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Comments

It's Not You, It's Me: An Analysis of the United States' Failure to Uphold its Commitment to OECD Guidelines for Multination Enterprises in Spite of No Other Reliable Alternatives

Matthew H. Kita*

I. INTRODUCTION

On December 14, 1960, the United States joined nineteen other countries in becoming a member of the Organization for Economic Co-Operation and Development (hereinafter the "OECD") by signing the Convention on the Organization for Economic Co-Operation and

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Development.¹ On June 27, 2000, the United States reaffirmed its commitment by adopting the OECD's revised *Guidelines for Multinational Enterprises* (hereinafter "*Guidelines*"). In what appears to be the largest demonstration of its commitment to the OECD, the United States annually provides a quarter of the OECD's EUR 320 million budget.² The OECD is a transregional group that has developed its own programs for social responsibility, namely the *Guidelines*, which act as transnational soft laws for those parties that voluntarily adhere to it.³

With its affirmations and reaffirmations, along with its enormous contribution to the annual budget, the United States, one might expect, would have an active role in the OECD and would take action to uphold the *Guidelines*. This Comment addresses whether the United States has taken such action, and whether it has fulfilled its responsibilities to the OECD and other member countries. To address the two preceding issues, transnational law must first be examined and the OECD and its goals analyzed. Transnational law is considered "soft law" because of its voluntary nature, so this Comment will analyze the OECD *Guidelines* in their capacity as "soft law."

Within each country that is a member of the OECD, a National Contact Point (hereinafter "NCP") acts as the link between Multinational Enterprises (hereinafter "MNE") and the country's commitment to the OECD *Guidelines*.⁴ The NCP handles complaints against MNEs and has the obligation to publicize the *Guidelines* in its country.⁵

After discussing the OECD and the *Guidelines* as soft law, this Comment will compare the United States' utilization of the *Guidelines* to that of the United Kingdom.⁶ Finally, conclusions will be drawn regarding (1) whether the United States has upheld its obligations to the OECD and its member countries and (2) whether upholding the obligations would in fact be beneficial the United States.

1. See OECD, Ratification of the Convention on the OECD, http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html (last visited Oct. 15, 2009).

2. See OECD, Scale of Members' Contribution to OECD's Core Budget-2009, http://www.oecd.org/document/14/0,3343,en_2649_201185_31420750_1_1_1_1,00.html (last visited Jan. 4, 2009).

3. See William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, 509 (2001).

4. *Id.* at 510.

5. See Organization for Economic Cooperation and Development [OECD], *Guidelines for Multinational Enterprises*, at 33 (2000).

6. See discussion *infra* Part III, VI.

II. TRANSNATIONAL LAW (SOFT LAW)

A. *The Organization for Economic Co-Operation and Development*

The Organization for Economic Co-Operation and Development's mission is to "bring together the governments of countries committed to democracy and the market economy from around the world" for reasons that include raising the standards of living around the world and assisting countries' economic development.⁷ The Organization "provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies."⁸ Comprised of thirty countries,⁹ the OECD has about 200 committees that work to advance policy in the areas of economics, trade, science, employment, education, and financial markets.¹⁰

1. The OECD Guidelines for Multinational Enterprises.

With the input of the various committees, the *Guidelines*¹¹ were created.¹² The *Guidelines* are "recommendations addressed by

7. See OECD, About the OECD, www.oecd.org/aboutoecd (last visited Oct. 15, 2009).

8. *Id.*

9. See OECD, OECD Member Countries, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Oct. 15, 2009). The 30 member countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. In May 2007, OECD countries agreed to invite Chile, Estonia, Israel, Russia, and Slovenia to open discussions for membership of the Organization and offered enhanced engagement, with a view to possible membership, to Brazil, China, India, Indonesia and South Africa. The process of becoming a member is complex and can be long as it involves the evaluation of the country's ability to meet OECD standards throughout many policy areas, making it hard to bring large groups of new members in at the same time.

Id.

10. See OECD, Who Does What, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (last visited Oct. 15, 2009).

11. *Guidelines*, *supra* note 5, at 7. The Guidelines are created with the idea that adhering countries consider that international investment is of major importance to the world economy, and has considerably contributed to the development of their countries; that multinational enterprises play an important role in this investment process; that international co-operation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimize and resolve difficulties which may arise from their operations; and that the benefits of international cooperation are enhanced by addressing issues relating to international investment and multinational enterprises through a balanced framework of interrelated instruments. *Id.*

governments to multinational enterprises . . . [that] provide voluntary principles and standards for responsible business conduct consistent with applicable laws.”¹³ In adopting the *Guidelines*, the member countries recommended that “multinational enterprises operating in or from their territories . . . observ[e] the *Guidelines*. . . .”¹⁴ When dealing with multinational enterprises, member countries commit to treating Foreign-Controlled Enterprises the same as domestic enterprises (“National Treatment”).¹⁵ Those same member countries agree to promote the use of the *Guidelines* by establishing NCPs¹⁶ that “act as a forum for the discussion of all matters relating to the *Guidelines*.”¹⁷

The *Guidelines* are comprised of three parts, dealing with the *Guidelines* themselves, the implementation of the *Guidelines*, and commentaries. In summarizing the *Guidelines*, this Comment will quickly discuss each section to provide an overview of its form and function.

Part one of the *Guidelines* spells out the guidelines themselves in ten sections. The first section of the *Guidelines* sets out the Concepts

12. The 200 Committees and Bodies that exist in the OECD include the Committee for Agriculture (COAG), the Committee for Financial Markets, and the Economic Policy Committee. Each committee and body provides suggestions and guidance in its particular specialty when creating the OECD Guidelines. OECD, Bodies/Groups Sorted by Parent Body/Group, [http://webnet3.oecd.org/OECD groups/](http://webnet3.oecd.org/OECD/groups/) (last visited Jan. 5, 2010).

13. *Guidelines*, *supra* note 5, at 9 (“The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.”).

14. *See id.* at 5.

15. *Id.* “In order to maintain public order, to protect their essential security interest and to fulfill commitments relating to international peace and security, countries shall treat foreign-controlled enterprises as they would treat domestic enterprises. Foreign-controlled enterprises should receive no less favorable treatment than that accorded in like situations to domestic enterprises.” *Id.*

16.

Adhering countries shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines so that they can contribute to the solution of problems which may arise in this connection, taking due account of the procedural guidance. The business community, employee organizations, and other interested parties shall be informed of the availability of such facilities. National Contact Points in different countries shall cooperate if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken. National Contact Points shall meet annually to share experiences and report to the Investment Committee.

Id. at 30.

