

Survival International Vs WWF: Using the OECD Guidelines for Multinational Enterprises as a means of NGO accountability

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1. INTRODUCTION

In February 2016, Survival International ('SI') filed a complaint to the Organisation for Economic Cooperation and Development (OECD) against the World Wide Fund for Nature ('WWF'), accusing the WWF of facilitating violent abuse against Baka 'Pygmies' forcing them to leave their homeland in Cameroon to make way for a national reserve. This complaint was unique as it was the first ever filed by a non-governmental organisation (NGO) against another NGO using the OECD Guidelines for Multinational Enterprises ('OECD Guidelines'),¹ which had been originally designed to handle complaints against transnational corporate entities. In December 2016, the Swiss National Contact Point accepted the complaint for further consideration asserting, in its initial assessment, that the OECD Guidelines could be applicable to non-corporate entities, such as NGOs. The purpose of this paper is to provide a commentary on this unprecedented dispute, evaluating the extent to which the OECD Guidelines could be used as a means of accountability against NGOs.

2. THE ROLES OF NON-GOVERNMENTAL ORGANIZATIONS IN THE INTERNATIONAL HUMAN RIGHTS LEGAL ORDER

The development of the international human rights legal order can be hardly understood without acknowledging the contribution that NGOs made to it. International activism has widely contributed

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¹ OECD, OECD Guidelines for Multinational Enterprises Annex to Declaration on International Investment and Multinational Enterprises, OECD Doc. C (76) 99 (Final) (1976) subsequently emended in 1979, 1982, 1984, 1991, 2000 and 2011.

to the creation and promotion of international human rights norms as well as to the dissemination of facts concerning alleged human rights violations.²

NGOs advocacy has frequently triggered and facilitated the processes of human rights standard-setting, leading to the codification of prominent international human rights norms such as freedom from torture, rights of the child and rights of indigenous peoples.³ NGOs have also played a crucial role in ensuring compliance with human rights standards by filing legal complaints, providing third-party interventions in judicial disputes or submitting opinions known as *amicus curiae* briefs.⁴ The European Convention on Human Rights, under Article 34 and Article 36 (2) respectively, allows NGOs to bring complaints and provides third-party intervention.⁵ Article 44 of the American Convention on Human Rights provides that NGOs can lodge petitions to denounce human rights violations and the Inter-American Court of Human Rights has accepted *amicus curiae* submissions from NGOs.⁶ Similarly, NGOs that have been granted observer status by the African Commission on Peoples' Human Rights can bring cases to the African Court on Human and Peoples' Rights under Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.⁷ Even if NGOs are not allowed to bring human rights complaints under the UN treaty-bodies mechanism, some organisations such as Amnesty International have often channeled relevant information for the reporting process to members of various UN monitoring bodies.⁸

Given the state-centric nature of the international human rights legal order, human rights complaints can only be brought against States as NGOs, just like other non-state actors, do not possess legal personality in international law and, as such, they are immune to human rights obligations.⁹ However, at the end of the 1980s NGOs began managing and distributing a wide range of social services traditionally carried out by States.¹⁰ Such a change revealed that governance both locally and globally was no longer the domain of governments and corporations alone as it involved

² Glausius and Lettinga, 'Global Civil Society and Human Rights' in Micheal Goodhart (ed), *Human Rights: Politics and Practice*, 3rd edition (2013) 147 at 151.

³ Van Boven, 'The Role of Non-Governmental Organisations in International Human Rights Standard-Setting: A Prerequisite for Democracy' 1990 (20) *California Western International Law Journal* 207 at 211.

⁴ Glausius and Lettinga, supra n 2 at 152.

⁵ Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions' 2011 (36) *Brooklyn Journal of International Law* 911 at 916.

⁶ Ibid. at 919-920.

⁷ Ibid. at 920-921.

⁸ Zagorac, 'International Courts and Compliance Bodies: The Experience of Amnesty International' in Tullio Treves et al. (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 11 at 13.

⁹ Charnovitz, 'Nongovernmental Organisations and International Law' (2006) 100 *The American Journal of International Law* 348 at 355.

¹⁰ Naidoo, Civil Society Accountability: 'Who Guards the Guardians?', UN Headquarters (3 April 2003) at 1, available at unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan043442.pdf [accessed 7 October 2017].

contributions from civil society actors.¹¹ In some instances, like in Bangladesh, NGOs operate as a parallel government as they invest more money in development than the national government.¹² Where NGOs exercise degrees of governance this inevitably raises the question of their accountability in terms of compliance with international human rights standards.

