12

Hidden in the Shades

Patterns of Entanglement within the Web of Corporate Social Responsibility Law

TOMÁŠ MOROCHOVIČ AND LUCY LU REIMERS

12.1 Introduction

The field of corporate social responsibility (CSR) is a rapidly growing area of transnational regulation that is characterized by a multiplicity of norm-making processes in a variety of institutions and different forums. These processes are reflexive, engaging in mutual interaction through mirroring, distancing or complementing existing normative frameworks. The resulting landscape of CSR is defined by contestation and entanglement as CSR instruments of different origin coexist side by side, sometimes with competing claims to compliance. As a result, CSR is a particularly fertile ground for studying how the relations between different bodies of norms are construed.

This chapter sets out to understand how actors entangle CSR norms and, in doing so, create an interlinked web of normative systems, both formal and informal, operating within the state as well as without it. Section 12.2 serves as a brief orientation within the complex world of CSR, identifying the main discourses and categorizations. Out of the multitude of collections of norms which come under the umbrella of CSR, the chapter draws focus to meta-regulatory CSR norms, and in particular the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the Guidelines).[1] Being positioned at the intersection of traditional international law, soft law initiatives developed within international organizations, and private standards and codes, the Guidelines provide a focal

[1] OECD, *Declaration on International Investment and Multinational Enterprises Annex I: Guidelines for Multinational Enterprises* (adopted 21 June 1976, last amended 25 May 2011) OECD/LEGAL/0144.

point for CSR entanglement. Section 12.3 looks at how the structural features of the Guidelines have contributed to the coordinated legal entanglement between various bodies of norms, which should be understood as the creation of stable, systemic and lasting connections and points of interaction. Coordinated legal entanglement can also create space for ad hoc entanglement, which is analysed in Section 12.4. The idea of ad hoc entanglement refers to more fluid and contingent interactions which might deepen the ties between bodies of norms but also sever them. The turn to ad hoc entanglement also involves a change of the subject of enquiry, moving from the systemic features of the OECD Guidelines to focus on actual instances of disputes around CSR, crystallized in the case law arising out of OECD National Contact Points (NCPs) – the Guidelines' implementation mechanism. As indicated, the picture here is more diverse, and interactions between various frameworks are analysed on a scale ranging from distancing to proximity.

By exploring forms of legal entanglement in the field of CSR, the aim is to glean more insight into the evolving shape of this global legal order, which has expanded to include a range of new subjects, norm-making institutions and regulatory tools. To this end, Section 12.5 draws attention to some of the dynamics which appear to be emerging through the interaction of the Guidelines with other bodies of norms. These types of structuring disrupt the traditional notion of a horizontal international legal order. What we see instead is something more akin to a three-dimensional and polycentric web created through new and irreverent forms of linkage and accommodation over time.

12.2 The Contours of Corporate Social Responsibility

There is no single, accepted definition of CSR or its scope. Many definitions exist, each highlighting different aspects of CSR according to the interests of the defining actor. Business groups, for example, tend to adopt definitions of CSR that highlight voluntariness, reinforcing the distinction often made between law and CSR.[2] Capital-exporting states similarly emphasize the voluntary aspect of CSR. The EU, for instance, defines CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations [. . .] on a voluntary

[2] J. A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006), p. 30.

basis'.[3] On the opposite end of the spectrum, non-governmental organizations (NGOs) – confronted with the reality of human rights abuses and environmental harms associated with the activities of global corporations – often prefer not to use the term CSR at all, rejecting the way it has been framed and operationalized by businesses. For example, the Amnesty International homepage on 'corporations' does not mention the term 'corporate social responsibility' once. Instead, Amnesty International calls for corporate accountability, thus bringing it closer to the notion of accountability under law.[4]

The dichotomy about CSR being either intrinsically voluntary or binding is somewhat misleading, however. As Zerk notes, the regulatory impact of CSR provisions does not necessarily correlate to their formal binding power.[5] More neutral definitions of CSR thus avoid references to the mandatory/voluntary distinction, emphasizing instead the social and environmental embeddedness of corporate activities and focusing on the corporate responsibility to address negative impacts while maximizing positive contributions. In this vein, Aguinis and Glavas define CSR as 'context-specific organizational actions and policies that take into account stakeholders' expectations and the triple bottom line of economic, social, and environmental performance'.[6] Similarly, Zerk defines CSR as 'the notion, that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society, and human health'.[7]