17. *Id.* at 13.

and Principles.¹⁸ The concepts include those previously mentioned, such as the equal treatment of foreign-owned enterprises and the creation of NCPs.¹⁹ The section also explains that “international dispute settlement mechanisms, including arbitration, are encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.”²⁰

Part one, section two lays out the General Policies enterprises should take into account in the countries in which they operate.²¹ Focusing on the MNEs, Enterprises are encouraged to “contribute to economic, social, and environmental progress”;²² respect human rights;²³ develop and adhere to good corporate governance practices;²⁴ promote employee awareness of the *Guidelines*;²⁵ and abstain from “improper involvement in local political activities.”²⁶

The third section of part one deals with the disclosures of an enterprise.²⁷ These disclosures range from the company objectives to material, foreseeable risk factors.²⁸ The *Guidelines* allow for the tailoring of the disclosures to the “nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”²⁹

Sections four through ten are the more policy-specific sections covering topics from employment relations to taxation.³⁰

The second part of the *Guidelines* deals with the *Guidelines*’ Implementation Procedures. The first procedure for implementing the *Guidelines* is the establishment of an NCP for promoting the activities of the OECD while also handling any disputes between the parties concerned with matters relating to the *Guidelines*, with the goal of contributing to the solution of the problem.³¹ The NCPs must meet

18. See *Guidelines*, *supra* note 5, at 12.

19. *Id.*

20. *Id.* at 13.

21. *Id.* at 14.

22. *Id.*

23. See *Guidelines*, *supra* note 5, at 14.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 15.

28. See *Guidelines*, *supra* note 5, at 15.

29. *Id.*

30. Getting into the more policy specific sections of the *Guidelines*, the fourth section deals with Employment and Industrial Relations. The sixth section is aimed at Combating Bribery. The seventh section deals with Consumer Interests. The eighth section covers Science and Technology. The ninth section covers Competition, and the tenth section covers Taxation. *Id.* at 17-25.

31. *Id.* at 30. (More specifically, “the business community, employee organizations, and other interested parties shall be informed of the availability of such facilities.”)

annually to share their experiences and report to the Investment Committee, which is part of the OECD organization.³²

The third and final part of the *Guidelines* presents commentaries prepared by the Investment Committee “to provide information on and explanation of the Guidelines text and of the Council Decision on Implementation of the Guidelines.”³³

2. The National Contact Point

Within each country, the NCP has the responsibility of furthering the effectiveness of the *Guidelines* while operating with “visibility, accessibility, transparency and accountability.”³⁴ There are four important aspects regarding the NCP: Institutional Arrangements; Information and Promotion; Implementation in Specific Instances; and Reporting.

In terms of Institutional Arrangements, the NCP will seek “the active support of social partners, including the business community, employee organizations, and other interested parties which includes non-governmental organizations.”³⁵ The NCP can be a government official, an office headed by a senior official, or a co-operative body including representatives of other government agencies and members of the business community, employee organizations, as well as other interested parties (hereinafter collectively “interested parties”).³⁶ The NCP has the responsibility of developing and maintaining relations with representatives of the various interested parties that play a part in the effective functioning of the *Guidelines*.³⁷

NCPs are also responsible for making the *Guidelines* known to the public.³⁸ One way to accomplish this is through the use of the Internet, making sure to translate the *Guidelines* into each country’s national language.³⁹ The informational and promotional duties of the NCP also include the obligation to respond to inquiries about the *Guidelines* from other NCPs, interested parties, and governments of non-adhering countries.⁴⁰

The NCP is tasked with settling any issues that arise as a result of the implementation of the *Guidelines*, when a specific instance calls for

32. *Id.* (The committee “shall be responsible for clarification of the Guidelines.”)

33. *See Guidelines, supra* note 5, at 37.

34. *Id.* at 33.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See Guidelines, supra* note 5, at 33.

39. *Id.* (Inward and outward investors are also to be informed about the *Guidelines*.)

40. *Id.* at 33-34.

NCP involvement.⁴¹ The NCP will serve as an opportunity for interested parties to raise concerns in a timely manner.⁴² The NCP also has the duty to “make an initial assessment of whether the issues raised merit further examination” and, when issues do merit further examination, to offer assistance to the parties involved to resolve the issues.⁴³ Such assistance may consist of seeking the advice of interested parties, contacting the NCPs in other countries concerned, or offering mediation to help deal with the issues.⁴⁴ In the event the parties do not reach an agreement, it is the NCP’s responsibility to “make recommendations as appropriate, on the implementation of” the *Guidelines*.⁴⁵ Finally, when the procedures are complete, after consultation with the parties involved, the NCP is to make the results publicly available to the extent they preserve confidentiality and are in the *Guidelines*’ best interest.⁴⁶

The NCPs are responsible for reporting their actions and recommendations annually to the Investment Committee.⁴⁷ The reports must include information on the issues and activities that were in dispute and how the issues were resolved.⁴⁸ After the NCPs of the various countries report, the Investment Committee considers the reports, whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances, and whether to issue a clarification where an adhering country or an advisory body makes a substantiated submission on whether an NCP has correctly interpreted the *Guidelines* in specific instances.⁴⁹ The Investment Committee will also make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the *Guidelines*.⁵⁰

As far as the United States government is concerned, it states that it is “committed to the effective use of the *Guidelines*.”⁵¹ Furthermore, “the United States will not shrink from [its] responsibility to continue to encourage the observance of high standards of conduct where it is lacking. Nor will [it] allow these *Guidelines* to become a vehicle for unfairly tarnishing the reputation of good corporate citizens.”⁵² Through

41. *Id.* at 34.

42. *Id.*

43. *Guidelines*, *supra* note 5, at 33.

44. *See id.* at 34.

45. *Id.*

46. *Id.*

47. *Id.* at 35.

48. *See Guidelines*, *supra* note 5, at 35.

49. *Id.*

50. *Id.*

51. U.S. Department of State, *U.S. National Contact Point Information Booklet* (2002), available at <http://www.state.gov/e/eeb/oecd/book/10215.htm> [hereinafter *US NCP*].

52. *Id.*

its comments, the United States appears committed to the *Guidelines* with a degree of caution as there is concern the *Guidelines* may open the door for unwarranted criticism and attacks by outside parties such as non-governmental organizations (hereinafter “NGO”).⁵³ While remaining committed to the OECD and the *Guidelines*, the United States has made clear that it also has an obligation to protect national corporations from potential unsubstantiated criticisms. The United States’ adoption of the revised *Guidelines* in 2000 demonstrated its commitment to reinforcing “high standards of corporate behavior” while promoting a “form of globalization that not only generates wealth, but also raises standards on social, labor, environmental, and human rights issues.”⁵⁴

B. *The Guidelines as “Soft Law”*

International law is made up of “hard law” and “soft law.”⁵⁵ While “hard law” comes from treaties and customary international law, which are generally binding agreements between nation-states and govern the legal relationship between the states, only states can initiate actions for violations.⁵⁶ Breaches of “hard law” subject states to sanctions by the other members of the treaty or convention, which constitutes a form of “hard law.”⁵⁷

On the other hand, “soft law” is an emerging trend in international law that is not a treaty or other form of “hard law.”⁵⁸ “Soft law” can take the form of “declarations, codes of conduct, guidelines, and other promulgations [by branches] of the United Nations, operational directives of the multilateral development institutions, and resolutions and other statements by non-governmental organizations.”⁵⁹ The biggest difference between “hard law” and “soft law” is that “soft law” does not carry the weight of enforcement.⁶⁰ Instead, soft law allows the private

53. *Guidelines*, *supra* note 5, at 33.

