense, if the home-country is more technologically advanced than the host country, as the home country then represents the basis for TNCs' knowledge and insight into good practices.

Both the precautionary and preventive principles are accepted by Cermaq. The company explicitly stated that in its activities "(s)ufficient account was not taken of the precautionary principle."[335] Precaution was further defined as "in the OECD Guidelines for Multinational Enterprises, including discussion of scientific uncertainty".[336]

Cermaq further conceded that "the company has a responsibility for people, communities and environment affected by its activities".[337] Consequently, it confirmed the wide definition of environmental damage which is found in the introductory paragraph in chapter VI.[338] This again illustrates that environmental risks have to be assessed in a societal context.

In conclusion, the joint statement indicates that Cermaq accepted some level of responsibility to contribute to develop a sustainable Chilean aqua-culture, especially by the transfer of best practice knowledge and technology. It also demonstrates that the company considers both internationally binding and non-binding instruments as applicable to its activities.

It is, on the other hand, possible to question the effectiveness of this joint statement. In a follow-up study commissioned by the complainants one year after the completion of the complaint procedure, it was found that little had changed it Cermaq's practices.[339] These findings have, however, apparently been denied by Cermaq.

4.3.2 The complaint against Intex Resources

In 2009, "Fremtiden i våre hender" (FIVH), a Norwegian NGO, brought a complaint against Intex Resources ASA (Intex), a Norwegian registered

335 Ibid
336 Ibid
337 Ibid
338 OECD Guidelines (2011), chapter VI, introduction
339 http://www.oecdwatch.org/cases/Case_166, (14 November 2015)

mining- and exploration company. The complaint addressed the operation of the Mindoro Nickel mine in the Philippines by a fully owned subsidiary of Intex.

The environmental allegations against Intex were 1) there was a risk of severe environmental damage if the project was materialised, and 2) this had not been appropriately communicated to potentially affected communities.[340] Intex was also accused of failing to consult with indigenous people, indicating that the Free, Prior and Informed Consent which the company had obtained in accordance with the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was unsatisfactory. The company was further accused of bribery. In the following the focus will be the environmental aspects to the complaint.

Intex had undertaken an EIA in accordance with national legislation.[341] The question to the NCP was whether Intex' EIA was conducted in a satisfactory manner, and addressed relevant social and environmental implications of the project. As Intex had declared its adherence to the World Bank/International Finance Corporations Standards and the 2011 IFC Performance Standard,[342] the NCP found that the standards for Intex' due diligence procedures had to be based on the OECD Guidelines in combination with these instruments.[343]

The NCP started by pointing out that the OECD Guidelines established a responsibility for enterprises to "maintain a system of environmental management".[344] They found that part of this environmental system should be to collect and evaluate "*adequate* and *timely* information regarding the environmental, health, and safety impacts of their activities".[345] (Emphasis added.) Consequently, the NCP appeared to include consultation procedures in EIAs under the Guidelines. Thereafter, the NCP considered IFC Performance Standard 1, finding that this re-

340 FIOH vs Intex (2011) 5
341 Ibid 37
342 Ibid 6
343 Ibid
344 Ibid 36
345 Ibid

quired a Social and Environmental Assessment to include assessments of risks and impacts in the "key stages of the project cycle, including pre-construction, construction, operations, and decommissioning or closure (…)"[346] An EIA, according to the IFC Performance Standard 1, should further describe all the components of the project, as well as any "associated facilities" developed directly as a result of the project.[347] The IFC Performance Standard was further found to require EIAs to specify impact mitigation and monitoring measures, and to establish follow-up assessments and procedures for any components that are not fully defined at the time the EIA is conducted.[348] The NCP stated that in the present case the "duration, size, and complexity of the project speak to the need for a detailed and clear EIA about key aspects of the project."[349]

The NCP confirmed and elaborated on several of the international minimum standards for EIAs that were discussed previously, affirming the importance of mapping and follow-up uncertainties, as well as the need to prepare monitoring and mitigation measures. The NCP also added an extra responsibility for supply chains, which is not part of states' environmental due diligence obligations, but seems to be part of TNCs' due diligence standards. In this, states' and TNCs' environmental due diligence processes differ. The NCP further confirmed the relativity of TNCs' environmental due diligence obligations, stating that this will vary in accordance with the size and duration of industrial projects.

In the complaint, the NCP found that Intex' EIA included detailed information of major components to the project and altogether contained a considerable amount of baseline physical and biological information.[350] Nonetheless, the EIA still failed to provide information about important aspects of the project. For instance, there lacked information about waste emissions, potential atmospheric emissions and marine pollution.[351] In

346 Ibid 40
347 Ibid 8
348 Ibid
349 Ibid
350 Ibid 8-9
351 Ibid 9

addition, there was little information about the dam wall and associated structures, as well as about potential impacts of the maintenance road and bridges, particularly whether they would run through wetlands and biodiversity areas.[352] The NCP set a high standard for the substantive content of the EIA, stating that "(t)o fulfil its objective, the EIA needs to be comprehensive; focus on the identification, clarification and objective analysis of issues; and be well-illustrated."[353] On this basis, the NCP concluded that Intex' EIA was "lacking on several points".[354] This was seen as a potential breach of the OECD Guidelines, as an insufficient EIA will prevent the public from receiving "adequate and timely information" on the environmental, health and safety impacts of the project.[355] This demonstrates the interconnection between sufficient EIAs and public participation, as the latter is based on former.

In the case against Intex, the NCP set quite strict requirements to the content of EIAs. EIAs should generally stand in correlation with the size and potential risks associated with industrial projects and the bigger the project, the bigger the risk. Hereupon, TNCs should be prepared to undertake quite comprehensive EIAs in relation to big projects, are they to fulfil their environmental due diligence obligations under international instruments.

In relation to the quality of the environmental information Intex had given to the public, the NCP based itself on the OECD Guidelines' recommendation of providing "adequate and timely information" to the public.[356] The IFC Performance Standard's recommendation of early disclosure of companies' EIAs was also noted.[357] And the NCP observed that the "key objective" with EIAs should be to provide information to the public, and concluded that "(t)he deficiencies identified in the EIA reduce its value in providing information to affected communities and

352 Ibid
353 Ibid
354 Ibid 46
355 Ibid
356 Ibid 44
357 Ibid 43

other interested parties."[358] To the NCP, there appears to have been a clear correlation between the properly conducted EIAs and the fulfilment of the Guidelines' recommendation of providing "timely and adequate" information to the public. This demonstrates an area where there is overlap between substantive and procedural requirements in environmental law. If the substantive elements of EIAs are lacking, then the procedural requirements of conducting EIAs and engaging in public consultation cannot be fulfilled. On this basis, the NCP in the present case clearly considered that public consultation should be part of the EIA procedures under the OECD Guidelines.

Furthermore, the right of indigenous peoples to consultation and cooperation seemed in the present case to strengthen the arguments in favour of public consultation. It further gave indications as to the requirements to satisfactory public consultation. Intex was found to have failed to engage in satisfying consultation with affected local communities. The company ought to have consulted all indigenous groups that potentially could be affected by the project. This included peoples affected by both the mine and the related infrastructure. Intex should also at an earlier stage of the project planning have "systematically investigated whether indigenous groups other than (the two they had consulted) could be impacted by all project components."[359] The company should further have "investigated if the groups with which they have consulted are legitimate representatives of all the affected indigenous peoples."[360] Consequently, the NCP expected the company to undertake consultations with all potentially affected communities, not just a select few.

The NCP further criticised that the EIA has not been made generally available to the public. Governors and mayors in the two relevant provinces have not seen it, it has not been made available online or translated into Tagalog or Mangyan dialects.[361] It was also noted that information available online was of little help to the locals, as most Mindorenos did

[358] Ibid 44
[359] Ibid 6-7
[360] Ibid 7
[361] Ibid 44

not have access to internet.[362]

Intex had conducted information campaigns in relevant areas. However, the NCP found no evidence that it had been explained to the local population whether proposed mitigations would be sufficient to prevent an increase of landslides, the contamination of water sources, where and how waste disposal will be carried out, the location of the processing plant, details related to the conveyor route, and other transportation issues. The NCP observed that "such information should be made available to the local population at an early stage of the project in accordance with the OECD Guidelines and IFC Performance Standard 1."[363] It was concluded that "the lack of a readily available EIA and other environmental and social information makes it difficult for the affected community to evaluate whether to support (the project)".[364] Intex had therefore failed to provide "adequate and timely information" on the environmental, health and safety impacts of the project. Hence, the NCP established relatively strict criteria for TNCs' consultation with potentially affected communities, requiring that they have an open and informed dialogue with the locals.

In conclusion, the case against Intex established quite strict criteria for TNCs both in relation to EIAs and consultation with potentially affected communities. It may be questioned if the standard of due diligence in this case borders to objective responsibility, as the criteria discussed by the NCP are strict and do not seem to take the NCPs' resources into account. Importantly in this regard, the case concerned a big and risky mining project in a "vulnerable" environment, as emphasised by the NCP.[365] In other words, this is likely to be the strictest standards provided for by the Guidelines, as this case concerned one of the most risky projects a TNC can undertake.

362 Ibid
363 Ibid 45
364 Ibid
365 Ibid

4.3.3 The complaint against Sjøvik AS

The Norwegian Support Committee for Western Sahara accused the Norwegian company Sjøvik AS of violating the human rights chapter in the OECD Guidelines.[366] Mediation was successfully concluded in the case.

This case is interesting for the purposes of this thesis because it contains remarks relating to the concurrence between human rights and environmental due diligence standards. In their joint statement, the parties agreed that "the recently endorsed UN Guiding Principles and the new chapter on human rights in the OECD Guidelines provide a good platform for efforts relating to human rights and the environment."[367] The parties further observed that "(u)nder the OECD Guidelines, companies are required to carry out risk and environmental and social impact assessments/ due diligence, so that they can be sure and can document that they are not violating, or aiding and abetting other actors in the violation of, human rights or environmental norms."[368] And Sjøvik AS stated that it would "carry out an environmental and social impact assessment for its activities based on the principles set out in the OECD Guidelines and the recently enacted UN Guiding Principles on Business and Human Rights."[369]

Consequently, the parties appeared to assume that the human rights due diligence provisions in the UN Guiding Principles are potentially applicable to environmental issues. This is interesting, as it demonstrates that human rights and environmental protection sometimes overlap. In addition, it could be taken as an indication of the similarities between human rights and environmental due diligence processes, as discussed previously, implying that these processes in some cases can be combined.