In sum, CSR can encompass adherence to both voluntary commitments and legal obligations with regard to corporations' impacts on society in the broad sense of the term. CSR norms can be codified in many different forms and may be produced by a host of different actors. Individual companies produce 'codes of conduct' containing general principles for 'ethical business conduct', often applicable in relation to suppliers/subcontractors, and occasionally linked to specific monitoring

[3] EU Commission, 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' (adopted 18 July 2001) COM (2001) 366.

[4] Amnesty International, *Everything You Need to Know about Human Rights and Corporate Accountability*, www.amnesty.org/en/what-we-do/corporate-accountability/.

[5] Zerk, *Multinationals and Corporate Social Responsibility*, p. 32 *et seq.*

[6] H. Aguinis and A. Glavas, 'What We Know and Don't Know about Corporate Social Responsibility: A Review and Research Agenda' (2012) 38 *Journal of Management* 932–68, at 933.

[7] Zerk, *Multinationals and Corporate Social Responsibility*, p. 32.

(and even complaints) mechanisms, and with sanctions in case of non-compliance. Codes of conduct are also produced at the sectoral level by industry associations, or in the context of multi-stakeholder groups (e.g. the Fair Labour Organization). NGOs and civil society actors have also produced a wide-ranging set of CSR norms, including labelling initiatives (e.g. Fairtrade), sectoral principles or certification schemes (e.g. the Fairmined Standard for Gold from Artisanal and Small-Scale Mining), multi-stakeholder initiatives (e.g. the Ethical Trading Initiative) and guidelines (e.g. the Voluntary Principles on Security and Human Rights). In many instances, governments have organized, facilitated, funded or participated in the drafting of CSR codes, sometimes even establishing their own labelling schemes (such as the EU's Ecolabel).

A category of CSR norms which is of particular interest to this chapter is the so-called 'meta-regulatory' instruments. These can be broadly described as CSR norms produced by international organizations and standard-setting organizations which are directed at multinational corporations (e.g. the International Labour Organization (ILO) Tripartite Declaration containing minimum labour standards). Some of these instruments cover a broad range of areas (e.g. the OECD Guidelines) and are linked to non-judicial complaints mechanisms, while others are directed at specific sectors (e.g. the OECD-Food and Agriculture Organization Guidance for Responsible Agricultural Supply Chains) or cover only specific areas of impact (e.g. the UN Guiding Principles on Business and Human Rights). Positioning themselves above other CSR norms, they often attract entanglement and serve as focal points for interaction.

12.3 Coordinated Interaction at the Meta-regulatory Level: CSR Systems and Their Linkages

The uninhibited increase in the number of CSR systems and their ensuing plurality makes them an excellent target for the study of legal entanglement. The proliferation of CSR initiatives creates a veritable 'market' in which regulatory systems mutually interact, with cooperation and competition representing merely the pinnacle of their diverse interactions.[8] This section focuses on meta-regulatory instruments which

[8] Marx and Wouters map the dynamics of cooperation and competition in the more narrowly construed space of voluntary sustainability standards – see A. Marx and J. Wouters, 'Competition and Cooperation in the Market of Voluntary Sustainability

inherently 'regulate regulation'[9] and, as a result of this, have a higher propensity for *coordinated* entanglement – that is, creating lasting and relatively stable regime interactions which contribute to an interlinked web of normative bodies of norms. Among these CSR frameworks, the OECD Guidelines stand out in particular due to their comprehensive coverage of corporate behaviour and structural openness towards other frameworks. As Backer notes, the Guidelines 'are beginning to serve as the focal point for the construction of an autonomous transnational governance system that is meant to serve as the touchstone for corporate behaviour in multinational economic relationships'.[10]

The history of the Guidelines dates back to 1976 when the document was born as an annex to the OECD's Ministerial Declaration on International Investment and Multinational Enterprises. Other authors have written comprehensively about the development of the Guidelines;[11] here it suffices to say that they are a soft law document containing recommendations to multinational enterprises in relation to

Standards', in P. Delimatsis (ed.), *The Law, Economics and Politics of International Standardisation* (Cambridge University Press, 2015), pp. 215–41; see also S. Wood, K. W. Abbott, J. Black, B. Eberlein and E. Meidinger, 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory' (2015) 6 *Transnational Legal Theory* 333–69 for a more comprehensive study of dynamics of interaction.