54. *US NCP*, *supra* note 51.

55. Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159, 166 (2006).

56. *Id.* (citing Owen J. Lynch & Greg Maggio, Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society, Center for International Environmental Law Publications, Nov. 15, 1997, at § II, available at <http://www.ciel.org/Publications/olp3ii.html>).

57. *Id.*

58. *Id.*

59. *Id.* (citing Owen J. Lynch & Greg Maggio, Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society, Center for International Environmental Law Publications, Nov. 15, 1997, at § II, available at <http://www.ciel.org/Publications/olp3ii.html>).

60. Lakhani, *supra* note 55, at 166.

sector the ability to create its own sets of guidelines and standards for the conduct of businesses across borders.⁶¹

Because many countries are unwilling to give any judicial power to extra-territorial bodies, soft law provides an outlet that is more flexible and acceptable to those countries.⁶² To many countries, "soft law" is more acceptable because rather than being a legislative procedure that is binding law, soft law is memorialized into "law" through contract, and thus is more flexible.⁶³ As well as being contractual, soft law is appealing to states because it does not challenge their sovereignty.⁶⁴ Though any actor to the agreement is free to leave, there are strong incentives to participate, with participation actually strengthening the integrity of the voluntary network of countries.⁶⁵ The networks that the parties create, in effect, replace the political community while mutual interest replaces territory to create a self-referencing system of regulation that binds all the parties in a web of mutual interest and constraint.⁶⁶

While the networks create mutual interest and restraint, soft law does not have a direct legal effect because it is not a legislative act.⁶⁷ Instead, soft law acts as a "behavioral framework"⁶⁸ that creates a sense of obligation to which corporations and other entities feel compelled to adhere.⁶⁹ In a sense, soft law, such as the *Guidelines*, uses peer pressure as a means of enforcement.⁷⁰ The *Guidelines* demonstrate the sense of peer pressure through the self-regulation among the many parties involved.⁷¹ When the parties act together, they create a cohesive obligatory network where the parties follow the behavioral norms of the community to avoid being challenged by other actors within the network. Not adhering to the norms of the network, such as the *Guidelines*, may raise business costs for actors such as MNEs because they will be forced to defend themselves against claims made to the NCP by other countries

61. See Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 503-504 (2008) [hereinafter *Multinational Corporations*].

62. *Id.* at 503.

63. *Id.* at 517.

64. Douglas M. Johnston, *Book Reviews: Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 95 A.J.I.L. 709, 711 (2001).

65. See *Multinational Corporations*, *supra* note 61, at 518.

66. *Id.* at 523.

67. *Id.* at 508.

68. *Id.*

69. See Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 WIS. INT'L L.J. 325, 331 (2007).

70. *Id.* at 327.

71. See *Multinational Corporations*, *supra* note 61, at 509. The transnational system is made up of actors including multinational enterprises, their suppliers, non-governmental organizations, the media, investors, and consumers. *Id.*

or NPOs.⁷² On the other hand, because the *Guidelines* are voluntary and lack legal effect, MNEs may save money by not defending themselves. The problem, however, is that MNEs who choose to save money by not defending against allegations may lose even more in terms of bad publicity.⁷³

The effect of bad publicity is demonstrated in an article run in the British newspaper, *The Observer*, reporting that the Gap, Inc., (hereinafter “Gap”) had children producing Gap clothing in its textile factories in conditions close to slavery.⁷⁴ The publication of the article brought bad publicity for Gap, forcing the company to take quick action to correct the issues before the bad publicity grew and spiraled out of control.⁷⁵ In the end, corrective actions were taken, and rather than looking bad in the public eye, Gap demonstrated its commitment to its corporate code of conduct as well as to its strong social conscience, boosting consumer opinion about it as a corporation.⁷⁶

Because the media are actors in the soft-law system, they have the ability to spread information regarding an MNE’s deviation from the soft law behavioral framework.⁷⁷ “Hard law” differs in that if a country violates a treaty, the violation can only be raised by other party-states to the treaty. Because only states are parties to treaties, they, and not corporations, are the only parties who can be sanctioned.⁷⁸

In a “soft law” system, however, there are no enforcement mechanisms. The media and NGOs function as actors who can make complaints to the NCP, which allows for a large degree of peer pressure in the hopes of pushing corporate codes of conduct as well as the *Guidelines* for all corporations to follow.⁷⁹

As mentioned, the flexibility of soft law means the National borders that limit hard law do not limit soft law.⁸⁰ While hard law often makes

72. Much like fending off bad publicity or putting up defense in court, there are always costs associated with defending damaging accusations.

73. See *Multinational Corporations*, *supra* note 61, at 513.

74. Dan McDougall, *Indian ‘Slave’ Children Found Making Low-Cost Clothes Destined for Gap*, *THE OBSERVER*, Oct. 28, 2007, available at <http://observer.guardian.co.uk/print/0,,331090351-119093,00.html>.

75. See *Multinational Corporations*, *supra* note 61, at 515.

76. *Id.* at 514.

77. *Id.* at 513.

78. See Lakhani, *supra* note 55, at 166 (citing Owen J. Lynch & Greg Maggio, Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society, Center for International Environmental Law Publications, Nov. 15, 1997, at § II, available at <http://www.ciel.org/Publications/olp3ii.html>).

79. *Id.* at 167.

80. See *Multinational Corporations*, *supra* note 61, at 502.

attempts to extend its power across borders,⁸¹ the contractual nature of soft law only limits its reach as far as the regions in which the parties conduct business.⁸² The reason for this is that soft-law networks are based on actors, not territories. MNEs can travel across borders, requiring a high level of flexibility, a flexibility that soft laws such as the *Guidelines* provide.⁸³ Insofar as networks and organizations value flexibility over certainty and judicial enforceability, the use of soft laws is growing.⁸⁴ In the case of the *Guidelines*, the flexibility is in the involvement of many actors who help regulate one another.⁸⁵ In the end, the integrity of the *Guidelines* is strengthened by the involvement of all the actors.⁸⁶

Even without formal legal status, soft law can ultimately have a real effect by working its way into customary international law, or by providing the framework for interstate cooperation.⁸⁷ Scholars interpret soft law as “either not yet or not only law.”⁸⁸ The NGOs and MNEs that make up the soft law frameworks will influence international law and be a positive influence on the enforcement of laws by showing that such laws are mutually beneficial.⁸⁹ Alternative dispute resolution on the international level also benefits from soft law because it uses societal norms and customs to incentivize and increase the enforcement and binding nature of agreements that are similar to the OECD *Guidelines*.⁹⁰ Thus, it may also be possible for soft law to influence or aid in the creation of international hard law by providing mutually beneficial networks from which treaties may be possible.⁹¹

81. *Id.* at 507. “Among the US and the European Union—extraterritoriality is leveraged by strategic bargaining under which standards as between these entities are harmonized. Thus harmonized, they are extended beyond their collective borders.” *Id.* “States have also sought to extend their authority with the extension of substantive regulation by entities operating or created within the home jurisdiction with respect to their activities in other states.” *Id.* at 502.