366 NSCWS vs Sjøvik (2011)
367 NSCWS and Sjøvik (2013) 2
368 Ibid
369 Ibid 3

4.3.4 The complaint against Norconsult AS

Similarly, in 2013, the Norwegian Association for International Water Studies (FIVAS) filed a complaint against the Norwegian TNC Norconsult for its involvement in hydropower projects in Sarawak in Malaysia. The complainants claimed that Norconsult failed to uphold its human rights responsibilities. Mediation was successfully concluded, and in their joint statement the parties made some comments which elaborate on the overlap between human rights and environmental due diligence procedures. It was stated that "(m)ajor hydropower projects can have severe negative consequences for indigenous populations and the environment in project areas."[370] Thus "(i)t is important that the *social* and *environmental* consequences are reduced to a minimum and that hydropower projects consider and respect indigenous people's rights and are carried out on the basis of the most stringent requirements for safety and respect for the community."[371] (Emphasis added.) They further agreed that TNCs should acknowledge the internationally recognised rights of those who are affected, and that this entailed "carrying out risk-based due diligence reviews, endeavouring to prevent or mitigate adverse impact, being open about predicable risk factors and consulting stakeholders in accordance with the OECD Guidelines and the human rights conventions."[372]

Hence, the parties in this complaint also seemed to consider human rights and environmental due diligence processes as tightly interconnected, finding the main components to be the same in both procedures: prevention, mitigation and consultation. Again, this could be taken to reflect the development of similar global norms in relation to TNCs' due diligence obligations in both these fields.

4.3.5 The case against Posco, ABP/APG and NBIM

In 2013, four NGOs lodged a complaint against Posco, a South Korean company, and two of its investors, the Norwegian Bank Investment

370 Norconsult and FIVAS (2015) 1
371 Ibid
372 Ibid

Management (NBIM), the Dutch Pension Fund and its pension administrator. It was claimed that these parties had violated both the human rights and environmental chapters of the OECD Guidelines.[373] Despite both the environmental and human rights chapters being part of the complaint, the Norwegian NCP chose to focus on the human rights aspects of the case. The Norwegian NCP's limited its assessment to whether NBIM had breached the OECD Guidelines. In this case, the NCP found that the OECD Guidelines apply to the financial sector, and consequently they also apply to minority shareholders, such as NBIM.[374]

The NCP explicitly stated that "(e)nvironmental issues are also relevant to this Specific Instance and the Environmental Chapter of the OECD Guidelines with the 2011 update includes due diligence requirements."[375] Thus the NCP confirmed the existence of specialised environmental due diligence obligations in the OECD Guidelines, and hinted that these environmental standards may have been relevant to the case.

As such, environmental due diligence appears to have been applicable in all of the last three discussed cases. It is noteworthy that the NCP in all three cases rather chose to focus on the cases' human rights implications. This can be taken to support the above discussed theory that human rights cases sometimes encompass other forms of complaints.

4.3.6 Rejected or pending cases potentially concerning environmental due diligence

The following section is intended to illustrate some of the issues in relation to the NCP system, as discussed above.

In 2011, 129 Roma in Kosovo claimed that the Norwegian Church Aid (a NGO) was in breach of the OECD Guidelines on general policies, human rights and environment because they did not prevent exposures

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373 Lok Shakti Abhiyan and other vs POSCO and others (2013) 5

374 Ibid 7, the Norwegian NCP has in 2015 chosen not to make statements with regards to two new complaints against NBIM, as it awaits decisions from the OECD in relation to minority shareholders: Cotton Campaign, Anti-Slavery International and KTNC Watch vs NBIM, and United Steel Workers (USW) og Birlesik Metal IS vs. NBIM

375 Ibid 6

to serious and lethal health risks caused by detrimental conditions in one of its camps. It was claimed that NCA had failed its due diligence responsibility to prevent several cases of lead poisoning, causing at least three deaths.[376] Noteworthy, this complaint also concerned an issue that potentially could be classified as both a human rights and an environmental problem. The case was rejected because the Norwegian Church Aid did not qualify as a company under the OECD Guidelines.

In 2012, Climate Network and Concerned Scientists accused Statoil of breaching its environmental due diligence obligations under the Guidelines, as its involvement in Canadian oil sand industry contributed to climate changes.[377] The complaint was rejected because it was directed against Canadian policies rather than corporate practice, which was outside the scope of the OECD Guidelines.[378] This case illustrates that it can be difficult to distinguish between government policies and corporate practices in environmental cases. If there is no international consensus with regards to acceptable environmental standards in an area, it is very difficult to impose stricter standards on TNCs than those that follow from national legislation. To do so can, for instance, interfere with states' sovereign right to exploit their natural resources[379] by imposing political choices on national economies.

In 2013, Jijnjevarie Sami Village claimed that Statkraft AS, a Norwegian state-owned company, violated the human rights, general policies and environmental chapters of the OECD Guidelines. The complaint mainly centred on Statkraft's alleged failed consultation process in relation to local communities.[380] After submission of the complaint, dialogue was renewed between the parties. The case was put on hold.[381] Thus the case mainly illustrates that public consultation can be both a human rights and an environmental issue.

376 Roma People vs Norwegian Church Aid (2011) 1-2
377 CN & CS vs Statoil (2012) 1
378 Ibid 1
379 Rio Declaration, principle 2
380 Jijnjevarie vs Statkraft (2013) 1-3
381 Ibid 2

4.4 Selected environmental cases before the Dutch NCP

The Dutch NCP is an independent body consisting of four experts and four advisory members from different government ministries. It follows the same procedure as the Norwegian NCP in its evaluations of complaints against TNCs. But the Dutch NCP differs from the Norwegian NCP by that it, as standard practice, publishes a brief evaluation of the implementation of the agreements and/or recommendations on its website one year after the final statement. In the following, two selected environmental complaints which were processed by the Dutch NCP will be discussed, focusing on the environmental due diligence standards they entail, as well as what they reveal about structural weaknesses in the NCP system.

4.4.1 The complaint against Pilipinas Shell Petroleum Corporation

In 2006, three NGOs brought a complaint before the Dutch NCP against Pilipinas Shell Petroleum Corporation (PSPC), a Philippine subsidiary of Royal Dutch Shell. PSPC was accused of violating the chapter in the OECD Guidelines concerning bribery, lack of disclosure and environment.[382] The environmental complaint involved alleged failure to provide information on potential environmental, health and safety impacts of activities, and failure to adopt contingency plans for serious environmental and health damage. Mediation failed in this case, so the Dutch NCP assessed the complaint.[383]

The NCP first considered the alleged failure to provide "adequate and timely" environmental information. In this regard, the NCP criticised the ambiguity of the OECD Guidelines, stating that they require "only vaguely specified corporate action such as 'adequate and timely consultation' (…) without further appraisal of what constitutes

[382] Pilipinas Shell Petroleum Corporation (2009) 2-7

[383] Ibid 23

adequate and timely information."[384]

In order to solve this ambiguity, the NCP reasoned that "one can either look at what constitutes (…) an adequate and timely consultation under the local circumstances, or from the perspective of the homeland."[385] But the NCP observed that "(c)ompanies may advocate local practice as the leading perspective, but this would not further the objective of the OECD Guidelines – good corporate conduct in a level playing field – at all. Therefore, the NCP underlines that the OECD Guidelines imply that the standard for communication with stakeholders should be derived from the practices and legal systems common to the home OECD countries, and not from local practices and legislation."[386] As such, the NCP found that the OECD Guidelines ought to be interpreted in light of their objective of encouraging "good corporate conduct in a level playing field",[387] concluding that home countries' common legislation should be the basis for standards in the Guidelines. By this, the NCP appeared to elaborate on the position of the parties in the joint statement in the Cermaq case, in which the TNC's home country's legislation was considered as a starting point to evaluate corporate practices.

In its assessment of whether PSPC had complied with its responsibility to inform the public of health, safety and environmental risks, the NCP started by assessing the known risks associated with the oil deposits. It found that there was little concrete information available as to potential environmental or health risks. Scientifically speaking, it was uncertain whether the increased levels of certain aromatic hydrocarbons in the air could be attributed to the operation of the project.[388] But the NCP still chose to consider whether PSPC had fulfilled its duty to consult and inform potentially affected communities. Consequently, the NCP appeared to take a precautionary approach to companies' duty to inform

384 Ibid 10

385 Ibid

386 Ibid

387 A level playing field can be defined as equal competitive opportunities for the TNCs

388 Pilipinas Shell Petroleum Corporation (2009) 9

local communities. Consultation should take place, even if risks are uncertain, if they are scientifically possible and have the potential to cause serious damage.

The NCP noted that the company had made efforts to inform local communities, such as setting up a website, and undertaking community information and capacity-building programmes. But, similar to the findings in the complaint against Intex, the NCP found that information campaigns had only involved three communities immediately adjacent to PSPC. It was observed that "(g)iven that other Pandacan communities are also potentially at risk, albeit possibly to a lesser extent, NCP strongly recommends that PSPC expand its information programme and consultation to other potentially affected communities in Pandacan."[389] As such, similar to in the Intex case, the NCP concluded that all potentially affected communities should be included in the duty to consult in the OECD Guidelines. In both cases the duty to consult was considered to contain substantive elements.

Furthermore, the NCP criticised the form of communication that the company had with stakeholders, saying that it had "too much of an information-giving nature, instead of substantive consultations and discussions of risks and responses."[390] Hereupon, the NCP stated that there was need for more dialogue. Thus the NCP set substantive criteria to the form of communication between TNCs and affected communities, establishing that consultations ought to be actual discussions where potentially affected communities have a chance to be heard.