3. THE OECD'S GUIDELINES FOR MULTINATIONAL COMPANIES (1975)

During the early 1970s, with the emergence of a New International Economic Order, the international community began debating on the human rights responsibilities of transnational corporations ('TNCs').¹³ Emphasising the importance of regulating corporate activities in developing countries carried out by multinational entities, the UN General Assembly provided in Section V of Resolution 3202 (S-VI) that 'all efforts should be made to formulate, adopt and implement an international code of conduct for TNCs'.¹⁴ Simultaneously, two documents were adopted to highlight the importance of a human rights based approach to global business: The International Labour Organisation released the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy¹⁵ in 1976 and the OECD adopted in 1975 the OECD Guidelines.¹⁶

The OECD Guidelines consist of voluntary recommendations addressed by governments to TNCs operating in or from adhering countries. This non-binding instrument sets standards of behavior to promote responsible business conduct in different fields (for example, transparency, human rights, environment, and taxation) among corporate actors operating in a global context. Governments adhering to the OECD Guidelines are required to set up a National Contact Point ('NCP') which oversees the implementation of voluntary recommendations at national level through promotional activities and to contribute to the resolution of issues in cases of non-compliance. As a state-based non-judicial grievance mechanism, NCPs serve as a platform to remedy harms arising from corporate misconduct and provide a forum for mediation and conciliation for resolving practical issues related to the non-observance of the OECD Guidelines.

NGOs have always played a pivotal role in filing complaints before NCPs against TNCs. It is estimated that NCPs have handled almost 250 cases submitted by community groups and NGOs

¹¹ Ibid.

¹² Godrej, 'NGOs - do they help?', *New Internationalist*, 1 December 2014, available at newint.org/features/2014/12/01/ngos-keynote/ [last accessed 20 June 2017].

¹³ De Schutter, 'The Challenge of imposing Human Rights Norms on Corporate Actors' in De Schutter (ed.), *Transnational Corporation and Human Rights* (2006) at 2.

¹⁴ Declaration on Establishment of the New International Economic Order, 1 May 1974, A/RES/S-6/3202.

¹⁵ ILO, Tripartite Declaration of Principles Concerning Multinational Enterprise and Social Policy, November 1977, ILO Doc. GN 204/4/2, UN Doc. E/C. 10/AC.2/3 (Annex II).

¹⁶ OECD, supra n 1.

from 2001 onwards.¹⁷ In a similar vein, NGOs have supported victims of illicit corporate behaviors by helping them file judicial complaints in jurisdictions where TNCs are registered to carry out their activities abroad when hosting countries are unable to deliver justice locally.¹⁸ Aside from such means of strategic litigations, international activists have also denounced TNCs publically for their human rights violations through ‘naming and shaming’ employing different strategies, the most peculiar of which was the recent establishment of a *tribunal d’opinion* (also called civil society tribunal) to denounce the ecocide perpetrated by Monsanto.¹⁹ Over the years, this form of lobbying has played a crucial role in pushing TNCs towards adopting corporate ethical codes in the form of self-regulation²⁰ whereas, at international level, it has led to the adoption of two prominent initiatives in the area of business and human rights: The UN Global Compact (2001)²¹ and the UN Guiding Principles on Business and Human Rights (2011).²² The culmination of the global movement of NGOs that has constantly called for a greater accountability of corporate entities for human rights violations was, more recently, the establishment by the UN Human Rights Council of an inter-governmental working group to elaborate a treaty on business and human rights (2014).²³

NGOs have certainly contributed to the development of a more responsible approach to human rights in the business sector by putting pressure on states, international organisations and corporations. Ironically, such a call to be more responsible has turned into a boomerang for NGOs as their counterparts (politicians and corporations) as well as public media and scholars have raised the question ‘who guards the guardians?’, in light of their growth in terms of size, power and influence.²⁴ The increased power acquired by NGOs illustrates that such actors can affect interests and opportunities of those communities they serve, becoming the third-force alongside states and TNCs. In this context, academics and practitioners have shown that NGOs follow a primarily donor-centric approach when it comes to organisational accountability, paying little attention to their beneficiaries, namely those people they provide services to or speak on behalf of in policy

¹⁷ OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*, June 2015, at 9, available at namati.org/resources/remedy-remains-rare-analysis-of-15-years-of-ncp-cases/ [last accessed 21 June 2017].