82. *See generally Multinational Corporations*, *supra* note 61.

83. Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 505 (2006).

84. Douglas M. Johnston, *Book Reviews: Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 95 A.J.I.L. 709, 713-14 (2001).

85. *See generally Multinational Corporations*, *supra* note 61.

86. *See id.* at 518.

87. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 575 (2008).

88. Lakhani, *supra* note 55, at 167 (citing Owen J. Lynch & Greg Maggio, Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society, Center for International Environmental Law Publications, Nov. 15, 1997, at § II, available at <http://www.ciel.org/Publications/olp3ii.html>).

89. *See id.*

90. *Id.*

91. *See Gersen & Posner*, *supra* note 87, at 575.

C. *Problems With Soft Law*

Regardless of the work of many scholars to establish soft law as a legitimate subject of study, some still insist that soft law does not exist.⁹² Arguing that the concept of soft law is merely a pledge or contract rather than any form of substantive law, Kal Raustiala argues that scholars draw their conclusions from weak evidence of state practice.⁹³ Raustiala reasons that the many agreements are labeled “soft law” rather than treating them as regular contracts or pledges because they lack the traditional qualities of international law.⁹⁴ He goes on to say that these agreements should not be labeled as soft law on an empirical basis because states behave as if legal agreements are decisively different from non-legal agreements.⁹⁵ States do not designate different levels of laws, with some being softer, some harder, and some not law at all.⁹⁶ Instead, states carefully choose the nature of their agreements in a black-and-white fashion, either making them law or not law.⁹⁷ While hard law can be flexible,⁹⁸ it is also declared law by the states. Raustiala uses the Helsinki Final Act as an example because of the importance the parties to the agreement put on its nonbinding nature.⁹⁹ Raustiala argues that the Act is not law because both parties clearly stated the Act was not a treaty or legally binding.¹⁰⁰

The Helsinki Final Act can be compared to the OECD’s *Guidelines* because they are voluntary and nonbinding.¹⁰¹ By extension, Raustiala’s argument would suggest the *Guidelines* are merely a pledge due to their nonbinding nature and because the member-states have not declared the *Guidelines* to be law.¹⁰² If the OECD and the *Guidelines* are not a form of law, and the United States has not declared them to be legally binding, then according to the view of soft-law critics, the United States would have no obligation to abide by the *Guidelines* aside from mutual respect with the other parties.¹⁰³

92. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 586 (2005).

93. *Id.* at 588.

94. *Id.*

95. *Id.* at 587.

96. *Id.*

97. See Raustiala, *supra* note 92, at 587.

98. *Id.* at 589 (Imprecision does not affect the legal character of domestic laws where standards such as “reasonable person,” “due process,” and “good faith” are used.).

99. *Id.* at 587.

100. *Id.*

101. See generally *Guidelines*, *supra* note 5.

102. See Raustiala, *supra* note 92, at 587.

103. *Id.* at 588.

Aside from the criticism that it is not a true form of law, soft-law also faces enforceability issues.¹⁰⁴ The OECD *Guidelines* are “rich in principle, but weak in enforcement.”¹⁰⁵ Because of problems with enforceability, NCPs have almost ceased to exist.¹⁰⁶ Unlike hard law, soft-law enforcement is more a matter of discreet persuasion by OECD officials and member countries, or public embarrassment through the media.¹⁰⁷ The NCP’s role in the process is to provide a forum for discussion where the parties to the complaint may raise the issues.¹⁰⁸ If the parties cannot come to a resolution themselves, the NCP is tasked with issuing a statement that provides recommendations on how to implement the *Guidelines*.¹⁰⁹ Aside from the recommendations, there are no further actions the NCP must take to resolve the issue.¹¹⁰ The general lack of bite possessed by the *Guidelines* and other forms of soft law are the biggest source of criticism.¹¹¹

III. THE UNITED KINGDOM AND THE OECD GUIDELINES

The United Kingdom has been quite active in its enforcement and promotion of the OECD *Guidelines*.¹¹² While the United States provides a quarter of the OECD’s annual budget, the United Kingdom provides seven and a half percent.¹¹³ As one of the world’s more active NCPs,¹¹⁴ the United Kingdom’s NCP will be used as a base for comparing the United States NCP’s enforcement and promotion of the *Guidelines*.

104. See Bob Hepple, *Papers of the Joint Japan-U.S.-E.U. Project on Labor Law in the 21st Century: A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL’Y J. 347, 354 (1999).

105. *Id.*

106. *Id.*

107. See Lance Compa and Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 671 (1995).

108. See *Guidelines*, *supra* note 5, at 34.

109. *Id.*

110. *Id.*

111. See Hepple, *supra* note 104, at 360.

112. See generally Department for Business Innovation & Skills, UK National Contact Point for OECD Guidelines for Multinational Enterprises, <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html> (last visited Jan. 5, 2010) [hereinafter *UK NCP*].

113. See *Contributions*, *supra* note 2.

114. See generally *UK NCP*, *supra* note 112.

A. Global Witness v. Afrimex

On February 20, 2007, the UK NCP received a request from Global Witness to consider a complaint against Afrimex UK Ltd.¹¹⁵ In its underlying complaint, Global Witness alleged that Afrimex paid taxes to rebel forces in the Democratic Republic of Congo and failed to practice sufficient due diligence on the supply chain, sourcing minerals from mines that used child labor and forced labor under unacceptable health and safety practices.¹¹⁶ The claim arose out of actions relating to the global market for coltan, a metal used in the production of cell phones and other consumer electronics.¹¹⁷ Specifically, Global Witness alleged that Afrimex did not comply with Chapter II (General Policies), Chapter IV (Employment and Industrial Relations) and Chapter VI (Combating Bribery) of the *Guidelines*.¹¹⁸ Afrimex fought the claims, which resulted in the decisions by the UK NCP.¹¹⁹

Global Witness' claims were based on Afrimex's activities in the Democratic Republic of Congo ("DRC") between 1998 and February 2007.¹²⁰ In evaluating Afrimex's actions, the NCP considered only actions that took place after 2000, but looked at pre-2000 conduct as circumstantially relevant to the post-2000 actions.¹²¹

There were two main sources for Global Witness' claims.¹²² The first related to the conflict zone within the DRC,¹²³ while the second focused on the relations between the entities that were responsible for the conduct at issue.¹²⁴ Data and fieldwork compiled by UN officials were critical to the NCP's decisions regarding the state of affairs in the region at the time.¹²⁵ The UN's report was the basis for presuming the DRC's conflict was a result of the desire to control the region's mineral

115. See UK NCP, *Global Witness v. Afrimex* (28 August 2008) [6].

116. *Id.*

117. Larry Catá Backer, *Rights and Accountability in Development ('RAID') v. Das Air and Global Witness v. Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELB. J. INT'L L. (forthcoming 2010) (manuscript at 21, on file with author, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427883) [hereinafter *Small Steps*].