The NCP then considered PSPC's alleged lack of contingency plans in its undertaking of the project. It was assessed whether the measures that PSPC had implemented between 2003 and 2006 to scale down and restructure its operations in Pandacan were in accordance with the company's worldwide environmental and safety standards, including proper clean-up and disposal of toxic waste.[391] No direct breach of the Guidelines was observed, but the NCP found that it could not be confir-

[389] Ibid 10
[390] Ibid
[391] Ibid 11

med that the company had "operated in accordance with the strictest environmental and safety standards prior to the clean-up."[392] The implemented measures had not been taken as "a matter of good practice to apply the best of health and safety measures in every country where the multinational in question is operating, as recommended in the OECD Guidelines",[393] but as a result of local regulation passed by the city council to address the situation. In this regard the NCP commented that "for an OECD-country-based multinational it is not enough to simply comply with local law and permits; in specific instances, the OECD Guidelines should be taken as the more authoritative guide to proper conduct.[394]

In conclusion, the NCP assumed substantive obligations on TNCs to consult from the OECD Guidelines, confirming the standards outlined in the above discussed Intex case. The NCP further remarked that common standards for the OECD countries should be the interpretative basis of the Guidelines, and that OECD-based TNCs should strive to conduct their global operations in accordance with such best practices. However, the NCP concluded that it did not have sufficient information to declare a breach of the Guidelines in the present case.[395]

4.4.2 The complaint against Shell in the Niger Delta

In 2011, Amnesty International, Friends of Earth International and Friends of Earth Netherlands submitted a complaint against Shell before the Dutch NCP. The NGOs alleged that Royal Dutch Shell violated the OECD Guidelines by providing misleading information about causes of oil spills. It was claimed that Shell based its communications on biased and non-verified information, failing to provide reliable and relevant information to external stakeholders.[396] Mediation was unsuccessful, so the NCP conducted an assessment of the complaint. This is the basis for the discussion below.

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392 Ibid

393 Ibid

394 Ibid

395 Ibid 13-15

396 Amnesty and others vs Shell (2013), 3

The NCP placed constraints on its evaluations of the facts in the case, because there had not been "undertaken a mission to verify the information that has been provided for" by any of the parties or the NCP.[397] Hence, the NCP found that "information on spills and spill cause determination procedures apparently allow for different interpretation."[398] The facts of the complaint were therefore considered unclear.

Due to the uncertainty of the facts, the NCP restricted its assessment to more general remarks. It observed that "there is a role to play for the parent company when international governance standards require more than just compliance to local law."[399] And in the specific case, the NCP recognised that "under the OECD Guidelines (Royal Dutch Shell) cannot ignore its ultimate responsibility and accountability concerning local operations of (Shell Petroleum Development Company of Nigeria Limited)."[400] The NCP further commented that it agreed with the UN Guiding Principles in that "leadership from the top is essential".[401] This meant, according to the NCP, that "the parent company of a multinational, e.g. (Royal Dutch Shell), has to actively stimulate pro-active observance of its subsidiaries to the OECD guidelines for multinational enterprises."[402] At a general basis, the NCP seemed to find that parent companies have the ultimate responsibility for ensuring that its subsidiaries operate in accordance with international norms. Hinting that such a responsibility would apply to Shell in the present complaint, the NCP still did not draw any conclusions in this regard. As such, the NCP shifted a considerable burden of proof onto the complainants, making it hard to bring similar claims before the NCP in the future.

In light of the dissenting opinion of Judges Simma and Al-Khasawneh in the *Pulp Mills* case, this could be viewed as a failure on behalf of the NCP to take account of the precautionary principle. As discussed, the

397 Ibid 3
398 Ibid
399 Ibid 5
400 Ibid
401 Ibid
402 Ibid

two judges argued that the precautionary principle entails that courts and tribunals should make independent assessments of evidence.[403] Since the NCPs often have limited resources available to them, this may be taken to imply that they should shift the burden of proof to the stronger party, in this case Shell. However, as the status and implications of the precautionary principle in international law are so unclear, this is a highly questionable assumption.

Noteworthy, the NGOs that launched the complaint against Shell were unsatisfied with the above described NCP procedure. Their dissatisfaction caused them to withdraw another complaint that they had also brought before the NCP concerning Shell's activities in the Niger Delta. The NGOs stated that their primary reason for withdrawal was that they felt "that there had been no meaningful consideration of evidence presented and the NCP was unable to prevent Shell form obstructing the OECD process."[404] From this, the NCP system, if to become an effective accountability mechanism for implementation of the OECD Guidelines, may need to review its procedures relating to evidence.

4.5 Selected environmental cases before the UK's NCP

The British NCP is based in the Department for Business, Innovation and Skills. Its work is overseen by a board, which includes four external members from the business sector, trade unions and NGOs.[405] The British NCP's structure is unique among its peers and its external steering board has helped to create some degree of independence.[406] Its complaint procedure is similar to the Norwegian NCP, with the difference that the UK's NCP can request follow-up statements from the parties.[407] In the following two selected environmental complaints before the British NCP

[403] Pulp Mills, joint dissenting opinion of Simma and Al-Khasawneh, para 6-8

[404] Amnesty and others vs Shell II (2015), 5

[405] https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines (10 September 2015)

[406] Remedy Remains Rare (2015) 34

[407] UK NCP Procedures (2013)

will be outlined, analysing their standards for corporate environmental due diligence.

4.5.1 The complaint against SOCO International plc

In 2013, WWF[408] brought a case against SOCO, a British TNC, alleging that SOCO conducted illegal oil exploration activities in the Virunga National Park in the Democratic Republic of Congo (DRC).[409] In "Remedy Remains Rare", the SOCO complaint is described as one of the most successful cases in the history of the NCP system.[410] Mediation was successfully concluded in the complaint, and the parties' joint statement is the basis for the discussion below.

Uniquely in the NCP system, SOCO agreed that it would "complete our existing operational programme of work in Virunga (…) within approximately 30 days of the date of this statement."[411] The company thus committed to end their current activities within the national park due to the risk of environmental damage. SOCO further committed "not to undertake or commission any exploratory or other drilling within Virunga National Park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status."[412] By this, the TNC bound its ability to conduct future activities within the protected area. Indirectly the company seemed to agree that it was impossible to undertake industrial activities in this vulnerable area without compromising environmental concerns. SOCO also accepted that UNESCO had to concede to any future operations in this area. This is interesting, as the company appeared to recognise that its activities would have to be in accordance with international norms, instead of merely national legislation.

In addition, SOCO committed "not to conduct any operations in any

408 World Wildlife Fund for Nature
409 WWF vs SOCO (2014) 4
410 Remedy Remains Rare (2015) 5
411 WWF and SOCO joint statement (2014) 7
412 WWF and SOCO joint statement (2014) 7

other World Heritage site."[413] Further stating that "(t)he company will seek to ensure that any current or future operations in buffer zones adjacent to World Heritage sites, as defined by the national government and UNESCO, do not jeopardise the Outstanding Universal Value for which these sites are listed."[414] As such, SOCO made general commitments in relation to its future business dealings, implicitly recognising the special status of World Heritage sites and that activities in these areas often represent unacceptable environmental risks that are difficult to compensate by preventive measures.

The company further assured that "when we undertake environmental impact assessments and human rights due diligence, the processes we adopt will be in full compliance with international norms and standards and industry best practice, including appropriate levels of community consultation and engagement on the basis of publicly available documents."[415] Consequently, the company hinted that EIAs are essential for TNCs to fulfil their environmental due diligence obligations, indirectly comparing EIAs to the concept of human rights due diligence as can be found in the UN Guiding Principles. This implies that these two procedures fulfil the same purpose in two separate fields. It is also noteworthy that SOCO referred to international norms and standards, as well as industry best practices, as the basis for EIAs and human rights due diligence processes. This implies that the company recognised relevant international instruments as essential guidelines for corporate practices.

In conclusion, SOCO made several specific commitments with regards to its present and future business undertakings in the above described joint statement. This makes it easier for both the company and others to know if they in the future follow the agreement. The company further seemed to assume that international norms and standards were the appropriate guidelines for good business practice. This can be taken to affirm the potential applicability of international instruments to TNCs.

[413] Ibid 7

[414] WWF and SOCO joint statement (2014) 7

[415] Ibid 7

4.5.2 The complaint against BHP Billiton in Mozambique

In 2012, on behalf of several NGOs, Justica Ambiental (JA) brought a complaint against the British mining company BHP Billiton PLC before the UK's NCP. JA accused BHP Billiton of violating the human rights and environmental chapters of the OECD Guidelines. The grounds for these allegations were BHP's plan of bypassing for six months the fume and gas treatment centres for its aluminum smelter in Mozambique.[416] JA claimed that this project constituted two violations of the OECD Guidelines: 1) by an inadequate environmental management plan produced by Mozal, the subsidiary of BHP, 2) by insufficient consultations with potentially affected communities.[417] Mediation was rejected in the case,[418] so the British NCP assessed the complaint. Its assessment is the basis for the discussion below. Only the environmental aspects of the complaint will be addressed.

The NCP started by assessing whether Mozal's environmental management system was satisfactory. It first considered whether Mozal's choice of bypassing its fume treatment centres had been sufficiently researched before the project was decided. Mozambique's Ministry for Coordination of Environmental Affairs had granted Mozal a special authorisation to conduct the bypass on the basis of information from the company. This information was kept confidential by Mozal and BHP Billiton. But as the special authorisation had been confirmed by the Administrative Court of Mozambique, the NCP found it sufficiently proven that it was conducted on credible information. The information was further attributed to researchers at Eduardo Mondlane University in Maputo.[419]

The NCP further considered different measures instated by Mozal as evidence of a satisfactory environmental management plan. For instance, the NCP placed weight on that in Mozal's presentations the goal for the project was described as "zero harm". The NCP emphasised that the

[416] Justica Ambientel et al. vs BHP Billiton PLC (2012) 6
[417] Ibid 7
[418] Ibid 10-11
[419] Ibid 14

company's definition of zero harm as "(m)anaging and controlling environmental aspects to ensure that no harm comes to people and/ or the environment", was based on the standards of the World Health Organization.[420] Moreover, the NCP noted that an internal message from Mozal to its employees had stated that "(t)his project will be measured in accordance with the standards of the World Bank, the World Health Organisation as well as ISO 14001. (…) Part of Mozal's monitoring (…) is to measure the emissions and ambient concentrations on a regular basis against World Bank and World Health Organisation standards. These international standards consider the cumulative effects over a 75 exposure year period. We target to meet or exceed these international standards."[421] Mozal's references to internationally accepted standards were thus considered proof of its satisfactory environmental management system.