¹⁸ For example, see *Friday Alfred Akpan v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria* LDT [30 January 2013] District Court of The Hague, C/09/337050/HAZA 09-1580.

¹⁹ See International Monsanto Tribunal’s official website at www.monsanto-tribunal.org [last accessed 10 October 2017].

²⁰ Joseph, *Corporations and Transnational Human Rights litigation* (2004) at 6.

²¹ The UN Global Compact, 26 July 2000, emended in 2004, available at www.unglobalcompact.org [accessed 21 June 2017].

²² UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5.

²³ See, in general, Bernaz and Pietropaoli, ‘The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations’ (2017) *Journal of Human Rights Practice* 1–25.

²⁴ Naidoo, *supra* n 10 at 2.

forums.²⁵ More dramatically, the credibility of NGOs has been undermined by a series of high-profile scandals concerning not only poor accountability performances towards their beneficiaries but also alleged human rights abuses perpetrated by NGOs themselves. This has been the case of WWF which was accused by SI of facilitating violent abuse against the Baka ‘Pygmies’, forcing them to leave their homeland in Cameroon to make way for a national reserve.

In February 2016, SI filed a complaint against the WWF before the Swiss NCP using the OECD Guidelines. This complaint was unique as it was the first ever filed by an NGO against another NGO using the OECD Guidelines, which are typically used to assess complaints against TNCs. Based on an extensive interpretation of the notion of multinational entities as provided by the OECD Guidelines, the Swiss NCP accepted the complaint for further consideration asserting, in its initial assessment, that voluntary recommendations can be applicable to non-corporate entities, including NGOs.

The purpose of this paper is to provide a commentary on this unprecedented dispute, evaluating the extent to which the OECD Guidelines can be used as a means of accountability against NGOs. The fourth section provides background information on the dispute before the Swiss NCP. The fifth section explores the content of the initial assessment issued by the NCP, focusing on the NCP’s reasoning according to which the OECD Guidelines are applicable to the WWF. Finally, the last section assesses the extent to which the OECD Guidelines can be applicable to NGOs, providing a taxonomy of the criteria that NGOs have to meet to be subjected to a complaint before NCPs. It is submitted that the OECD Guidelines can be used as a means of accountability against certain types of NGOs, even if NGOs are by nature non-profit making.

4. SURVIVAL INTERNATIONAL VS. WWF: FACTUAL AND BACKGROUND CIRCUMSTANCES

In February 2016, SI submitted a 228-page complaint to the OECD in Switzerland, where WWF International is based, asserting that the Baka - indigenous group who live in the rainforest in southeast Cameroon - had been denied access to their homeland and subsequently abused by local eco-guard officers after the Cameroon government established protected areas with the vital support of WWF to make the way for a national reserve.²⁶ The complaint was based on field research conducted by SI in Cameroon and upon extensive discussions with the Baka, local organisations as well as with other stakeholders.²⁷

²⁵ Ebrahim, ‘Accountability in Practice: Mechanisms for NGOs’ (2003) 31 *World Development* 813 at 817. See also Edwards, *NGO rights and responsibilities: A new deal for global governance* (2000) at 13.

²⁶ *Survival International Charitable Trust v The Wide Fund for Nature*, OECD Complainant Submission, 10 February 2016, at paras 1-5, available at www.oecdwatch.org/cases/Case_457 [last accessed 13 October 2017].

²⁷ *Ibid.* at para 6.

The first limb of the complaint ('land issue') regarded the *modus operandi* through which the national government, in close consultation with the WWF, had introduced protected areas in the rainforest of southeast Cameroon. Based on evidence gathered by SI, the establishment of the protected areas was conducted without the free prior and informed consent of the Baka who had been denied access to the traditional territories and natural resources on which they depend.²⁸ According to SI, the WWF should have known that its logistic support of the demarcation of the national reserve and the subsequent deployment of eco-guards would result in adverse human rights impacts.²⁹ Essentially, the WWF failed to conduct an adequate human-rights assessment with due diligence as it did not consult local communities directly affected by its actions as required by the 2011 OECD Guidelines, Chapter IV, Human Rights, Paragraphs 4 and 5.³⁰