118. See *Afrimex*, *supra* note 115, at [13].

119. *Id.* at [14]-[16].

120. *Id.* at [7].

121. *Id.* The new Guidelines came into force in June 2000, and while the NCP "will not make a determination about the allegations prior to June 2000, the NCP considers that past behavior is pertinent when considering behavior that occurred after June 2000." *Id.*

122. See generally *Small Steps*, *supra* note 117.

123. See *Afrimex*, *supra* note 115, at [8]-[12].

124. *Id.* at [17]-[26].

125. *Id.* at [20].

resources.¹²⁶ The illegal mining activities in the DRC included the direct exchange of arms for natural resources by international corporations working in the DRC.¹²⁷ The UK NCP analyzed not only the movement of arms and the conflict in the DRC, but also analyzed other UN activities relating to the conflict in the DRC, to support the presumption of an “explicit link between minerals and funding rebel groups.”¹²⁸

The UK NCP focused on any connection between Afrimex to both the DRC and the suspicious activity.¹²⁹ In order to establish a connection, the NCP would have needed to connect Afrimex to the Congolese companies Societe Kotecha or SOCOMI.¹³⁰ Even after Afrimex’s effort to establish that a separation of business existed between them and the other two companies,¹³¹ the UK NCP found a connection sufficient to put Afrimex in a position to “influence Societe Kotecha and SOCOMI.”¹³² Therefore the companies were treated as connected for the purpose of the UK NCP’s decision.¹³³ Just because the companies were found to have had a connection did not mean that the companies were each other’s alter egos; rather, the connection only suggested that the companies could have acted as alter egos.¹³⁴

With the companies being evaluated as if they were linked, the UK NCP applied the *Guidelines* to the facts that stood as the basis of Global Witness’ complaint.¹³⁵ The NCP found a connection between the companies and found that Afrimex had failed to uphold its duties under the *Guidelines* when it did not influence SOCOMI to stop paying taxes and licensing fees to Rassemblement Congolais pour la Democratie (“RCD-Goma”),¹³⁶ a rebel group that operated within the DRC conflict zone.¹³⁷

126. See UN DRC Panel, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, 215, UN Doc S/2001/357 (12 April 2001) [hereinafter *UN Panel*].

127. See *Afrimex*, *supra* note 115, at [9].

128. *Id.* at [11].

129. See *Small Steps*, *supra* note 117, at 23; See *Afrimex*, *supra* note 115, at [29]-[57].

130. See *Afrimex*, *supra* note 115, at [17]-[24]. The two enterprises were involved in the region, and believed to even be part of the same company as Afrimex. UK NCP, *Global Witness v. Afrimex* (28 August 2008) [20].

131. See *Afrimex*, *supra* note 115, at [21]-[24].

132. *Id.* at [27].

133. *Id.*

134. See *Small Steps*, *supra* note 117, at 23.

135. See *Afrimex*, *supra* note 115, at [29]-[51].

136. *Id.* at [39].

137. *Id.* at [38].

The International Peace Information Service (IPIS), implies that Afrimex was SOCOMI’s only export customer during the period of the statistics collected in 2000/01. If this is the case, Afrimex was the reason that SOCOMI traded in

The UK NCP also considered the possible violation of the supply chain conduct rules of the *Guidelines* because SOCOMI was not Afrimex's only supplier, and Afrimex would have been in a position to influence its other business partners and suppliers.¹³⁸ The NCP concluded that Afrimex had failed to conduct due diligence with regard to its suppliers, and therefore had failed to fulfill the requirements of the *Guidelines*.¹³⁹ Afrimex's failure to fulfill the requirements resulted in the taxation payments going down Afrimex's supply chain, and funding the conflict.¹⁴⁰ While Afrimex's level of due diligence may have been acceptable outside a conflict zone, the fact that it had occurred in the DRC conflict zone proved it to be unacceptable, as a greater level of scrutiny was required due to weaker governmental authority.¹⁴¹

The NCP also determined that Afrimex was aware of the situation in the DRC and was active in the conflict zone.¹⁴² Though Afrimex did not pay taxes to the rebel group RCD-Goma, the NCP concluded that Afrimex had not taken the necessary steps to prevent SOCOMI from paying taxes and fees for mineral licenses to RCD-Goma, resulting in the failure to meet the requirements of the *Guidelines*.¹⁴³ Though the NCP concluded Afrimex did not pay taxes while SOCOMI and Societe Kotecha did, the NCP did not consider any of the payments to be bribery.¹⁴⁴ Furthermore, the NCP concluded that Afrimex had failed to apply sufficient due diligence to its supply chain by not taking the necessary steps to influence its supply chain to explore options for sourcing minerals from mines without child or forced labor, and with better health and safety conditions.¹⁴⁵

In response to Afrimex's violations, the NCP recommended that Afrimex directly apply a number of international norms and standards to its business.¹⁴⁶ Along with the recommendations, Afrimex offered to formulate a corporate-responsibility document to shape its future actions.¹⁴⁷ In its resolution, the NCP stated that Afrimex had to take proactive steps to understand how its existing and proposed activities

minerals and therefore Afrimex is responsible for SOCOMI paying the license fees and taxation to RCD-Goma. . . .

Id.

138. *Id.* at [40].

139. *Id.* at [51].

140. *See Afrimex, supra* note 115, at [51].

141. *See Small Steps, supra* note 117, at 25.

142. *See Afrimex, supra* note 115, at [58].

143. *Id.* at [59].

144. *Id.* at [60].

145. *Id.* at [62].

146. *See Small Steps, supra* note 117, at 25.

147. *See Afrimex, supra* note 115, at [63].

affected human rights in the DRC.¹⁴⁸ The NCP also referred Afrimex to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which has been developed as part of the OECD's Investment Committee's follow up to the *Guidelines*.¹⁴⁹

The NCP's decision on Afrimex shows that the *Guidelines* can have an important influence on cross-border corporate behavior.¹⁵⁰ Most important is the scholarly suggestion that soft-law principles are an important substitute for hard law in weak government areas and that the decision suggests the power of transnational legal standards to be a powerful supplement or surrogate for national standards.¹⁵¹

B. RAID v. DAS Air

On April 28, 2005, the UK NCP received another complaint, this time from RAID (Rights and Accountability in Development) alleging breaches of UN embargoes by DAS Air.¹⁵² The case against DAS Air was brought in the UK because DAS Air was registered in the UK.¹⁵³ In the complaint, RAID alleged that DAS Air had transported coltan, originating in a conflict zone, from the DRC through the operation of civilian aircraft.¹⁵⁴

While RAID's complaint sought to establish UN embargo violations for DAS Air flights in the region during the conflict, the *Guidelines*, under which the complaint was made, did not take effect until 2000.¹⁵⁵ Because most of DAS Air's flights in the DRC had occurred prior to 2000, the UK NCP focused on the three flights that occurred after 2000,

148. *Id.* at [65].