In their comments to Mozal's management plan, BHP promoted that it contained assessments of environmental, occupational, social, and financial impacts of the project, as well as evaluations of the duration of the bypass.[422] Thus properly undertaken EIAs, among other risk assessments, were considered as central to legitimise Mozal's management system. This illustrates that EIAs are central in TNCs' environmental due diligence processes, representing a way for multinational corporations to "know and show" that they have fulfilled their duty of care. With regards to the content of EIAs, BHP Billiton placed significant emphasis on the fact that different alternative options to the bypass had been investigated, claiming that this meant that the best alternative had been chosen.[423] Thus BHP seemed to confirm that EIAs should contain assessments of alternatives as part of their environmental due diligence process. Hereupon, the NCP found Mozal's environmental management system to be satisfactory.

Thereafter the NCP considered whether BHP had engaged in "timely and adequate" consultation with local communities potentially affected

420 Ibid 15
421 Ibid
422 Ibid 14
423 Ibid

by the bypass. It was found that at least one stakeholder meeting had taken place prior to the special authorisation of the project by Mozambique's government. Afterwards stakeholders had been given Mozal's contact information in case they had further enquiries. The NCP concluded that there had been interaction and several meetings between Mozal's employees and local communities prior, during and after the bypass.[424] However, the NCP expressed concern because English had been the main language of communication in these meetings between Mozal and civil society. But the NCP established that as translation services had been available during the meetings the use of English was acceptable.[425] Hence, the NCP also in this case set up substantive elements in relation to the duty to consult in the OECD Guidelines, as well as implying that consultation should be part of the EIA procedures.

By this, BHP appears to represent an example of properly conducted environmental due diligence obligations. This shows that the NCP system can establish standards for good corporate practices.

4.6 Concluding remarks

In general, the structural and functional differences of the OECD NCPs appear to set the foundation for an inconsistent compliance system. Theoretically, the NCP system has the potential to provide accountability mechanisms for corporate activities. The non-binding OECD Guidelines regulate many of the most central areas of business and could potentially form a basis for global best practices. However, without a working system of compliance to uphold and establish standards for corporate behaviour, this is unlikely to develop.

In relation to environmental complaints, the normative standards in the OECD Guidelines are based on principles in international environmental law, but these principles have an abstract and vague nature. If interpreted by authoritative bodies they may still develop into concrete and workable obligations. In the complaints assessed by the NCPs, norms

[424] Ibid 23

[425] Ibid

for environmental due diligence obligations can be identified, such as precaution, sustainability, prevention, EIAs and the duty to consult. Being a procedural requirement, EIAs are the most specific of these normative standards and potentially one that can be tested by civil society and others. The EIA procedures have many of the same features as the human rights due diligence process established by the UN Guiding Principles. As such, EIAs may potentially be a way for TNCs to "know and show" that they have respected their environmental due diligence obligations.

The strength of EIAs in this regard, is that they represent a way of combining substantive and procedural requirements. This is demonstrated by the above described cases, in which the quality of EIAs and their public consultation procedures were evaluated. In relation to the OECD Guidelines, public consultation seems both to be an independent requirement, as well as a required element to the EIA procedures. EIAs potentially also represent a way of making more concrete requirements on the basis of other principles of international environmental law, such as precaution and sustainability. The above discussed joint statements, read in combination with global CSR movements such as the UN Global Compact, imply that TNCs are inclined to recognise and accept that such universal environmental principles apply to their activities. Thus the potential for workable and more defined environmental due diligence obligations is present in the OECD Guidelines.

On the other hand, in order for such standards to develop, the NCP system would have to define clear procedural and substantive criteria as part of the EIA process. In addition, as stated, there has to be a functional compliance system in place, so that both push and pull factors are present and TNCs can avoid the prisoners' dilemma.

The current NCP system, even in relatively well-functioning NCPs such as the Norwegian, Dutch and British NCPs, is too flexible and unpredictable to establish clear standards for corporate environmental due diligence obligations. As illustrated by above, statements from successful mediation are often unspecific and vague on behalf of TNCs. In some cases, such as the SOCO complaint, this may be different, but

this is the exception rather than the rule.

The NCPs have not outlined clear standards for TNCs' environmental due diligence responsibilities. This is needed if the Guidelines are to become effective in relation to environmental protection. An example of a working system based on clear-cut corporate environmental due diligence standards will be outlined in the next chapter of this thesis.

5 Environmental due diligence as presented in the practice of the Norwegian Council of Ethics

5.1 Introduction

5.1.1 Introductory remarks

The main point in the present chapter is to illustrate potential criteria for corporations' environmental due diligence obligations, as developed by the Norwegian Council of Ethics (the Council). It aims to demonstrate that the Council has developed fixed standards for when TNCs can be held responsible for causing environmental damage. These standards are exemplified by the Council's practice.

In this regard, the committee, which defined the ethical criteria that the Council bases its recommendations upon, sought to identify an overlapping consensus of ethical values that were consistent over time. In order to achieve this objective, the committee relied largely on internationally accepted principles, and specifically cited principles found in the UN Global Compact and the OECD Guidelines.[426] This shows that the Council's practice is directly linked to the interpretation of the same principles that are discussed in the previous chapters.

The Council is further relevant for this thesis as an example of a functioning corporate accountability mechanism. In a global context, the Council represents a special form of accountability mechanism, as an investor's advisory body on ethical investment. It is therefore a different mechanism to the OECD NCPs, but it is still an interesting point of comparison, because the Council applies international norms to TNCs. The possibility of holding TNCs accountable, and as such create more fixed norms, is central to the development of corporations' international ethical responsibilities. As stated, it is the NCP system that distinguishes

[426] Chesterman (2008) 585-586

the OECD Guidelines from many other codes of social corporate responsibility.

5.1.2 The Council on Ethics and environmental cases

The Council is an independent ethical advisory committee for the Norwegian Oil Fund. It consists of five experts who are assisted by a secretariat and has the possibility of hiring independent consultants for the cases. Established by a royal decree in November 2004, the Council is a unique accountability mechanism for corporate conduct, supervising and assessing the ethical behaviour of the companies and their units in which the Oil Fund is invested. The Council can recommend disinvesting from unethical corporations or placing these under observation. The recommendations are given either on the basis of *products*, such as weapons that violate humanitarian law, tobacco, or the sale of weapons or military equipment to certain states.[427] Or, alternatively, on the basis of *conduct* which generates an unacceptable risk that the company or a unit it is responsible for, are complicit in serious or systematic violations of human rights, serious violations of individuals' rights in war or conflict, severe environmental damage, or other particularly serious violations of fundamental ethical norms.[428]

Importantly, the Council's mandate differs from the OECD NCPs'. Both of them are state-based non-judicial mechanisms for corporate social responsibility. But the Council's mandate is based upon risk-assessments of corporations' future behaviour. Thus, even if considerable abuses have taken place in the past, if the future risk of abuse is deemed to be low, the Council will take no action. The Council further investigates cases on its own initiative, on the basis of information that its secretary gets through surveillance of media and other sources' reporting on companies. As the Council does hold oral hearings, the Council has been criticised for being one-sided and not allowing TNCs to rebut accusa-

[427] https://www.regjeringen.no/contentassets/2b45214393d2464f9e75ef6c56870fd9/retningslinjene_etikk.pdf

[428] Ibid

tions.[429] However, the Council invites companies to comment upon allegations before it makes statements, and it generally conducts extensive independent investigations of cases.[430] In contrast, the OECD NCPs are set up as a form of non-judicial remedial mechanism for victims for corporate abuses. Their mandates are mainly based on processing individual complaints.[431] Moreover, the OECD NCPs are generally obliged to initiate mediation and dialogue between the parties of a conflict, meaning that complaints can be settled by the parties without any independent assessment of the facts. Thus the OECD NCPs and the Council have different working methods and mandates, and make for an interesting comparison.

The Council has given a number of recommendations concerning TNCs' environmental conduct and undertakings. In several of its assessments, the Council has chosen to focus on environmental concerns rather than human rights, corruption or other alleged areas of violations.[432] Ola Mestad, former Chair of the Council, says that this was a deliberate choice because they experienced that environmental issues were more easily attributed directly to companies' practices. This made environmental recommendations more readily accepted among TNCs, the Ministry of Finance and the Norwegian Bank as corporations' responsibility and grounds for exclusion.[433] Furthermore, this is also indicated by the Council's practice, in which the majority of the recommendation concern severe environmental damage:

[429] Chesterman (2008) 593

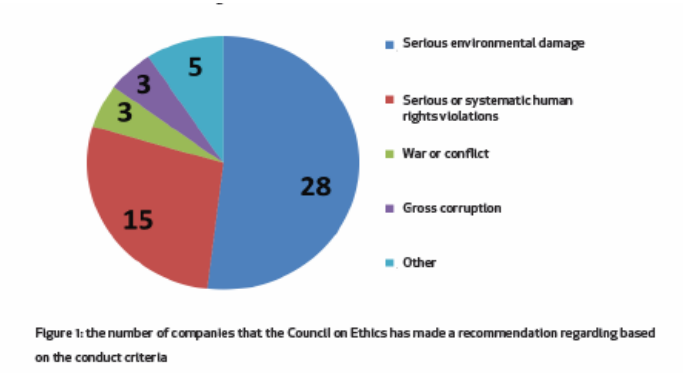
[430] Ibid

[431] The Danish NCP has since 2012 had a right to initiate investigations, but this has never been used: http://virksomhedsadfaerd.dk/file/557525/peer_review_rapport_dansk_ncp.pdf ,page 19 (August 24 2015)

[432] DRD Gold Limited (2006), 17

[433] Conversation with Professor Ola Mestad

Figure 6: Overview of recommendations from the Council (per 2014)[434]



Seemingly continuing this trend, the new Council on Ethics has in 2015 only given four recommendations, which all of them concerned severe environmental damage.[435] This implies that in the Council's practice corporate environmental due diligence has been formed into applicable standards. This will be further discussed in the following.

5.1.3 The criteria defining "severe environmental damage"

The Ethical Guidelines for observation and exclusion of Companies from the Government Pension Fund Global[436] (the Ethical Guidelines) set out the criteria for conduct-based considerations of companies in section 3. In relation to corporate environmental conduct it is outlined that:

> "(c)ompanies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is

[434] Annual report 2014, the Council on Ethics for the Government Pension Fund Global, 24

[435] Daewoo International Corporation and POSCO, Genting Berhad, IJM Corporation Berhad, and PT Astra International Tbk (all from 2015)

[436] Ibid

> responsible for: c) *severe environmental damage*".[437] (Emphasis added.)