The second limb ('eco-guards issue') was related to the violent abuse to which the Baka had been subjected by the eco-guards who patrolled the protected areas. According to SI, the eco-guards had been trained and supported both financially and logistically by the WWF.³¹ In particular, SI contended that WWF's support to the eco-guards, who were supposed to patrol and focus on commercial poachers and professional hunters, led to violent abuse of the Baka contributing to adverse human rights impacts resulting into a subsequent failure to address such impacts when occurred, under the 2011 OECD Guidelines, Chapter IV, Human Rights, Paragraphs 1, 2, 3 and 6.³² One scholar commented on the operation conducted by the eco-guards in the village inhabited by the Baka, warning that human rights abuses against indigenous groups are increasing due to a 'militarised approach' to conservation.³³ According to several witnesses, the eco-guards confiscated various objects belonging to the villagers such as guns, metal cables and even machetes (which are not used for hunting elephants or other protected species) while other villagers were tortured and abused both physically and verbally.³⁴

Relying on the definition of multinational enterprises under Chapter 1 (4) of the OECD Guidelines, SI emphasised that voluntary recommendations were potentially applicable to the WWF and more broadly to any private entity, other than conventional TNCs, operating internationally in all sectors of the economy regardless of its size, ownership and structure.³⁵ More specifically, SI

²⁸ Ibid. at paras 51-57.

²⁹ Ibid.

³⁰ Ibid. at paras 82-94.

³¹ Ibid. at paras 26.

³² Ibid at paras 62-75; at paras 95-109.

³³ See, in general, Duffy, 'Waging a war to save biodiversity: The rise of militarized conservation' (2014) 90 *International Affairs* 819-834.

³⁴ Matsuura, 'Humanitarian assistance from the viewpoint of hunter-gatherer studies: cases of central African forest foragers' (2017) 53 *African Study Monographs* 120 at 121.

³⁵ *Survival International Charitable Trust v The Wide Fund for Nature*, supra n 16 - Annex IV: The Guidelines - at para 8.

pointed out that the WWF was an independent foundation under Chapter 3 of the Swiss Civil Code, it was entered in the Commercial Register of the Canton and coordinated a network of over 80 WWF national offices around the world.³⁶ SI claimed that conservation was an increasingly significant sector of the economy and that the WWF had adopted a market-based approach to conservation and had business plans for its major projects.³⁷

As to the WWF, the conservation group had voluntarily agreed to the mediation process before the Swiss NCP although it disagreed with turning the OECD Guidelines conventionally designed for commercial companies ‘into a mechanism for resolving issues between two non-profit organisations’.³⁸ In September 2016, the WWF submitted a written statement to the Swiss NCP. In its communication, the WWF emphasised its commitment to respect internationally accepted human rights standards in its conservation work, ensuring that nature conservation activities had positive impacts for indigenous peoples.³⁹

As concerned the land issue, the WWF opposed the claims advanced by SI asserting that evidence gathered did not take into consideration the complexity of the zoning process and it also neglected the extensive consultations undertaken by the WWF with the Baka, prior the establishment of protected areas, which resulted in significant amendments of the initial project.⁴⁰

Concerning the eco-guards issue, the WWF expressed its willingness to verify credible allegations of alleged abuse and has taken up instances of verified abuse with the Cameroonian authorities.⁴¹ On this matter, the WWF made clear that even if WWF Cameroon provided advice to Cameroon government on the protection of natural resources, it was not able to set the respective agenda and determine priorities.⁴² Lastly, the WWF explained that the deployment of eco-guards was a decision taken by the Cameroonian government on its own, on which the NGO had no influence and neither logistical nor financial support to the eco-guards was actually provided.⁴³

³⁶ Ibid. at para 10.

³⁷ Ibid. at paras 10-14.

³⁸ Barkham, ‘Human rights abuses complaint against WWF to be examined by OECD’, *The Guardian*, 5 January 2017, available at www.theguardian.com/environment/2017/jan/05/oecd-to-examine-complaint-against-wwf-over-human-rights-abuses-in-cameroon [last accessed 01 July 2017].

³⁹ National Contact Point of Switzerland, Initial Assessment, Specific Instance regarding the World Wide Fund for Nature International (WWF) submitted by Survival International Charitable Trust, 20 December 2016, at 4, available at www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html [last accessed 10 October 2017].

⁴⁰ Ibid.

⁴¹ Ibid. at 5.

⁴² Ibid.

⁴³ Ibid.