149. *Id.* at [67]. The Risk Awareness tool consists of a list of questions that companies should ask themselves when considering actual or prospective investments in weak governance zones. These questions cover obeying the law and observing international relations; heightened managerial care; political activities; knowing clients and business partners; speaking out about wrongdoing; and business roles in weak governance societies—a broadened view of self interest. *Id.* The tool also states that companies have the same responsibilities in weak governments. *Id.* at 68. The Risk Awareness tool is available at www.oecd.org/dataoecd/26/21/36885821.pdf.

150. *See Small Steps*, *supra* note 117, at 27.

151. *Id.* at 26.

152. *See* UK NCP, *DAS Air* (21 July 2008) [1]. RAID is a Non-Government Organization that was founded in 1997 that aims through its research to promote social and economic rights to impose corporate accountability. *Id.* at [6]. Coltan is the colloquial African name for columbite-tantalite, a metallic ore used to produce the elements niobium and tantalum, primarily used for the production of capacitors, which are vital components in electronic devices. *Id.* at [12].

153. *Id.* at [7]. DAS Air is a long established UK based air-freight-services business. *Id.*

154. *Id.* at [1].

155. *Id.* at [9].

using the prior 32 pre-2000 flights as circumstantial evidence of DAS Air's continued violations.¹⁵⁶

The UK NCP based its decision on factual determinations that had been generated through various commissions investigating DAS Air.¹⁵⁷ In June 2000, the UN Security Council appointed an independent panel of experts to follow up on reports and to collect information regarding the illegal exploitation of natural resources in the DRC.¹⁵⁸ The panel was also tasked with evaluating the exploitation of the DRC's natural resources and the continuation of the conflict.¹⁵⁹ In its reports, the UN Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo found that the conflict was mainly about access to and control of coltan, diamonds, copper, cobalt and gold.¹⁶⁰ What was damaging to DAS Air was the Panel's finding that the company was transporting coltan from the conflict zone to Europe.¹⁶¹ This fact became the basis for the complaint against DAS Air.¹⁶²

Following the report by the UN Panel of Experts, a Ugandan Judicial Commission led by Ugandan Justice Porter was established to look at the allegations in the UN Report.¹⁶³ The Porter Commission found that military airbases were being used to transport goods for civilian reasons.¹⁶⁴ More specifically, the Ugandan military bases were being used to hide civilian trade occurring in the conflict zone.¹⁶⁵ The allegations against DAS Air stemmed from the hidden civilian flights arriving at and departing from the military bases.¹⁶⁶

In its decision, the UK NCP rejected DAS Air's claim that the Porter Commission's findings were fabricated and unsubstantiated.¹⁶⁷ Without proof to the contrary, the UK NCP found that DAS Air did fly into the conflict zone, and that the flights were improperly classified as military flights rather than civil flights so as to avoid violations of "the Chicago Convention."¹⁶⁸ The UK NCP also looked at DAS Air's

156. *Id.*

157. *See DAS Air, supra* note 152, at [17]-[24].

158. *Id.* at [17].

159. *Id.* at [5].

160. *Id.* at [18].

161. *Id.* at [19].

162. *See DAS Air, supra* note 152, at [20].

163. *Id.* at [21].

164. *Id.* at [22]-[24].

165. *Id.* at [23].

166. *Id.* at [24].

167. *See DAS Air, supra* note 152, at [29].

168. *Id.* at [30]. Formally titled the *Convention on International Civil Aviation* (CICA), the convention consists of a number of principles and arrangements to which governments have agreed so that international civil aviation may develop in a safe and

internal governance regarding its transportation activities.¹⁶⁹ It accepted the conclusions of the UN Panel that the private sector played a role in the continuation of the war by trading the minerals that were the source of the conflict.¹⁷⁰ Based on the Panel's findings, the UK NCP found that DAS Air had not adhered to the heightened care required of companies when investing and trading in weak governance zones.¹⁷¹ The UK NCP also found that DAS Air could have influenced its third-party contacts through contracts for the transportation of coltan.¹⁷² DAS Air could do this because it had a significant market share of the flights that transported minerals out of the DRC and had a specialized knowledge of the region, which knowledge the UK NCP believed should have yielded a clear understanding that the minerals might have come from conflict zones.¹⁷³ Since DAS Air had not made an effort to learn the source of the minerals it was transporting, the UK NCP found that DAS Air had failed to undertake sufficient due diligence on its supply chain.¹⁷⁴

In its conclusions, the UK NCP found that DAS Air had failed to meet the requirements of the *Guidelines*.¹⁷⁵ The UK NCP also stated that it expected UK businesses to follow international conventions, such as the *Chicago Convention*,¹⁷⁶ and urged UK companies to use their influence to ensure due diligence when trading natural resources from

orderly manner, and so that equality of opportunity is the basis for the establishment of international civil air transport. *Id.*

169. *See Small Steps*, *supra* note 117, at 20.

170. *See DAS Air*, *supra* note 152, at [42].

171. *Id.* at [43]. The NCP stated:

There is no evidence that DAS Air made any concessions to the conflict occurring in the region. DAS Air transported minerals from Kigali, which had a reasonable probability of having been sourced from the conflict zone in the DRC, on behalf of its customers.

Id.

172. *Id.* at [44].

173. *Id.* at [44]. DAS Air stated to the NCP that it did not question the source of the mineral that it transported. *Id.*

174. *Id.* at [44].

175. *See DAS Air*, *supra* note 152, at [50].

The lack of due diligence on the supply chain, meant DAS Air did not meet the requirements of the following paragraphs of the *Guidelines*:

II.1 Contribute to economic, social and environmental progress with a view to achieving sustainable development.

II.2 Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

II.10 Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the guidelines.

Id.