Thus the overall criterion established by section 3 c) of the Ethical Guidelines is whether "there is an unacceptable risk that the company contributes to or is responsible for (…) c) severe environmental damage". The phrase "severe environmental damage" is abstract and vague on its own, but the Council has elaborated on its meaning in their practice.

Starting with the recommendation about Freeport McMoRan in 2006, the Council has developed a list of seven main criteria for assessing if severe environmental damage has occurred. The three first of these criteria relate to how severe environmental damage should be defined, whereas the four others institute standards of care for TNCs in order to avoid such damage. Hereupon, the practice of the Council on Ethics may shed light on the substantive content of the concept of severe environmental damage in a corporate context, as well as on corporate environmental due diligence standards.

The seven criteria are whether 1) the damage is significant; 2) the damage has irreversible or long-term effects; 3) the damage has considerable negative impact on human life and health; 4) the damage is a result of violations of national laws or international norms; 5) the company has neglected to act to prevent the damage; 6) the company has implemented adequate measures to rectify the damage; and 7) it is probable that the company's unacceptable practice will continue.[438] This list is non-exhaustive and the Council may take other aspects into consideration,[439] but it generally seems to focus its evaluation of corporations' environmental conduct on these seven criteria. Normally, one or two of them in combination is sufficient to conclude that there is "severe environmental damage". In the following the seven criteria outlined by the Council will be discussed.

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[437] Adopted 18 December 2014 by the Ministry of Finance pursuant to the Royal Decree of 19 November 2004 and section 2, second paragraph, and section 7 of Act No. 123 of 21 December 2005 relating to the Government Pension Fund

[438] Ta Ann Holdings Berhad (2012) 2-3

[439] Freeport McMoRan (2006) 4

5.1.4 Contribution to or responsibility for severe environmental damage

The Council is to give recommendations of observation or exclusion of companies from the Norwegian Oil Fund on the basis of there being an unacceptable risk of them either "contributes to or (being) responsible for" severe environmental damage. In the recommendation about Freeport McMoRan, the Council interpreted direct responsibility to mean that "the company's acts or omissions must have caused the damage."[440] Direct responsibility is the most likely form of liability in relation to corporations' environmental responsibilities.

Complicity is explained by the Council as to "presuppose that another party is the main perpetrator."[441] This makes complicity, as defined by the Council, mostly applicable in human rights cases. This is because, as established by the Council, "only states can in principle be held liable for human rights violations. It may consequently be asserted that a company's complicity can only be established in cases where it is determined that the main perpetrator of the same violation is a state."[442]

However, as states normally cannot be categorised as the main perpetrator in environmental cases, due to the vagueness and non-binding nature of international environmental law, complicity is usually less relevant here.

5.2 "Severe environmental damage"

5.2.1 Criterion 1): whether "the damage is significant"

The first criterion for whether TNCs' have breached the standards for environmental due diligence has a similar wording as the above cited section 3 c) in the Ethical Guidelines, which addresses "severe" environmental damage. These two terms contain overlapping assessments, but "severe" has by its wording a higher threshold than "significant". This

[440] Ibid 6
[441] Wal-Mart (2005) 5
[442] Ibid 5

implies that the criterion of whether damage is "significant" represents an element in a broader assessment of corporate conduct, at the same time as it contains implications for overall considerations behind the Ethical Guidelines. As stated, the basic premise in order for environmental damage to be problematic in accordance with the Ethical Guidelines is that its adverse impacts have to be severe.

In the Council on Ethics' first recommendation about exclusion on the basis of "severe environmental damage", Freeport McMoRan, the Council said that "environmental damage can be defined as a measureable adverse change in a natural resource or in the environment caused directly or indirectly by external agents."[443] The Governmental White Paper on Ethical Guidelines,[444] the preparatory work which outlines the parameters for the Guidelines, states that the exclusion mechanism applies to "acts that cause considerable damage to the natural environment through pollution of air, water and soil; storage and disposal of waste or interventions which have severe irreversible effects on the natural environment, for example in relation to biodiversity, protected areas or human health."[445] This entails a wide definition of environmental damage, which includes effects on human health, and hereby potentially overlaps with human rights law.

But neither the preparatory work nor the Guidelines give any clear definition of what constitutes severe environmental damage.[446] According to the Council, the potentially broad definition indicates that "this must be assessed in each case."[447] The Council did "not find it appropriate to establish general criteria for defining special ecological value or which consequences may be acceptable";[448] this is because "the severity of the damage may be assessed in different ways, depending on the affected area's present and future functions, and whether economic, social or

443 Freeport McMoRan (2006) 3
444 NOU 2003:22, 167
445 Freeport McMoRan (2006) 3
446 Ibid 3
447 Ibid
448 Ibid 5

other values are given primary importance."[449] By this, the Council appeared to refer to the principle of sustainable development, citing its three elements. As discussed, the principle of sustainable development is signified by its abstract and inconclusive nature, allowing for wide political considerations. The Council confirmed that in its opinion the balancing of environmental, social and economic concerns is an open question, and that integration of these three "cannot be made on a general basis."[450] Loss of ecological value might be "acceptable" if profits and/ or social gains "outweigh the benefits of preserving the area."[451]

On this basis, the Council emphasised that "in order to regard loss of ecological value as severe environmental damage, the damage must be extensive, there must be degradation of special natural heritage features, or the damage must be of importance to future generations."[452] The Council further observed that "environmental damage will depend on the kind and the extent of the impact or the intervention, as well as the receiving environment's vulnerability and resilience."[453] Consequently, for the Council to recognise adverse environmental impacts as "significant", something special can be required, such as for instance a biologically unique area, habitats for rare species, or destruction of large ecosystems.

In this regard, the characteristics of the environmental area affected by corporate activities are central to the Council's evaluation of its ecological value. This can be illustrated by some of the Council's recommendations. For instance, in the recommendation regarding DRD Gold Limited's mining operations in Papua New Guinea and Fiji, the Council emphasised that "(i)t is well known that riverine ecosystems are extremely vulnerable to the input of sediments in large quantities".[454] Similarly, in the recommendation concerning NTPC Limited's construction of a large

449 Ibid
450 Ibid
451 Ibid
452 Ibid
453 Ibid 4
454 DRD Gold Limited (2006) 13

coal-fired power plant in southern Bangladesh, the Council considered that "the entire Sundarbans have unique environmental qualities, and that there is a special need to protect the mangrove forest in the Sundarbans generally and the world heritage sites and globally endangered animal species in particular."[455] In the recommendation concerning Ta Ann Holdings Berhad's (Ta Ann) activities that involved logging and clearing of forests in Malaysia, the Council commented that "these areas contain particularly important ecological values that are strongly threatened by deforestation and forest degradation."[456] The Council's practice in this regard will be analysed further in the following section.

This sets a relatively high threshold for environmental damage to qualify as "significant" in relation to TNCs, implying that for corporations to be held responsible for environmental degradation this must destroy natural resources for future generations. Hence, the Council appears to establish a high threshold for TNCs to be hold responsible. As mentioned, the threshold is low in relation to states for adverse environmental impacts to qualify as serious. Logically, it makes sense to have a higher threshold for TNCs' activities than for states. This is because one otherwise could end up in a situation where one imposed on states' right to exploit their natural resources[457] by setting environmental standards for TNCs operations. In addition, states and multinational enterprises have different purposes. TNCs ethical responsibilities come into play when states fail to do their job of safekeeping their populations or territories. Consequently, the threshold for their responsibility should be higher than states', as one otherwise could transfer decision-making power in relation to natural resources from states to TNCs. Thus the threshold for TNCs' responsibility is clearer in the Council's practice than in the OECD Guidelines, where there was given no information in this regard, which made it plausible to assume that it is the same as for states in international environmental law.

455 NTPC Limited (2014) 14

456 Ta Ann Holdings Berhad (2012) 16-17

457 Rio Declaration, principle 2

5.2.2 Criterion 2): whether "the damage has irreversible or long-term effects"

In Freeport McMoRan, the Council stated that "(i)rreversible effects include the loss of species and natural areas (biodiversity), climate change, high concentrations of environmentally hazardous substances and radioactive substances."[458] Thus irreversible effects are tightly connected to the vulnerability and resilience of the area in question, as discussed above. The Council further clarified that "(i)rreversible changes are serious due to their lasting consequences", and that also "other types of environmental damage can be regarded as severe, even though they are not necessarily irreversible in the strict sense of the word."[459]

According to the Council, the necessary condition for something to fulfil criterion 2 is that "the general damage persists over a long period of time", and that "a clean-up will require vast resources."[460] This can be illustrated by the recommendation about NTPC Limited, in which the Council placed emphasis on the potential accumulation of metals in the environment, stating that "(s)everal of the most environmentally harmful metals can accumulate in organisms", and that (t)his means that they remain in the ecosystem and are concentrated up the food chain with the result that top predators (…) may develop very high blood and tissue concentrations."[461]

Furthermore, in Freeport McMoRan, the Council outlined that important elements in its assessments are whether "endangered species or their habitats are adversely affected, whether the area contains unique values in terms of biodiversity, or whether it fulfills important ecological functions (water balance, protection against erosion, etc)."[462] This seems to reflect that some ecosystems are more vulnerable than others, and industrial activities are more likely to have long-term or irreversible effects in these areas. In these kinds of areas the risk of significant envi-

458 Freeport McMoRan (2006) 4
459 Ibid 5
460 Ibid 5
461 NTPC Limited (2014) 11
462 Freeport McMoRan (2006) 5

ronmental damage is higher, which entails that TNCs have an increased duty of care.