5. THE INITIAL ASSESSMENT OF THE SWISS NCP

In December 2016, the Swiss NCP formally agreed to mediate between the two NGOs after being informed that an agreement between the parties outside the OECD system had not been reached. Based on the Procedural Guidance to the OECD Guidelines⁴⁴ and the Specific Instances Procedures of the Swiss NCP,⁴⁵ the latter considered its competence over the dispute as well as whether the OECD guidelines were applicable to the WWF.⁴⁶

As to the choice of the forum, the NCP clarified that normally a specific instance - a complaint about conduct by an enterprise that is alleged to be inconsistent with standards set by the Guidelines - must be raised in the country in which the alleged breach occurred.⁴⁷ If this country was not a signatory state of the OECD Guidelines and did not have its own NCP, the issue should be raised in the country where the TNC has its headquarters.⁴⁸ Consequently, the Swiss NCP was competent for this specific case because Cameroon was not a signatory state of the OECD Guidelines and WWF International, which was responsible for WWF operations in Cameroon, has its headquarters in Gland, Switzerland.⁴⁹

Subsequently, the NCP ruled that the OECD Guidelines were applicable to the WWF despite its non-profit nature. The starting point of the NCP's ruling was Chapter 1 (4) of the OECD Guidelines which did not provide an accurate definition of the term 'multinational enterprises' and stated that 'a precise definition of multinational enterprises is not required for the purposes of the Guidelines'. Indeed, Chapter 1 (4) broadly defines TNCs as those 'enterprises that operate in all sectors of the economy and that ownership may be private, State or mixed ... and they usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.'

Among the element contained in this definition, the primary consideration in defining a TNC was the ability of the corporation to coordinate activities between entities operating in more than one country.⁵⁰ Due to the use of generic term 'other entities', this definition is broadened to encompass numerous business entities regardless of their form, structure and area of activity.⁵¹

⁴⁴ OECD, Decision of the Council on the OECD Guidelines for Multinational Enterprises, 27 June 2000, C (2000) 96/FINAL, available at acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=233&Lang=en&Book=False [last accessed 11 October 2017].

⁴⁵ National Contact Point for Switzerland, Information on the Specific Instances Procedure, November 2014, available at www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP.html [last accessed 17 October 2017].

⁴⁶ National Contact Point of Switzerland, supra n 39 at 1.

⁴⁷ Ibid. at 7.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Muchlinski, *Multinational Enterprises and the Law* (2007) at 7.

⁵¹ Ibid.

Traditionally, the OECD Guidelines establish non-binding standards for responsible business conduct, which is generally understood as the responsibility of TNCs. However, the Swiss NCP pointed out that in this specific instance

[T]he key question ... is whether an entity is involved in commercial activities, independently of its legal form, its sector of activity or its purpose (profit or non-profit). Whether an entity can be considered to have commercial activities, should be decided by the competent NCP through a case-by-case analysis based on the concrete circumstances.⁵²

Considering that WWF International is a non-profit making foundation, and thus a private entity under Chapter 3 of the Swiss Civil Code, the Swiss NCP had recognised the application of the OECD Guidelines to the WWF based on two main considerations. Firstly, the WWF International led and coordinated activities of the WWF network with offices in more than 80 countries around the world.⁵³ Therefore, the transnational nature criterion required by Chapter 1 (4) for the applicability of the OECD Guidelines was self-evident in this specific instance. Secondly, even if WWF International's operations may not *per se* be qualified as being of commercial nature, unlike other global business entities, WWF's approach to conservation was to a certain extent market-based as it carries out a variety of commercial activities, such as income of the WWF network from royalties or selling collectors' albums and the panda emblem for more environmentally friendly products.⁵⁴ In light of this, the Swiss NCP concluded that in the OECD Guidelines applied to the WWF, even if it was by nature a non-profit entity.⁵⁵

Despite the two NGOs had initially accepted the Swiss NCP as a forum with the aim of reaching a mutually acceptable outcome on the dispute, SI announced publically that it would withdraw from the mediation underway after talks with WWF had failed to secure WWF's agreement to consent with the Baka over how to manage the conservation zone.⁵⁶ In September 2017, the Swiss NCP reacted to SI's announcement highlighting that SI breached confidentiality rules of the mediation process that require parties involved not to make public any information on the mediation unless both of them expressly agree to it.⁵⁷ In view of SI's withdrawal, the Swiss NCP has declared that it will close this specific instance.⁵⁸

⁵² National Contact Point of Switzerland, *supra* n 39 at 7.

⁵³ *Ibid.* at 8.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Survival International, Survival-WWF OECD talks break down over tribal consent, 5 September 2017, available www.survivalinternational.org/news/11800 [last accessed 17 October 2017].