[9] Although note that there is divergence on what meta-regulation means – Marx and Wouters, 'Competition and Cooperation in the Market of Voluntary Sustainability Standards', 37; cf. L. C. Backer, 'From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes That Institutionalizes the Advocacy Role of Civil Society', in C. Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017), pp. 97–110; A. Loconto and E. Fouilleux, 'Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance – Politics of Private Regulation' (2014) 8 *Regulation & Governance* 166–85; C. Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), pp. 207–37.

[10] L. C. 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 Case Notes' (2009) 10 *Melbourne Journal of International Law* 258–307, at 284.

[11] See e.g. J. Murray, 'A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD' (2001) 30 *Industrial Law Journal* 255–70; S. Tully, 'The 2000 Review of the OECD Guidelines for Multinational Enterprises' (2001) 50 *The International and Comparative Law Quarterly* 394–404; J. L. Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises International Law' (2008) 4 *Hanse Law Review* 71–102.

the adverse impacts which arise as part of their business activities. While the recommendations themselves are not binding on corporations, adhering countries (including some non-OECD countries) have an obligation to promote the Guidelines.[12] Over the years, the Guidelines have undergone multiple revisions which have significantly expanded both their subject scope and geographical reach, with the major revisions happening in 2000 and 2011. From a legal entanglement perspective, the earlier versions of the Guidelines were uninspiring as they 'made no reference to standards other than those created in the national sphere'.[13] Despite the existence of reservations about the merits of 'cross-pollination' with other bodies of norms,[14] however, the 2000 revision of the Guidelines embraced coordinated entanglement through a number of provisions in the updated text. First, the scope of regulation applicable to corporate behaviour was extended beyond domestic norms to include all 'applicable law',[15] clarified through the OECD's commentary to the Guidelines' chapter on labour standards as referring to the idea that enterprises can be subject to 'national, sub-national, as well as supranational levels of regulation'.[16] A similarly broad wording was adopted in relation to the chapter on environment, which refers to 'relevant international agreements, principles, objectives, and standards'.[17] The wording created an opening through which the Guidelines could be entangled with other bodies of norms, at first being mainly restricted to more traditional international law norms, but this continuously expanded. Second, the 2000 version of the Guidelines explicitly identified a number of instruments which were considered as a relevant resource to determine the scope of obligations, or which the Guidelines were aligned with. Out of those, the various ILO documents cited[18] and the International Organization for Standardization (ISO) Standard on Environmental Management Systems stand out, as they can be seen as directly competing with the Guidelines in the 'market' of transnational

[12] OECD, 'Decision of the Council on the OECD Guidelines for Multinational Enterprises' (adopted 27 June 2000) OECD/LEGAL/0307. See also R. Nieuwenkamp, 'The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (2013) *Dovenschmidt Quarterly* 171–5, at 172.
[13] Murray, 'A New Phase in the Regulation of Multinational Enterprises', 258.
[14] Tully, 'The 2000 Review of the OECD Guidelines for Multinational Enterprises', 397.
[15] See 2000 edition of the OECD Guidelines, chapters I and IV.
[16] Ibid., chapter IV commentary.
[17] Ibid., chapter V.
[18] Ibid., chapter IV.

regulation of corporate conduct. By including such references in the text, and predominantly in the Commentary which forms an integral part of the Guidelines, the OECD began to create the sort of lasting, systemic connections between bodies of norms which characterize coordinated entanglement and enmeshment, and realize the benefits resulting from cooperation between systems.[19]