This was also an element in the assessment in the Ta Ann recommendation, in which the Council emphasised that there is a "documented risk that orangutans and other endangered species may have their habitats in Ta Ann's licence areas."[463] Similarly, in the recommendation concerning China Ocean Resources' unregulated and unreported fishing activities, the Council gave "weight to the fact that China Ocean Resources engages in targeted fishing of shark species that are deemed threatened in a global context."[464]

Interestingly, in some cases the Council has hinted that industrial activities cannot take place without causing irreversible environmental damage and thus violate the Ethical Guidelines. In the recommendation regarding Noble Group Limited's conversion of tropical forests into oil palm plantations in Indonesia, the Council noted that the island of New Guinea "is the home of an estimated five per cent of the world's animal and plant species, some two-thirds of which are only found on New Guinea", and that "…this raises the question of whether the conversion of rainforest in this part of Papua, and on such a large scale, is at all possible without running a high risk of irreversible damage to biodiversity and ecosystems in these unique areas."[465] This latter statement implies that this area is of such unique ecological value that its destruction cannot be balanced against social or economic concerns, possibly because it also has to be balanced against the needs of future generations. The Council did not state this clearly, however. But if interpreted in this meaning, it suggests that the Council agrees with Christina Voigt's view on the concept of sustainable development as having set limits. As discussed, Voigt seemed to establish a very high threshold for situations where environmental concerns would trump the other two, stating that an argument can be made in favour of "not endanger life-supporting eco-

463 Ta Ann Holdings Berhad (2012) 18

464 China Ocean Resources (2013) 11

465 Noble Group Limited (2013) 13

logical systems".[466] In their statement the Council appeared to think that the rain forests of Papua New Guinea might be an ecosystem of such unique value that it fulfilled this requirement. But as it was not explicitly stated, such conclusions must be drawn with care.

The Council did, however, raise similar concerns in its recommendation concerning Daewoo International Corporation and POSCO's conversion of tropical forests into plantations in Indonesia, remarking that the concession areas were located in "a particularly ecological region with an exceptionally rich, unique biodiversity."[467] Also in this recommendation, the Council asked almost rhetorically whether conversion of rain forests in this particular area at such a scale is "at all possible without running a high risk of irreversible damage to biodiversity and ecosystems in these unique areas."[468] This suggests that in some special cases regarding unique and irreplaceable ecosystems, it may be questioned if TNCs have a responsibility not to interfere. The SOCO case before the British NCP implied similar notions with regards to the Virunga National Park in Congo and other areas in UNESCO's list of sites which are categorised as world heritage.[469]

In conclusion, the considerations of whether corporate activities may constitute irreversible or long-term effects on the environment, contains clear elements balancing social, economic and environmental concerns, as portrayed in the principle of sustainable development. The Council's practice implies that there are potential situations where environmental concerns are particularly strong, such as in cases where there are risks of irreversible or long-term damage to irreplaceable ecosystems.

5.2.3 Criterion 3): whether "the damage has considerable negative impact on human life and health"

Another criterion for assessing if there is "severe" environmental damage is adverse impacts on human societies. In Freeport McMoRan, the

466 Voigt (2015) 32

467 Daewoo International Corporation and POSCO (2015) 10

468 Ibid 10

469 WWF vs SOCO (2014)

Council stated that "according to the NOU 2003: 22, serious damage to human health may prove grounds for exclusion." [470] By this, the Council recognised the link between human rights and environmental damage, as environmental depravation can impact human habitats. This does, however, not give any individual rights for single individuals or groups in the Council's practice, but is an element in a broader assessment.

According to the wording in both the preparatory work and in the criterion, which both talk of "considerable" negative impact, the threshold is high for when effects on human life and health can qualify as contributing to severe environmental damage. The Council added that "it is often difficult to prove that pollution from a particular company is harmful to public health. In such cases, the Council is of the opinion that it may be sufficient to establish such a correlation with a high degree of probability, however, an evaluation needs to be made on a case-by-case basis."[471] Consequently, if negative health effects can be related to corporate activities with a high degree of probability, this may constitute severe environmental damage. But the burden of proof will in such cases be on the victims, and it may be difficult to prove.

In the recommendation regarding Volcan Compania Minera SAA's (Volcan) mining activities in Peru, the negative consequences of high levels of lead for the local population was promoted as the main reason to exclude the company from the oil fund. Stating that the environmental damage in this case "is serious, will have long-term effects, and that it is likely that the lead exposure that the children are subject to will lead to chronic and serious health problems in a group that is already vulnerable",[472] the Council appeared to consider health problems to qualify as severe environmental damage if the effects are long-term or chronic. It also implied that health problems can more readily qualify as serious if they affect vulnerable groups, such as children. Similarly, in the recommendation concerning MMC Norilsk Nickel's metals and mining operations on the Taimyr Peninsula in Russia, the Council ca-

[470] Freeport McMoRan (2006) 5

[471] Ibid

[472] Volcan Compania Minera SAA (2012) 17

tegorised the harmful impacts on human health as "severe environmental damage" on the basis of the local population's exposure to large concentrations of pollutants in the atmosphere, soil and water. The Council emphasised the health risks related to children also in this case, saying that "(o)f particular concern to the Council are health risks facing children and infants…"[473]

Furthermore, the Council has found that considerable negative impact on human life may also qualify as severe environmental damage. This is outlined by the Council in Freeport McMoRan, stating that "in addition to the loss of ecological value in itself, it must also be considered what consequences such a loss has for the people who are affected".[474] In the assessments of the effects on peoples' lives, it should be considered whether "the natural areas may form living areas and basis of existence for many people, representing significant cultural or social values", such as peoples' "livelihood, identity, culture and traditions", as well as the "local people's food and drinking sources."[475] For instance, these were elements in the assessment regarding Barrick Gold's mining operations in Papua New Guinea, in which the Council emphasised that pollution of air and water could affect the livelihoods of local communities.[476] Similarly, in the recommendation concerning Rio Tinto's mining operations in Indonesia, the Council placed weight on the contamination of groundwater, and the risk that heavy metals would enter the food chain, destroying local peoples' livelihoods.[477] This was further part of the evaluation of ENI's extraction of oil in Nigeria, in which the Council commented that "(m)ore than 70 per cent of the population of the Niger Delta lives in more or less a subsistence economy in which the local nature comprises the basis for their existence in the form of agricultural areas, fishing resources, fresh water, forests, etc."[478]

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473 Norilsk Nickel (2009) 20
474 Freeport McMoRan (2006) 5
475 Ibid 5-6
476 Barrick Gold (2008) 18
477 Rio Tinto (2008) 8
478 ENI (2013) 7

In conclusion, negative impacts on human health and livelihood can provide basis for "severe" environmental damage. Noteworthy, the Council's practice suggests that direct effects on human health more easily can qualify as severe environmental damage than destruction of peoples' livelihoods, even if these two effects are interlinked. By this, the Council makes a bridge between adverse environmental impacts and human rights. The elements that the Council consider, such as health, access to food and fresh water, cultural identity and traditions, are all part of human rights law. The Council's practice does not give grounds for individual rights being part of environmental law, but consider human suffering as an element in a wide assessment of "severe" environmental damage. It is not clear if human rights jurisprudence may influence and be a source for the Council's assessments.

5.3 Corporate environmental due diligence standards

5.3.1 Criterion 4): whether "the damage is a result of violations of national laws or international norms"

The following four criteria concern actions TNCs can employ in order to avoid causing "severe environmental damage", as described above. As such, they can be taken to concern corporate environmental due diligence obligations.

In Freeport McMoRan, the Council on Ethics stated that "(a)ccording to NOU 2003:22, importance should be attached to the way in which the company's actions have caused the damage".[479] Thus companies' conducts, which can be interpreted as their due diligence, meaning their efforts to avoid causing severe environmental damage, are central elements in the Council's assessments. The Council outlined that its evaluations, for instance, will include considerations of whether environmental damage is a result of illegal actions.[480] Illegal actions were defined as "acts contrary

[479] Freeport McMoRan (2006) 6

[480] Ibid

to national laws and international treaties and norms."[481] In a national context, illegal actions will be environmental crimes, and only the most serious incidents of environmental crimes will be considered by the Council, especially cases where the company has acted intentionally and it is likely that the practice will continue.[482]

In relation to international law, the Council observed that:

> "(i)nternational law, including international environmental agreements, does not place legal obligations on private companies, and companies can therefore not be accused of violating international law. However, several conventions set international standards for the protection of the natural environment and human life and health. In the environmental field, there are also international guidelines (…) indicating best practice (…) within different sectors… Consequently, the Council regards international law and standards as normative also for corporations' activities, especially in states with inadequate environmental legislation or ineffective enforcement, and where companies take advantage of this to avoid investing in environmental measures."[483]

This statement from the Council suggests that international environmental standards and norms potentially exercise significant influence on the reasonable expectations that can be placed on multinational corporations. Corporations should generally aim to conduct their activities in accordance with best practice standards within their sectors.

The Council further stated that "(a) number of international conventions (…) aim at protecting the natural environment... Such conventions reflect a global consensus regarding which environmental values should be protected… Even though the conventions are aimed at States, it is the Council's opinion that they provide a sound basis for deciding what kind of environmental impact related to companies' activities should be taken into account."[484] Hereupon, the Council on Ethics applied the same reaso-

[481] Ibid
[482] Ibid
[483] Ibid 6-7
[484] Ibid 4

ning that underlies the UN Guiding Principles, giving universal conventions a global outreach as international minimum standards. As mentioned, the UN Guiding Principles do this with the International Bill of Rights.[485] The Council seemed to apply international environmental conventions in a similar fashion. These conventions are not binding on TNCs, but can be taken to express international global consensus within environmental law, which means that they should be treated as guidelines as to how multinational enterprises should conduct their activities. The Council did not specify any particular environmental conventions in this regard, but based on their wording it seems only applicable to international conventions which can be said to express a global consensus. This definition is quite vague and unspecific, but it encourages TNCs to consider global environmental conventions in their operations.

In this regard, according to the Council, it is reasonable to expect that TNCs "do not take advantage of insufficient environmental regulation and lack of enforcement to lower their environmental performance in such a way that it leads to substantial damage."[486] This expectation has been expressed in the Council's practice. For instance, in its assessment of Barrick Gold, the Council put weight on the fact that Papua New Guinea (PNG) and Indonesia are "the only countries that allow riverine tailings disposal", and that the "waste management rules that the company has to obey in PNG are significantly laxer than those applicable in the company's home country, Canada, where riverine disposal is prohibited."[487] It also emphasised that the World Bank no longer financed projects that made use of riverine tailings disposal, and that international guidelines advised against this waste disposal method.[488] On this basis, the Council found Barrick Gold's practice in Papua New Guinea as "clearly in breach of international norms."[489] Hereupon, elements in the evaluation of whether corporations respect international norms are: Best

485 UN Guiding Principles, part II., A., principle 12

486 Freeport McMoRan (2006) 7

487 Barrick Gold (2008) 23

488 Ibid

489 Ibid 24

practice within the sector in question, international guidelines, international conventions that express global consensus, and if the TNCs can be said to exploit weak environmental laws or poor enforcement systems in the host country to lower their standards of practice.