⁵⁷ National Contact Point of Switzerland, Specific Instance regarding the World Wide Fund for Nature International (WWF) submitted by Survival International Charitable Trust, Statement of the Swiss NCP on the publication of confidential information by Survival International regarding the mediation process with WWF International, 7

6. CAN THE OECD GUIDELINES BE USED AS A MEANS OF ACCOUNTABILITY AGAINST NGOs?

The Initial Assessment issued by the Swiss NCP represents a landmark decision within the case law of the NCPs and it set an important precedent for handling alleged violations of the OECD Guidelines by non-profit entities. From now onwards, NGOs can be potentially scrutinised by the various NCPs worldwide in case of non-compliance with the OECD Guidelines. However, it would be wrong to assume that all NGOs, of any kind, can be subjected to complaints within the OECD system.

In general, the term 'NGO' is an umbrella-like concept referring to a plethora of private entities and was first ever used by the United Nations when a small club of international social movements acquired the observer status within the Economic and Social Council.⁵⁹ When it comes to defining NGOs, academics use the interrelated concept of civil society as starting point to frame their understanding of the notion concerned. Located between the market, the family and the State, civil society is a concept which brings together 'the world of associational life' (the pluralism of voluntary associations), 'the good society' (a system of noble values) and 'the public sphere' (an 'arena' in which citizens discuss common issues and arrive at some political consensus).⁶⁰ The notion of civil society aggregates under a common category a wide range of organisations: community groups, NGOs, labour unions, indigenous groups, charitable organisations, faith-based organisations, professional associations, and foundations.⁶¹

Consequently, NGOs are a subset of civic associations described as independent, non-profit making, self-appointed and self-governing entities that campaign for the well-being of others.⁶² According to Edwards, 'if civil society were an iceberg, then NGOs would be among the more noticeable of the peaks above the waterline, leaving the great bulk of community groups, informal associations, political parties and social networks sitting silently (but not passively) below'.⁶³ In public discourse, NGOs are often seen as identical and it is often ignored that NGOs are profoundly

September 2017, available at www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html [last accessed 14 October 2017].

⁵⁸ Ibid.

⁵⁹ Article 71, Chapter X, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. See Charnovitz, *supra* n 9 at 352: '[t]he label non-governmental organisations was apparently not used in the League of the Nations. Instead, NGOs of that era were called unofficial, non-public, voluntary or private organisations. By 1943, if not earlier, scholars of international law had begun to use non-governmental organisations'.

⁶⁰ Edwards, *Civil Society* (2004) at 91.

⁶¹ The World Bank, *Defining Civil Society* (2013), available at web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html [last accessed 04 July 2017].

⁶² Gray, Bebbington and Collison, 'NGOs, civil society and accountability: making the people accountable to capital' (2006) 19 *Accounting, Auditing & Accountability Journal* 319 at 321. See also, for example, Bendell, *Terms for Endearment: Business, NGOs and Sustainable Development* (2000) at 16; Vakil, 'Confronting the classification problem: Toward a taxonomy of NGOs' (1997) 25 *World Development* 2057 at 2068.

⁶³ Edwards, *supra* n 25 at 7-8.

different from one another in terms of type (for example, services-provider, and advocacy group), geographic area of activities (for example, international, national, and local organisations) and operational area (for example, human rights, development, and humanitarian assistance).

In the specific instance of the WWF, the Swiss NCP's decision was founded on the assumption that complaints against multinational entities, other than TNCs, should be assessed by the competent NCP through a case-by-case analysis based on the concrete circumstances. In other words, a one size-fit-all approach on the matter should be rejected. Essentially, the NCP's reasoning recognises the heterogeneity of the NGOs' landscape and this is why NCPs are asked to consider each instance separately taking into account individual circumstances and attributes of an NGO.

In addition to this, the Swiss NCP has set some criteria to evaluate what kind non-profit entities can be subjected to complaints within the OECD system: 1) the NGO must operate in more than one countries; 2) the NGO must operate or be registered within a signatory state of the OECD Guidelines; 3) the NGO must carry out commercial activities, even if it has non-profit aim. Obviously, these criteria must be fulfilled jointly. Considering that NGOs are profoundly heterogeneous, an accurate explanation of the three criteria will help to narrow down deductively the applicability of the OECD Guidelines to a certain type of NGOs.