176. *Id.* at [51].

conflict regions.¹⁷⁷ Finally, the UK NCP pointed to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones for questions UK companies should ask themselves before investing in weak governance zones.¹⁷⁸

IV. THE UNITED STATES AND THE OECD GUIDELINES

For the United States, involvement with the OECD falls under the U.S. Department of State.¹⁷⁹ If the United States' website regarding the OECD is in any way indicative of its utilization of the *Guidelines*, the United States does not appear to put forth much effort beyond contributing to the yearly budget.¹⁸⁰ While the United Kingdom's website provides procedures for filing NCP complaints and past UK NCP cases,¹⁸¹ the United States NCP website provides little more than a recital of the basic provisions of the OECD *Guidelines* themselves.¹⁸² The United States website states that the country hopes to ensure that other countries match the United States' standards.¹⁸³

A. *My Experience Contacting the National Contact Point*

When I first attempted to make contact with the United States NCP by phone, I found that the phone numbers listed on the website were disconnected. After calling all available numbers in an effort to get a hold of someone in the Department of State who was involved with the OECD, I reached the office of the NCP. Any excitement gained from my find was quickly diminished when the office of the NCP informed me that there were no cases or information that could be provided to demonstrate the NCP's activities relating to the *Guidelines*.¹⁸⁴ Instead, the office of the NCP suggested I contact another country whose NCP was more active and would have information to provide.¹⁸⁵

The conversations with the office of the NCP paired with the lack of information on the United States NCP's website lead to the conclusion that the United States falls far short of the effort taken by other countries, namely the United Kingdom, to promote the *Guidelines* and to ensure it

177. *Id.* at [54].

178. *Id.*

179. See United States Department of State, OECD, <http://www.state.gov/e/eeb/oecd/> (last visited Jan. 6, 2010) [hereinafter *US DoS*].

180. *Id.*

181. See generally *UK NCP*, *supra* note 112.

182. See generally *US DoS*, *supra* note 179.

183. See generally *US NCP*, *supra* note 51.

184. Telephone Interview with United States National Contact Point, United States Department of State (Sept. 26, 2009).

185. *Id.*

is used. For a country that provides a quarter of the OECD's yearly budget,¹⁸⁶ the United States does not appear to uphold even the most basic obligation of publicizing the *Guidelines* and making known the procedures for filing a complaint with the NCP.

V. POSSIBLE ALTERNATIVES TO THE OECD GUIDELINES AND THE NATIONAL CONTACT POINT

Though the use of the *Guidelines* and NCPs is heavily reliant on peer pressure, it offers solutions to issues that may not otherwise be available.¹⁸⁷ The reason for this is that companies are specialized economic enterprises, not public-interest organizations.¹⁸⁸ The treaties and international agreements that govern States do not govern the duties and responsibilities of a corporation or a separate economic organ.¹⁸⁹

A. *The Alien Tort Claims Act*

If not for the availability of the NCP and the *Guidelines*, claims for violations of international law would have to be brought through avenues such as the Alien Tort Claims Act (hereinafter "ATCA") in the United States.¹⁹⁰ The ATCA gives federal courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁹¹ With that said, one of the major problems with the ATCA is that claims can only be brought for violations of international law, not violations of agreements between nations.¹⁹²

To demonstrate the difficulty of bringing a case under the ATCA, to date, only two cases stemming from the ATCA have gone to a federal jury trial.¹⁹³ In *Doe v. Unocal*, Unocal Corporation was sued in the Central District of California for numerous alleged human-rights

186. See *Contributions*, *supra* note 2.

187. See generally Sarah A. Altschuller and Amy Lehr, *Corporate Social Responsibility*, 43 INT'L L. 577 (2009).

188. See generally Special Representative for the Secretary-General, *Report of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Summary, *Delivered to the U.N. Human Rights Council*, U.N. Doc. A/HRC/8/16 (Apr. 7, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>.

189. *Id.*

190. See generally Altschuller & Lehr, *supra* note 187.

191. Alien Tort Claims Act, 28 U.S.C. § 1350 (1789) [hereinafter ATCA].

192. See generally Altschuller & Lehr, *supra* note 187. Federal courts now recognize jurisdiction under the ATCA when three conditions are met: (1) an alien sues; (2) the suit is for a tort; and (3) the plaintiff alleges a violation of international law. See William J. Aceves, *Affirming the Law of Nations in U.S. Courts: An Overview of Transnational Law Litigation*, 49 FED. LAW. 33, 34 (2002).

193. *Id.*

violations that had occurred during the development of a natural-gas pipeline in Myanmar.¹⁹⁴ The court found that nonstate actors could be held liable for violations of international treaties and agreements even without state action.¹⁹⁵ The court also determined the international-law standard for when a corporation could be liable for the acts of another party.¹⁹⁶ In the end, the court held that Unocal could not be held liable for the actions of the Myanmar government if Unocal did not also actively participate in those violations.¹⁹⁷

While Unocal was not held liable, the case recognizes the potential liability of MNEs for both their own actions and the actions of partners and joint ventures.¹⁹⁸ At the same time, the case illustrates the many difficulties in bringing a successful ATCA action against an MNE.¹⁹⁹ The difficulties stem from the fact that courts generally construe the ATCA narrowly.²⁰⁰ One difficulty that is discussed in the Unocal case is that the MNE must engage in “practical assistance or encouragement” that has a direct and substantial effect on the violation.²⁰¹ Put another way, a corporation cannot be held liable merely for investing in a country where the government or someone in the supply chain engages in violations of international law.²⁰² Proving that the corporation took an active role in any violation is extremely expensive because the events that lead to the claims under the ATCA do not usually occur in the United States, and the costs associated with international discovery and the required travel are not slight.²⁰³

194. See generally *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997).

195. *Id.*

196. *Id.* at 1310.

197. *Id.* There was evidence presented that Unocal knew of the forced labor, and that it was benefitting from its usage, but the court found that such evidence was not enough to “establish liability under international law.” *Id.*

198. See William J. Aceves, *Affirming the Law of Nations in the U.S. Courts: An Overview of Transnational Law Litigation*, 49 *FED. LAW.* 33, 37 (2002).

199. See generally *Unocal*, *supra* note 194, at 1310.

200. See Helen C. Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 *DEPAUL L. REV.* 231, 238 (1987). Several recurring questions appear in the case law: (1) Has an actual violation of international law occurred? See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978). (2) Does international law grant a private cause of action? See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-08 (D.C. Cir. 1984) (Bork, J., concurring). (3) Does international law impose liability upon private actors for private conduct? See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). (4) Is adjudication of the claim barred by one or more of the doctrines of political question, sovereign immunity, and act of state? *Id.*

201. See Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 *RUTGERS L. REV.* 971, 979 (2004) (citing *Jones v. Saudi Arabia*, [2004] EWCA Civil 1394, 1, PP 61-68 (Oct. 28, 2004)).