There are also other examples of this reasoning in the Council's practice. Examples are for instance its recommendation on the observation of Royal Dutch Shell in the Niger Delta, in which the Council commented that "Shell (as the operator) has a clear responsibility for the unacceptable damage situation" even its attempts to improve conditions had been blocked by the Nigerian state company.[490] Furthermore, in its recommendation regarding National Thermal Power Company Ltd.'s (NTPC) involvement in the construction of a large coal-fired power plant in southern Bangladesh, the Council also concluded that the company should be aware of deficiencies in national laws comparative to the norms of the International Maritime Organisation (IMO). It stated that "the company must be aware of this deficiency, and has an independent responsibility to ensure that its activities and those of its suppliers do not constitute an unacceptable risk."[491]

Importantly in this regard, the Council's practice is based on ethical standards, and does not entail that such international norms can make TNCs legally liable. In the Council's words: "international standards and norms can be indicative of which acts or omissions are deemed unacceptable, without asserting that companies are legally responsible for violations of international conventions."[492]

Furthermore, the Council placed some limits on the environmental standards which apply to companies abroad, saying that "it is not necessarily reasonable to apply Norwegian or Western environmental standards in all situations", thus it must "be evaluated on an individual basis."[493] The Council therefore imply that TNCs cannot be expected to operate with the highest possible standards in all situations, as circumstances in

490 Royal Dutch Shell (2013) 29
491 NTCP Limited (2013) 16
492 Wal-Mart 5
493 Freeport McMoRan (2006) 7

different countries vary considerable, and some differences compared to Western countries are to be expected in developing countries. However, international conventions and other instruments with a global outreach generally entail universal minimum standards, which also concern corporate practices. TNCs should at least be able to demonstrate that they are conscious of such global norms and that they try to follow them as best as they can.

In conclusion, the Council appears to place considerations of whether TNCs have attempted to follow international minimum standards at the centre of corporate environmental due diligence obligations.

5.3.2 Criterion 5): whether "the company has neglected to act to prevent the damage"

Another criterion that the Council considers in relation to TNCs environmental due diligence obligations under the Ethical Guidelines, is whether the company in question has neglected to act to prevent environmental damage. According to the preparatory work, two aspects are important to the evaluation of corporate conduct: 1) the "way (in which) the company's actions have produced the harmful effects", and 2)"what the company has done to avoid these."[494] The Council, as mentioned, outlined that in its assessments attention will be paid to the way in which companies' actions have caused environmental damage, and consider whether the acts are illegal (either in accordance with national laws or international norms). In the following the expectations placed on TNCs' environmental due diligence obligations will be extended to include damage that is the result of systematic practice, has been intentional, planned, a result of the company taking advantage of a situation, or has escalated because of the company's attempts to conceal its actions. These aspects were also outlined in Freeport McMoRan as central to the assessment of corporate conduct.[495]

The Council clarified, in Freeport McMoRan, that environmental damage should be considered on the grounds of what can "reasonably

[494] Ibid 6

[495] Ibid

be expected from companies in terms of environmental responsibility – implicitly what companies have done to prevent and/or limit the damage."[496] As examples of reasonable expectations the Council mentioned that companies should have environmental policy and management systems, designed to prevent damage both in the short and long term.[497] This is in line with the recommendations to TNCs under the OECD Guidelines, which, as discussed, can be interpreted as an expression of the preventive principle in international environmental law in relation to TNCs. As mentioned, EIAs are the most concrete measure stemming from this principle, and they are explicitly recommended for TNCs in cases of there being risks of significant environmental damage. But the Council has not explicitly included EIAs as part of its assessments. This suggests that the Council looks to national legislation in relation to EIAs, even if this is not clearly outlined. The reason for this may be that many countries have environmental legislation that requires EIAs in cases of potential significant environmental damage, as observed by the Council in one recommendation,[498] in addition to the fact that the Council's mandate is not to establish regulations for TNCs, but to evaluate their environmental conduct in relation to the oil fund. EIAs will in this perspective potentially still represent a way for TNCs to demonstrate their efforts to avoid severe environmental damage, but they do not have the same central position in the Council's practice as they do under the OECD Guidelines. To the Council, EIAs appear to be part of a broader assessment.

In its practice, the Council sometimes consider EIAs undertaken by companies in their overall assessments of company practices. Information in the EIAs undertaken by the companies or the lack of EIAs can indicate if TNCs have acted to prevent severe environmental damage. For instance, in its assessment of Daewoo International and POSCO, the Council considered the company's EIA as insufficient and lacking of information

496 Ibid 7
497 Ibid 7
498 NTPC Limited (2014) 12

of the environmental impacts of Daewoo's activities.[499] The Council observed that "(t)he company's environmental impact assessments contains little information on the condition of the forest, ecosystems or species diversity in the concession area. Flora and fauna have not been surveyed."[500]

Furthermore, the Council pointed out that Daewoo's EIA contained information that was inconsistent with the Council's finding. For instance, the company's EIA stated that most of the concession area was covered by shrubs, bushes and secondary forest, but according to official Indonesian maps the Council found this to be incorrect. In its assessment, the Council further found Daewoo's planned high conservation value (HCV) surveys to lack details, such as specified timetables, methods to be used, or consequences of eventual findings. Thus the planned HCV surveys were "inadequate to prevent severe environmental damage."[501] The Council concluded that "Daewoo is doing little to preserve biodiversity and important ecological values in the concession area", emphasising in particular that the company did not seem to have initiated investigations to identify conservation values in the concession area.[502] Thus the Council considered the quality of the company's environmental plans and assessments. This implies that the Council set substantive requirements to the content of EIAs as well as other research conducted by TNCs. However, in relation to EIAs, it is more an overall assessment of facts and information rather than procedural requirements as whether the EIA includes investigations of alternative operation sites.

Similarly, in the Barrick Gold recommendation, the Council focused on the fact that the company had not "initiated comprehensive environmental and health assessments to obtain updated knowledge on the environmental and health status of the local population and future risks related to this", stating that "(c)onsidering the pollution in question, this

499 Daewoo International Corporation and POSCO (2015) 10

500 Ibid

501 Ibid

502 Ibid 10

is particularly serious."[503] Moreover, in its evaluation about NTPC Limited, the Council remarked that "(t)he EIA describes measures that, in principle, appear relevant. However, it contains no, or few, descriptions of what is required to avoid damaging the environment, and does not assess whether the proposed measures will be adequate. (…) It is therefore impossible to assess whether the environment will be sufficiently protected if the company's proposals are adopted."[504] The Council further found that "(t)he EIA does not deal with the consequences of failing to comply with the regulations. This renders the identification of relevant, adequate measures difficult. If adequate environmental protection requires full compliance with all regulations, an analysis will be required of whether this is achievable, or whether additional systems have to be introduced to discover or reduce the effects of deviations."[505]

In its NTPC Limited recommendation, the Council made some general comments about the standards of TNCs' EIAs, saying that "… environmental impact reports are generally not prepared by the companies themselves, but by consultants. However, the companies are responsible for ensuring that those who draft the reports are experts, and that the reports cover all relevant environmental risks. Further, the companies own the reports and are responsible for implementing proposed measures."[506] Consequently, the Council seemed to be of the opinion that TNCs are responsible for ensuring the quality of their EIAs. This is supported by the fact that in the recommendation about NTPC Limited, the Council found the EIA insufficient, despite the fact that it had been approved by the Bangladesh governmental authorities, stating that "(e)ven though the authorities in Bangladesh have been more involved in analysing risks and specifying suitable risk-alleviation measures (since an official body has actually prepared the EIA), the generally accepted principle nevertheless applies that the company itself is responsible for

503 Barrick Gold (2008) 24
504 NTPC Limited (2014) 12
505 Ibid
506 Ibid

identifying risk factors and implementing adequate measures."[507] Similarly, in its recommendation about Volcan Compania Minera, the Council elaborated on its position, remarking that "(a)ccording to internationally accepted norms (…), companies have an independent responsibility to prevent or reduce the risk of their activities having negative consequences on the safety and health of local inhabitants. Among other things, this means that companies must identify risks and impacts, as well as measures that can prevent and reduce these."[508]

Importantly, the Council appears to emphasise TNCs' individual capacities and operation experience in its evaluations of what environmental risks they can reasonably be expected to consider. For instance, in NTPC Limited recommendation, the Council underlined that NTCP Limited is "a large company with previous experience"[509], and compared the environmental standards applied by the company in this case with the company's previous operations. Similarly, in its recommendation about Shell, the Council compared the number of oil spills during Shell's operations in the Niger Delta with other operations that the company had conducted.[510] This illustrates that companies' experience and insight matter in the Council's assessments. The Council further placed weight on Shell's possibility to control, influence and initiate preventive measures, emphasising that prevention of risks was particularly important, and that the company had good insight into operating conditions and risks.[511] It was concluded that Shell, as the operator, was to a large extent responsible for the negative impacts of its operations in the Niger Delta, despite being bound by its operation agreement to have the consent of its three operating partners before it could implement actions. Shell was co-responsible for unanimous votes in the joint venture.[512] The Council remarked that "the company's utilisation of its freedom to act in a

507 Ibid 15
508 Volcan Compania Minera SAA (2012) 1
509 NTPC Limited (2014) 15
510 Royal Dutch Shell (2013) 19-20
511 Ibid 28
512 Ibid 29

complex situation is a key factor (in the Council's assessment), including (its) willingness and ability to actually make use of the tools it has…"[513] This implies that the Council's evaluations of the standards for corporations' environmental due diligence obligations are based on subjective elements.

In conclusion, in the Council's recommendations, TNCs' efforts to prevent severe environmental damage, for instance in the form of EIAs and other assessments, is central. The Council further consider the quality of these assessments to reveal the sincerity of TNCs' preventive measures, thus instating substantive requirements to their content, but without going into specific details. Moreover, TNCs' resources, experience and capacities appear to influence the Council's expectations of their environmental due diligence obligations.