The 2011 revision of the Guidelines further developed this trend. 'Applicable law' became 'applicable laws and internationally recognized standards',[20] providing a basis for entanglement with bodies of norms which might not be considered law under doctrinal interpretations. The collection of explicitly entangled frameworks grew as well. The undeniably biggest contribution came from the inclusion of a new, standalone chapter on human rights, inspired by the UN Guiding Principles on Business and Human Rights (UNGPs).[21] The alignment of the Guidelines with the UNGPs significantly expanded the normative CSR web, creating direct and indirect linkages with a multitude of bodies of norms. The UNGPs are framed as a 'conceptual and policy framework' for business and human rights, elaborated through extensive multi-stakeholder consultations led by Special Representative (SR) John Ruggie. Having been adopted by the UN Human Rights Council,[22] they operationalize the three-pillar 'Protect, Respect and Remedy' Framework[23] developed by SR Ruggie. While they perform a number of complex roles vis-à-vis a multitude of actors, for the purposes of this chapter we can classify them as a global soft law CSR framework, albeit acknowledging their multifaceted nature. An important element of the UNGPs is that their implementation takes place through 'influence on or integration into other transnational business governance instruments'.[24]

[19] Such as mutually enhancing legitimacy and the prevention of a race to the bottom between standards – Marx and Wouters, 'Competition and Cooperation in the Market of Voluntary Sustainability Standards', 232.

[20] See 2011 edition of the OECD Guidelines, chapter I [1].

[21] Special Representative of the Secretary-General, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

[22] UNHRC, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4.

[23] Special Representative of the Secretary-General, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5.

[24] K. Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2015) 6 *Transnational Legal Theory* 399–434, at 426.

Among these, the Guidelines take pride of place, evidenced by SR Ruggie's assertions that in parallel to preparing the UNGPs he worked closely with the OECD to ensure consistency between the two bodies of norms.[25] Beyond the Guidelines, the most recent amendment of the ILO MNE Declaration[26] takes into account normative developments within the UNGPs, directly transposing some parts of the UNGPs with only minor clarificatory changes in their wording; and both the International Finance Corporation (IFC) Performance Standards and ISO 26000 Sustainability Standard have been coordinated so as to ensure compliance of their respective human rights provisions with the UNGPs.[27] Buhmann describes this as 'mutual piggybacking' between corporate governance schemes, providing implementation mechanisms for the UNGPs, and the UNGPs in turn imbuing other bodies with legitimacy.[28] Using the categorization suggested by Krisch in Chapter 1, the UNGPs are performing the role of 'overarching norms', characterized by the intra-systemic and overarching nature which they display in regard to the regulation of multiple bodies of norms within a single system.[29] Thus, the UNGPs enable the weaving together of international human rights law provisions across different normative bodies and, in doing so, indirectly entangling the Guidelines in an intricate normative web.

A further major feature of the 2000 and 2011 revisions of the Guidelines is the development of straddling practices – 'norms and practices that straddle different bodies of norms without being seen to belong to either'[30] – and again, the UNGPs are prominent in this regard, with their introduction of the concept of human rights due diligence. Although the notion of due diligence is not uncommon within

[25] J. G. Ruggie, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises', in C. Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017), pp. 46–61, at p. 49; J. G. Ruggie and T. Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' Corporate Social Responsibility Initiative Working Paper No. 66 (2015) 426.

[26] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (adopted November 1977, last amended 17 March 2017).

[27] Ruggie, 'Hierarchy or Ecosystem?', 49–50.

[28] Buhmann, 'Business and Human Rights', 427.

[29] See Chapter 1, Section 1.5.1.

[30] The effect of such straddling is that boundaries between bodies of norms are blurred. Straddling practices are thus closest to what we would understand as trans-systemic norms which find applicability across multiple systems and have the ability to 'weave' linkages between them. See Chapter 1, Section 1.5.1.

international law, particularly in international environmental law,[31] the decision by SR Ruggie to reconceptualize it in the context of human rights obligations of corporations, that is non-state actors, was novel. Yet, when the human rights due diligence principle was incorporated into the Guidelines, it was not restricted to the human rights chapter – the OECD took the decision to make it applicable to all areas covered by the Guidelines. A similar thing happened to the concept of Environmental Impact Assessments (EIAs), introduced in the earlier versions of the Guidelines. The fundamentals of the concept, which originated within international environmental law, found application also in relation to non-environmental impacts of corporate behaviour, morphing into Environmental and Social Impact Assessments (ESIAs) and Social Impact Assessments. As will become clear from Section 12.4, the implementation mechanisms of the Guidelines have steadily portrayed these concepts as true straddling practices, being irreverent about their origins and treating them as inherent to the Guidelines.