A. The NGO must operate internationally

The OECD Guidelines are an instrument designed to address business behaviors of entities operating on a global scale. As noted previously, Chapter 1(4) of the OECD Guidelines specified that multinational entities must operate in more than one county or must coordinate activities in various ways among entities established in more than one county. In light of this, the OECD Guidelines are applicable solely to International-NGOs, operating in at least two countries, excluding from its application national NGOs (operating in one country) as well as small non-profit entities operating at local level within a single country.

International-NGOs have normally various national offices situated in several countries which work under a common name (for example, Amnesty International Ireland, Amnesty International Portugal and so on) and international campaigns and activities are coordinated by a global headquarter (for example, Amnesty International UK- London). In this context, it is important to note that some International-NGOs operate in more than one country through associate or affiliate organisations. Despite the terms 'affiliate' and 'associate' are often used as synonymous, they refer to different degrees of relationship, governance and control exercised by the International-NGO over its local organisations spread around the world. For example, ActionAid International, which is structured as a global federation of member organisations, distinguishes between

associates and affiliates as follows: a) associates are those organisations that have joined (admitted into) ActionAid International with the purpose of becoming affiliates members; b) affiliates are organisations originally admitted into ActionAid International as associates which have undergone through a defined path expected to strengthen their governance processes, accountability structures and organizational performance with the aim of being admitted into affiliate status of ActionAid International.⁶⁴

Moreover, International-NGOs operate in multiple countries through various grassroots support organisations or local partners - intermediate independent entities - that create links between beneficiaries and the remote levels of the International-NGO. In general, grassroots support organisations and local partners are autonomous entities which are involved within the International-NGO's governance through mechanisms of collaboration or forms of shared-decision making. These autonomous entities complement the complex hierarchical structure of International-NGOs establishing close ties with local populations (downwardly) and, simultaneously, they channel local populations' needs into the numerous dislocated offices of NGO's managers (upwardly).

Given that Chapter 1(4) of the OECD Guidelines requires multinational entity to coordinate activities between organisations in 'various ways', International-NGOs could be potentially scrutinised by a NCP in case of non-compliance regardless of their organisational structure which can be founded on various transnational links with associates, affiliates or independent local partners.

B. The NGO must operate within a signatory state of the OECD Guidelines

The OECD Guidelines is a multilateral soft-law instrument, meaning that complaints should be brought to the competent NCP set by the relevant signatory state. This implies that complaints must be filed against a multinational entity operating in or from adhering countries. With regards to the choice of the forum, the ordinary rule is that the claim must be raised in the country where the alleged breach occurred. Otherwise, if this country is not a signatory state of the OECD Guidelines, the issue should be raised in the country where the multinational entity is registered to carry out its activities abroad. In fact, the Swiss NCP in *SI v. WWF* has claimed its competence over this dispute because Cameroon was not a signatory state of the OECD Guidelines and WWF International, which was responsible for WWF operations in Cameroon, had its global headquarters in Switzerland.

⁶⁴ ActionAid, 'Our structure and governance', available at www.actionaid.org/who-we-are/our-structure-and-governance [last accessed 14 July 2017].

Just as with TNCs, complaints against NGOs can be therefore brought to NCPs set by adhering countries where International-NGOs operate through national offices, associates, affiliates or partners and, where this is not possible, the complaints can be filed in those adhering countries where International-NGOs are registered to coordinate ‘satellite organisations’ located worldwide.

C. The NGO must carry out commercial activities

Under Chapter 1(4) of the OECD Guidelines, the latter are applicable to enterprises operating in ‘all sectors of the economy’ with the aim of ensuring the widest possible observance of voluntary recommendations. Contextually, Chapter IV on Human Rights of the OECD Guidelines applies to all enterprises regardless of their size, sector, operational context, ownership and structure. In *SI v. WWF*, the Swiss NCP revealed that the most important criterion to evaluate whether a complaint against an NGO can be handled by a NCP was through an assessment aimed at verifying if the non-profit entity was involved in commercial activities, independently of its legal form and its sector of activity. Therefore, an International-NGO can be scrutinised by the competent NCP as long as it carries out commercial activities, no matter if it is a services-provider or an advocacy group and regardless of its operational context (for example, humanitarian assistance, international development and so on).