5.3.3 Criterion 6): whether "the company has implemented adequate measures to rectify the damage"

Another element in the Council's evaluations of TNCs' environmental due diligence obligations is whether the company in question has implemented *adequate* measures to rectify the damage after it has occurred. Importantly, much of what has been said above in relation to criteria 5 will also apply under criteria 6, as both criteria 5 and 6 concern assessments of TNCs' acts or omissions. The main difference between the two criteria is that the first concerns the company's attempt to prevent negative consequences of its operations, whereas the latter concerns the company's attempt to rectify damage after it has occurred. Both criteria are based on subjective assessments of companies' actions.

As will be described under criteria 7, the mandate of the Council is to consider future risk, and the Council does not attempt to remedy past wrongs done by corporations. Thus TNCs' past conduct is interesting as it may indicate future behaviour, as it shows multinational corporations' willingness to prevent environmental damage or change its behaviour. In Freeport McMoRan, the Council explained this as that "previous

[513] Ibid 28

patterns of behaviour may give some indications as to what will happen in the future, and certain violations of ethical norms which have been initiated in the past could also be regarded as ongoing violations."[514]

The application of this criterion can be illustrated by the Council's practice. For instance, in the recommendation about Daewoo International and POSCO, the Council on Ethics placed emphasis on satellite images which observed a large number of fire hot spots in the concession area.[515] However, the company denied the use of such methods and claimed that the fires were caused by the negligence of workers and local people, which the Council could not rule out. Thus the corporation's direct responsibility for causing the fires could not be proved. The Council then evaluated what actions the company had undertaken to investigate the cause of the fires, finding these to be insufficient and to imply that the company was insincere. It stated that "the sheer number of fires and the fact that the burning has been ongoing for several years should have prompted the company to investigate the cause of the fires, and to consider whether its measures are adequate to prevent fires from occurring."[516] Hereupon, the TNCs' inability to demonstrate that it had taken reasonable measures to prevent the fires from occurring became a deciding factor in the Council's assessment.

Similarly, in recommendation regarding DRD Gold Limited, the Council commented that the company "systematically and over many years has failed to take steps aimed at reducing or preventing environmental damage despite the company's awareness of the impact".[517] And in the recommendation concerning China Ocean Resources, it remarked that "the company does not appear to be taking any steps to develop its operations in a more sustainable direction."[518] Moreover, in its recommendation about Volcan Compania Minera, the Council pointed out that "(s)everal measures proposed in impact assessments and other reports

514 Freeport McMoRan (2006) 3
515 Daewoo International Corporation and POSCO (2015) 10
516 Ibid 10
517 DRD Gold Limited (2006) 22
518 China Ocean Resources (2013) 12

to reduce discharges to water and soil appear largely to not have been implemented".[519]

In conclusion, in its evaluation of criteria 6, the Council is mostly concerned with how companies' past behaviour demonstrate their willingness to do their best to reduce and prevent future negative consequences of their operations.

5.3.4 Criterion 7): whether "it is probable that the company's unacceptable practice will continue"

A deciding element in the Council's evaluations of TNCs' environmental due diligence obligations is whether it is probable that the company's unacceptable practice will continue. This criterion establishes the limits of the Council's mandate, clarifying that the Council is not intended as a complaint mechanisms for victims of corporate abuse. Section 3 in the Ethical Guidelines, as cited above, outlines that the Council is to evaluate if there is an "unacceptable risk" that the TNC in question will be responsible or complicit in present or future harm. This will be commented upon below.

In Freeport McMoRan, the Council observed that its mandate "makes it clear that the likelihood of contributing to present and future acts is the issue in question". [520] On this basis, it was clarified that "the Council assumes that actions and omissions which *have taken* place in the past will not normally provide a basis for exclusion under this provision."[521] (Emphasis added.) Thus what matter for the Council is whether there is an unacceptable future risks in relation to TNCs' activities. The Council affirmed this in a recommendation, saying "(t)he term "risk" is associated with the probability of unethical actions occurring in the future."[522]

The meaning of the wording "unacceptable risk" is unclear, though, and the Council has commented that it is not explicitly defined in the

[519] Volcan Compania Minera SAA (2012) 18
[520] Freeport McMoRan (2006) 3
[521] Ibid 3
[522] Ibid

preparatory work.[523] On this basis, it found that "the unacceptability of the risk is linked to the seriousness of the act and how severe the environmental damage is."[524] Thus the probability of companies contributing to or being responsible for serious environmental damage is based upon an overall assessment, in which all of the above described criteria will affect the risk assessment.

In conclusion, whether risks of future damage are "unacceptable" depends on an overall assessment of all the above described criteria.

5.4 Concluding remarks

The Council is a Norwegian ethical advisory committee and does not have any formal standing in national or international law. Nevertheless, it is one of the few examples of a functioning non-binding accountability mechanism for corporate conduct in the world, and consequently its practice can potentially suggest international ethical standards that are applicable to multinational enterprises.

In the Council's practice the concept of severe environmental damage is interpreted to include seven underlying criteria. The most important implications which can be derived from these criteria will be outlined in the following.

Three of these involve a definition of the concept of severe environmental damage, outlining what kind of environmental damage TNCs potentially are responsible for avoiding. Severe environmental damage is not defined in concrete terms, but generally is taken to include environmental adverse impacts on a greater scale, particularly involving unique and vulnerable ecosystems. If environmental damage is likely to have long-term or irreversible effects, it can constitute severe environmental damage. Similarly, if it destroys human habitats so that local communities lose their livelihoods or causes damage to human health. This definition of environmental damage can potentially help to clarify for TNCs what risks they should be extra careful to avoid, and what

[523] Ibid 2

[524] Ibid

environmental risks states can be considered responsible for.

Furthermore, in the Council's practice, TNCs can be interpreted as to have environmental due diligence obligations to avoid such severe environmental damage. They should for instance conduct their activities in accordance with national legislation, but they should also, more importantly, strive to follow international norms that express standards of best practice within their sectors. Multinational enterprises have an independent responsibility to apply such standards of best practices, and should especially not exploit weak national laws or implementation mechanisms to avoid them.

In the assessment of whether corporate environmental due diligence has been adequate, it is central to consider the measures that TNCs have undertaken to avoid environmental damage. EIAs and other assessment are such potential measures, and requirements should be set to their content. Multinational corporations have an independent responsibility to ensure that such measures address the most relevant risks, even if they have been approved by national governments. Thus even though it is not explicitly outlined by the Council, TNCs will normally be in a better position in accordance with their due diligence obligations if they have undertaken EIAs.

Consequently, the Council's practice demonstrates that it is possible to outline quite clear standards for TNCs' environmental due diligence obligations. The practice further seems to confirm that the standards for corporate environmental responsibility that are found in the OECD Guidelines can be developed into effective criteria.

6 Conclusion

In this thesis I have taken a broad perspective in relation to standards for TNCs' environmental responsibilities. I found that there are principles in international environmental law that are potentially applicable to multinational enterprises. Especially the principles of sustainable development, prevention and precaution are generally extendable to TNCs. This is, for instance, exemplified by the UN Global Compact and the OECD Guidelines.

There are concurrences between the normative standards that the OECD Guidelines establish and those that are applied by the Council on Ethics in their cases. The basic premise in both instruments is that there are environmental due diligence obligations related to TNCs. Environmental due diligence standards is centred on a duty of care for multinational enterprises, which entails that they should do their utmost to prevent their activities from causing significant or severe environmental damage. As observed, the Council sets a high threshold for what form of environmental damage that fall under TNCs' responsibilities, whereas the OECD Guidelines are generally unclear as to what threshold that applies to their recommendations. But both the Council and the OECD Guidelines establish general environmental standards under which multinational enterprises by different measures should be able to demonstrate that they have taken environmental effects into consideration by sound environmental management.

In this regard, environmental impact assessments are a central tool in both the Guidelines and the Council's practice. If companies have undertaken EIAs, and these are conducted properly, they seem to be the most efficient and convincing method to fulfil TNCs' environmental obligations in both instruments. In addition, the Guidelines and the Council both appear to place substantive requirements on the content of EIAs, elaborating on the standards set by the ICJ in the *Pulp Mills* case. The exact requirements for EIAs are, however, not clearly stated under any of the two instruments. Based on the wording of the OECD

Guidelines, interpreted in light of relevant international instruments, it seems likely that public consultation is a requirement in EIA procedures. This is further supported by the practice from the NCPs. The Council also appears to focus on whether EIAs are conducted by independent consultants and whether they assess all relevant risks.

On this basis, it may be concluded that there are effective, international normative environmental standards that apply to TNCs. The exact implications of these standards are sometimes unclear, but general norms are developed. They centre on the three environmental principles of sustainability, prevention and precaution, and generally require multinational enterprises to undertake responsible risk assessments.

Risk assessments appear in most cases to be based on a relative notion of environmental due diligence, in which companies' experience, knowledge and available resources are taken into account. However, in specific cases relating to unique and irreversible ecosystems, a more objective norm seems to be applied. This suggests that the principle of sustainable development might entail environmental concerns to prevail over social or economic matters in such situations. But the exact implications of a potentially more strict standard of environmental due diligence in cases where essential environmental values are at risk are unclear.

In relation to holding corporations accountable, the opportunities available are limited. The NCP system is inefficient and in need of reform in order to conduct more efficient assessments of corporate practices. There is for instance need for new rules relating to evidence, as well as structural changes to make the NCPs more independent. However, the system appears to be partially working in some countries, even if it does not work at all in many others. Theoretically, the potential for a uniform and global system is present, and there is hope for future reform and improvement. The Council on Ethics demonstrates that quasi-judicial accountability mechanisms can potentially contribute to develop global norms for TNCs. Social pressure from civil society and others may influence multinational corporations to respect such norms.

The conclusions that I make in this thesis are made on the basis of relatively broad research. It would, however, have been advantageous to

be able to look in more detail at the practice from the NCP system, both from the Dutch and British and other NCPs. This would have provided me with better insight into the implementation of environmental norms in this system, in addition to its strengths and weaknesses. As such, this is an area for potential research.

Bibliography

All links were last visited on 10 January 2016

International instruments

Agreements, Treaties and Conventions

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Convention on Biological Diversity	UN Convention on Biological Diversity, Rio de Janeiro, 5 June 1992.
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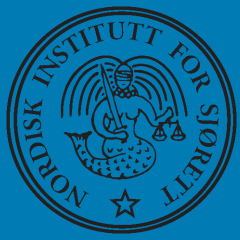

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