12.4 Focal Points for CSR Interaction: NCPs as Sites of Ad Hoc Legal Entanglement

One of the distinguishing features of the OECD Guidelines is their implementation framework, based primarily on the practice of mediating complaints (called 'specific instances') by NCPs established domestically in countries adhering to the Guidelines. The geographic spread of NCPs, significant differences in their inner organization and the flexible and open-ended nature of the specific instance procedure create an inherently diverse system which has proved to be a suitable breeding ground for ad hoc legal entanglement. At present, there are forty-eight NCPs, distributed both in the home and host countries of multinational enterprises. The Guidelines provide adhering countries with significant leeway when it comes to setting up NCPs, with different organizational forms being envisaged and with room for the involvement of a variety of stakeholders.[32] As the most recent annual report on the Guidelines shows, NCPs appear to be operating with four decision-making structures with varying

[31] H. Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and beyond' (2015) 48 *George Washington International Law Review* 743–80, at 745–49.
[32] See 2011 edition OECD Guidelines, Procedural Guidance, Chapter I (A).

degrees of interministerial integration and stakeholder engagement.[33] The diversity of actors already involved at the organizational level creates space for a variety of perspectives, and bodies of norms, to be brought to the table. The inclusion of external CSR norms is further facilitated by the open-endedness of the provisions on specific instances. The mandate for specific instances is defined vaguely – essentially, it 'is intended to provide a consensual, non-adversarial, "forum for discussion"'.[34] What this means in practice, however, is open to interpretation by NCPs, and as this section shows, NCPs do diverge significantly in the way they understand this mandate.

At its simplest, the procedure is supposed to bring together interested parties to discuss issues arising in relation to activities of multinational enterprises which potentially impact on the implementation of the Guidelines. The term 'interested parties' is important, as it denotes the open-ended definition of who can trigger a specific instance. Complaints are generally brought by NGOs supporting the claims of affected communities but can also be initiated by trade unions, directly by concerned individuals, multi-stakeholder initiatives, local communities, businesses and even the NCPs themselves, showing that the potential range of actors who can initiate procedures is extensive.[35] There is similar flexibility when it comes to the determination of relevant CSR norms, with the Guidelines simply stating that specific instance proceedings should be carried out 'in accordance with applicable law'.[36] In interpreting the rather vaguely formulated provisions of the Guidelines, parties to the NCP process can thus refer to external bodies of norms, including international soft law. As neither the Guidelines nor the Procedural Guidance set out how external norms should be brought to bear on the Guidelines, normative relationing between bodies of norms in the NCP process often has an ad hoc, even haphazard quality to it, relying on the discursive contributions of the various actors involved in specific instances. NCP case law thus provides a window into the still fuzzy, emerging structures of the postnational world of law in which actors

[33] OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2018' (2019) 35–6. For example, some NCPs are organised within a single ministry, others can involve multiple ministries or governmental agencies, and the most unusual ones could involve a multitude of stakeholders or be led by external experts.

[34] OECD, 'Guide for National Contact Points on Coordination When Handling Specific Instances' (2019), 4; 2011 edition OECD Guidelines, Procedural Guidance, Chapter I (C).

[35] OECD, 'Annual Report 2018', 34.

[36] 2011 edition OECD Guidelines, Procedural Guidance, Chapter I (C).

irreverently weave loose ties between non-hierarchically situated bodies of norms in new governance spaces.

The case studies in Sections 12.4.1–12.4.3 allow us to look through the window and see whether patterns and common dynamics can be identified. The study provides an overview of over 130 concluded NCP cases dating back to 2011 when the second revision of the Guidelines took place. The study also includes a number of pre-2011 cases which provide perspective on how the NCP system dealt with entanglement before the revision. It is important to note that the majority of submitted complaints are not resolved (a small number are withdrawn, many are rejected and a significant number of cases are concluded without a mediated agreement due to withdrawal by one of the parties).[37] Moreover, only in rare cases are NCPs willing to make assessments of non-compliance with the Guidelines in the absence of a joint/mediated agreement. The present study only focuses on those specific instances concluded by the NCPs (whether with or without a mediated agreement), thus excluding cases which were not accepted or are still pending.