When it comes to verifying whether an NGO carries out commercial activities, NCPs should conduct an accurate case-by-case analysis which takes into account individual peculiarities and attributes of the NGO. In setting this criterion, the Swiss NCP has overcome a false dichotomy according which to non-profit entities cannot engage in business activities. In fact, these two categories (non-profit activity and business activity) are not mutually exclusive as explained by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe in its opinion on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations:

An NGO must not have a profit-making-aim. This condition distinguishes NGOs from commercial companies or other bodies which exist to distribute financial benefits among their members. However, an NGO may make a profit, without altering its character, in connection with a given operation (for example, by renting a property, selling a publication, etc.) if that operation is to serve its non-profit-making aim.⁶⁵

⁶⁵ Council of Europe, *Explanatory Report on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, ETS 124, Strasbourg 1986, at para 8.

Essentially, not-for-profit entities are allowed to engage in commercial activities, as long as those activities are undertaken with the aim of advancing the organisation's purposes.⁶⁶ In general, there are four main ways NGOs may carry out commercial activities in line with their non-profit purposes:

- (a) Commercial activities directly carrying out charitable purposes – where an NGO carries out commercial activities as part of its charitable activities, and these activities directly relate to its charitable purposes.⁶⁷
- (b) Commercial surplus used to further charitable purposes – where an NGO undertakes commercial activities with the aim of generating a surplus, which will fund its non-profit activities.⁶⁸
- (c) Intrinsically non-profit activities carried out in a commercial way – where NGO's activities are intrinsically charitable but carried out in a commercial way.⁶⁹
- (d) Commercial activities incidental to non-profit purposes – where an organisation's commercial activities are only incidental to its primary stated purposes.⁷⁰

There are several reasons because some NGOs adopt a business-oriented approach to achieve their charitable purposes, such as the fact that mere reliance on donations can be often insufficient to finance and carry out their work.⁷¹ At the same time, the spread of a business oriented approach in the non-profit context has been viewed in pejorative terms as it is leading to a process of marketisation of NGOs that could potentially undermine their ability in building long-term transformative goals.⁷² Leaving aside the motives leading International-NGOs to carry out commercial activities and the related criticism, the dispute between the SI and the WWF demonstrates ultimately that if an NGO adopts a market-based approach to serve its non-profit aims, it can be subjected to a complaint in case of non-compliance with the OECD Guidelines.

⁶⁶ Lathlean, 'Making A Profit As A Not-For-Profit: Undertaking Commercial Activities' (2016) 12 *Third Sector Dimension* 2 at 2-3.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Banks, Hulme and Edwards, 'NGOs, States and Donors Revisited: Still Too Close for Comfort?' (2015) 66 *World Development* 707, at 710; Eikenberry and Kluver, 'The Marketization of the Nonprofit sector: Civil Society at Risk?' (2004) 54 (2) *Public Administration Review* 132, at 134.

7. CONCLUSION

The ruling of the Swiss NCP in *SI v. WWF* marked a new era for the OECD Guidelines and for International-NGOs as no transnational entity, no matter how noble its purposes are, can avoid scrutiny. International NGOs are now called on to monitor not only TNCs but also their peers who do not comply with international human rights standards set for businesses. In that respect, the initial assessment issued by the Swiss NCP represented a first clear guidance on how NCPs should assess their competence to mediate disputes concerning non-profit misconducts. In general, complaints can potentially be filed against international NGOs registered or operating in adhering countries of the OECD Guidelines that coordinate global activities in various ways: through national offices, associate or affiliate organisations based in multiple countries or through various forms of cooperation with local independent partners spread worldwide. Additionally, the OECD Guidelines can be invoked to scrutinise exclusively international-NGOs that carry out commercial activities regardless of their size, type or area of intervention. On this matter, NCPs are called to assess, through a case-by-case analysis, the extent to which an NGO engages in business activities by taking into account its individual peculiarities and attributes. Once an NGO meets the threshold applied to the WWF, any claim that the OECD Guidelines have not been adequately implemented by global NGOs can be then handled by the competent NCP.

In conclusion, the OECD Guidelines can be now used as a means of accountability against a certain type of International-NGOs, even if the latter are by nature non-profit making. Traditionally, International-NGOs have always been on the side of the claimant, voicing victim's concerns against corporate human rights violations. In that respect, the decision of the Swiss NCP in *SI v. WWF* represents a shifting paradigm, as NGOs are crossing over to the other side of courtroom normally reserved to alleged perpetrators, defendants and respondents. From now onwards, the OECD Guidelines are available for being used as a tool of peer-pressure, through which watchdogs watch themselves, with the aim of settling non-judicial disputes against International-NGOs.