202. See *Unocal*, *supra* note 194, at 1310.

203. See *Cleveland*, *supra* note 201, at 982.

Along with the difficulty of directly tying a corporation to violations of international law, the complexity of corporate forms creates another problem for plaintiffs.²⁰⁴ Corporations and their networks of subsidiaries are structured to limit liability, and given the instability in some developing countries, MNEs are wise to shield themselves from their foreign subsidiaries.²⁰⁵ Because federal courts usually have personal jurisdiction over the parent companies, plaintiffs often go after the parent under the ATCA.²⁰⁶ In cases of complex corporate forms and structures, plaintiffs face an uphill battle because courts generally respect the corporate form's limited-liability character.²⁰⁷ Suggestions have been made that when a corporation, rather than an individual, is a shareholder, the shield of limited liability should be lifted and the corporate parent held liable for the actions (or lack of action) of its subsidiaries.²⁰⁸ But, until courts look differently upon corporate form and limited liability, plaintiffs will have to deal with limited liability as a barrier to their ATCA cases.²⁰⁹

If, however, a plaintiff can afford the expenses of litigation and successfully dodges the parent company's limited liability, he or she is still not out of the woods.²¹⁰ In moving forward with a case, plaintiffs must also contend with U.S. foreign relations.²¹¹ If the litigation in any way interferes with U.S. foreign relations, the courts may have to deal with the executive branch urging for dismissal, a move that has proven successful in the past.²¹² Whether the executive acts to save peace negotiations,²¹³ or generally just to save relations with a foreign

204. See Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 170 (2005).

205. *Id.* at 178. Limited liability was established to minimize shareholder liability and to encourage risk-taking in the United States. It is important to ask "whether the justification for limited liability—thickened by layer upon layer of wholly- and partly-owned subsidiaries as well as joint ventures across multiple countries and differing legal systems—extends so readily to [MNEs]." *Id.* at 179.

206. *Id.* at 170. "Doctrines employed to analyze the liability of a parent corporation include: piercing the corporate veil, integrated enterprise liability, agency-based liability, aiding and abetting, and ratification." *Id.*

207. *Id.* at 170.

208. *Id.* at 179 (citing Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, 55 (1991)).

209. See generally Londis, *supra* note 204, at 182-88.

210. See Cleveland, *supra* note 201, at 982-88.

211. *Id.*

212. *Id.* at 983 (citing *Sarei v. Rio Tinto, PLC*, 221 F.Supp.2d 1116, 1178-79 (C.D. Cal. 2002)).

213. See generally *Sarei v. Rio Tinto, PLC*, 221 F.Supp.2d 1116 (C.D. Cal. 2002) (dismissed based in part on the United States' representation that the litigation was disrupting a dubious indigenous peace negotiation).

country,²¹⁴ the U.S. Supreme Court has deferred to the executive branch's interpretations of the impact cases will have on foreign policy.²¹⁵

If statistics were not enough to demonstrate the difficulty of bringing a successful ATCA claim, the lingering threat of encroachment on foreign policy and the deference given to the executive branch clearly show the fragility of any ATCA case.²¹⁶

B. Other Possible Alternatives

Aside from the ATCA, there are very limited outlets where judicial enforcement of international laws can be sought.²¹⁷ International-law claims cannot be brought to state courts because the courts will lack jurisdiction to hear the cases.²¹⁸ The ATCA grants exclusive jurisdiction to federal courts for violations of international law, jurisdiction that state courts do not have.²¹⁹

Prosecution of MNEs in other countries has not proven much more successful than cases brought in the United States.²²⁰ An example of this is the case of Trafigura, a Dutch MNE based in London, which was charged with dumping toxic waste in municipal dumps in the Ivory Coast, causing thousands of people to suffer health problems.²²¹ Trafigura argued that it hired an Ivorian company to handle the waste, and was therefore not liable.²²² The Ivorian Court of Appeal found insufficient evidence with which to charge Trafigura but sentenced the head of the Ivorian company that was alleged to have handled the waste to twenty years in jail, thus demonstrating the difficulty in prosecuting MNEs on an individual state level.²²³

214. See generally Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to the Honorable Louis F. Oberdorfer, U.S. District Court Judge for the District of Columbia (July 19, 2002), available at <http://www.laborrights.org> (argument that lawsuit could alienate Indonesian government, therefore affecting its willingness to participate in the war on terror).

215. See Cleveland, *supra* note 201, at 983. (citing *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766, n.21 (2004)).

216. *Id.* at 971. The *Rio Tinto* court dismissed the case almost solely on the opposition expressed in the Executive branch's Statement of Interest. See *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116 (C.D. Cal. 2002).

217. *Id.* at 972.

218. See generally *id.* at 971.

219. See generally ATCA, *supra* note 191.

220. See generally Altschuller & Lehr, *supra* note 187.

221. See generally *Two Jailed Over Ivorian Pollution*, BBC NEWS, Oct. 23, 2008, <http://news.bbc.co.uk/2/hi/africa/7685561.stm>.

222. *Id.*

223. *Id.*

VI. CONCLUSION

Though soft law may not have the enforceability of hard law and may be voluntary for member-states, it still can fill gaps in hard laws.²²⁴ The *Guidelines* along with NCPs offer a procedure and venue for interested parties to bring actions against MNEs for violations of standards agreed upon by a transnational group of nations.²²⁵ What the *Guidelines* lack in enforceability, they make up for in flexibility.²²⁶ Without the *Guidelines*, affected parties would have to rely on statutes such as the ATCA, which has never led to a plaintiff-favorable judgment.²²⁷ Then again, as it currently stands, an interested party in the United States may have no course of action, as the U.S. NCP provides no procedures for filing a claim and cannot even provide examples of past work it has completed.²²⁸ The situation would be much different in the United Kingdom, where the NCP provides information regarding the procedures to follow for a claim, as well as a list of past recommendations.²²⁹

In the absence of an effective alternative method of holding MNEs accountable for their actions abroad, the *Guidelines* provide an option that while not based on hard law can effect change through the use of peer pressure.²³⁰ After all, if the use of the ATCA has never led to a judgment for a plaintiff, the possibility that peer pressure leads to any form of remedy for a violation of the *Guidelines* is a substantial improvement. The *Guidelines* also provide an option where state law fails to meet a plaintiff's needs.²³¹ Where hard law fails to provide outlets to resolve problems, the use of soft law, more specifically the *Guidelines*, puts options in front of interested parties or NGOs that may be monitoring violations of transnational law.

The *Guidelines* will grow stronger as more and more countries adhere to it and promote it, since the *Guidelines* is built on mutual respect among the member-states.²³² As the largest contributor to the OECD, and as one of the most influential countries in the world, the United States should do more to both utilize and advertise the *Guidelines*. By adhering to the OECD agreements, the United States can enhance its international credibility towards corporate responsibility,

224. See generally Christians, *supra* note 69.

225. See generally *Guidelines*, *supra* note 5.

226. See generally Christians, *supra* note 69.

227. See generally Altschuller & Lehr, *supra* note 187.

228. See *US NCP*, *supra* note 51.

229. See *UK NCP*, *supra* note 112.

230. See generally *Multinational Corporations*, *supra* note 61.

231. See generally Altschuller & Lehr, *supra* note 187.

232. See generally Christians, *supra* note 69.

while simultaneously strengthening the system that is already in place.²³³ In the end, transnational-law litigation provides a voice for victims who would have no other outlets and a forum to hear their claims. The United States should make an effort to remove any limits on such litigation, and should put in place mechanisms that affirm the law of nations and that ensure that all victims may receive justice.²³⁴ The best option, and maybe the only effective option, is a commitment to the OECD *Guidelines*.

233. See generally Cleveland, *supra* note 201.

234. See Aceves, *supra* note 198, at 38.