The picture which emerges shows a nuanced approach to normative entanglement. While most complaints are concluded without references to external norms, interaction with other bodies of norms is not uncommon – some form of relationing was identified in around a quarter of the cases studied. A dominant feature apparent from the cases is the notion of different 'shades of entanglement', with NCP-specific instances which demonstrate distancing and proximity occupying opposite ends of the spectrum. Some of the examples cannot be clearly categorized as either but nevertheless prove informative regarding how participants in the NCP process construct the responsibilities of corporations under the Guidelines by reference to other bodies of norms and thus fall into a grey area somewhere in-between. However, even specific instances falling into a single category show different intensities of each dynamic and variation as to the 'commitment' by an NCP to distancing or proximity between bodies of norms. Thus, while the three main categories are useful from an analytical perspective, entanglement within the system of the OECD Guidelines is best understood as operating on a spectrum with different shades being present both between and within the two opposite ends of the distancing–proximity dichotomy.

[37] This is also true for this study – in the relevant period, only about half of the submitted specific instances were formally concluded.

12.4.1 Distancing

While distancing can be understood as a dynamic of interaction between bodies of norms and thus as a category of entanglement, it is a mechanism of relationing which is closest to the notion of separation. However, it does not solely perform the role of division. As Krisch notes in Chapter 1, distancing creates space between bodies of norms but it can also be strategically deployed to horizontalize the relationship between them and prevent the emergence of hierarchies.[38] It is necessary to keep this in mind when analysing distancing within the NCP system, as the overall approach adopted by NCPs is very subtle and indicates only limited attempts to distance other CSR frameworks. Notably, none of the cases studied here featured what could be classified as a clear effort at separation, that is, an explicit rejection by an NCP of another normative system as manifestly inapplicable or irrelevant in certain circumstances. This indicates straight away that the Guidelines are a relatively open system. However, it also means that we need to rely on implicit or hidden forms of distancing which can create ambiguous interpretations of the intentions behind them.

Arguably the strongest example of distancing is silence by an NCP in the face of claims by another party in a specific instance as to the applicability of a normative system.[39] Such a situation occurred in the *Salini Impregilo S.p.A.* (2016)[40] specific instance handled by the Italian NCP, in which the NGO Survival International Italia complained about the alleged human rights violations caused by the Gibe III dam construction, carried out by Salini in Ethiopia. The complaint, brought on behalf of affected Indigenous communities in Ethiopia and Kenya, relied on provisions of the African Charter on Human and People's Rights (ACHPR)[41] in apportioning blame on Salini for its failure to respect

[38] See Chapter 1, Section 1.4.3.

[39] In general, the research found only a handful of examples of distancing within the analysed cases but this may be a result of the methodology adopted which focuses only on final statements within the specific instance procedure. Thus, if a body of norms was identified as relevant within the earlier stages of a specific instance and the NCP subsequently remained silent on its interaction with the Guidelines in the final statement, it would fall outside of the scope of this research. This limitation means that the number of examples of distancing may be underrepresented.

[40] Italy NCP, *Survival International Italia* v. *Salini Impregilo S.p.A. (Final statement)* (8 June 2017).

[41] OAU, *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5.

human rights. In response to this, the company highlighted its membership of the UN Global Compact and adherence to a number of ISO standards and sustainability policies. However, none of these found its way into the examination carried out by the NCP nor into its final recommendations. By remaining silent on their relevance to the specific instance, the NCP can be seen as engaging in distancing and asserting the dominance of the Guidelines. Another example of distancing through silence occurred in *Triumph International* (2009).[42] In this specific instance, a coalition of labour unions and NGOs alleged that Triumph, a Swiss company, had not complied with the Guidelines' provisions concerning employment. Unable to successfully initiate mediation between the complainants and the company, the Swiss NCP concluded the specific instance. Although the complaint referred to various bodies of norms beyond the Guidelines, including the company's own CSR code of conduct and ILO documents, the NCP limited its analysis to the Guidelines in the final statement. The silence of the Swiss NCP with regard to assessing compliance with the OECD Guidelines in relation to external bodies of norms can thus be interpreted as a form of distancing.

Interestingly, both of these specific instances related to conduct which happened before 2011 and thus were decided on the basis of the pre-2011 Guidelines which contained only rudimentary human rights provisions. The NCPs' hesitant approach towards analysing compliance with regard to human rights – as evidenced by the Italian NCP's reluctance to engage with external norms, including the ACHPR, in *Salini* – was indicative of the uncertainty surrounding business and human rights at the time. Sticking to the status quo position might have represented the conservative choice for NCPs unsure of where and how to position the 2000 version of the Guidelines within the emerging business and human rights 'galaxy of norms'.[43]

12.4.2 The Grey Area

With the next category of cases, the approach taken by NCPs is even more ambiguous and moves away from efforts at distancing. The analysed cases can be seen as straddling a grey area between distancing and

[42] Switzerland NCP, *Specific Instance regarding Triumph in the Philippines and in Thailand (Final Statement)* (14 January 2011).

[43] E. Diggs, M. Regan and B. Parance, 'Business and Human Rights as a Galaxy of Norms' (2019) 50 *Georgetown Journal of International Law* 309–62.

proximity. Silence still plays a role here, but it has both an integrative and exclusionary function. The dynamic in these cases can be described as 'silent entanglement' – NCPs rely on particular norms (as opposed to bodies of norms) which are not clearly featured within the OECD Guidelines without referring to the framework in which the norm originated. This has been the approach adopted by the German NCP in the *NORDEX SE* (2014)[44] specific instance, which concerned a complaint by an individual against a German wind turbine supplier involved in a wind park energy project in Izmir, Turkey. The complainant pointed to general failures in the respondent's risk management, including insufficient due diligence and failure to carry out an environmental impact assessment – both concepts which can be found in the Guidelines. However, the measures recommended by the NCP and accepted by the respondent through the mediation procedure were more extensive. They included, among other things, the carrying out of environmental and social impact assessments which are distinct from EIAs and external to the Guidelines.[45] Despite recommending the use of a measure external to the OECD system, the NCP did not provide any indication as to its origin or contents, at least not publicly.

A similar process has occurred in relation to the concept of free, prior and informed consent (FPIC) under the auspices of the Swiss NCP, which utilized it on a couple of occasions without giving due consideration to its integration into the Guidelines. FPIC is not mentioned within the Guidelines, yet it was utilized in the *World Wildlife Fund for Nature International (WWF)* (2016)[46] specific instance. In 2016, Survival International filed a landmark complaint against WWF for adverse human rights impacts, including the establishment of protected areas without the free, prior and informed consent of the Baka, an Indigenous tribe in Cameroon. While mediation efforts failed, with the complainant withdrawing from the process, the NCP nevertheless issued a final statement and recommended to WWF 'to help ensure open and transparent FPIC processes in Cameroon'.[47] As with ESIAs in *NORDEX SE*, the NCP did not give any consideration to the pedigree of FPIC, again

[44] Germany NCP, *Dominic Whiting* v. *NORDEX SE (Final statement)* (31 August 2016).
[45] IFC Performance Standards are an example of a normative body which works with the concept of ESIAs.
[46] Switzerland NCP, *Survival International* v. *World Wide Fund for Nature International (Final statement)* (21 November 2017).
[47] *WWF*, p. 6.

engaging in silent entanglement. The Swiss NCP repeated this in the *Credit Suisse* (2017)[48] specific instance, brought in respect of the respondent's business relations with companies involved in the construction of the Dakota Access Pipeline. The mediation ended successfully, with a joint statement in which the respondent committed to incorporating FPIC within its sector-specific policies. While the NCP simply welcomed the respondent's adoption of FPIC, it is notable that there was not complete silence – Credit Suisse, quoting its modified internal policies, traced FPIC to the IFC Performance Standards and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[49] If anything, however, this creates further confusion, as the silence by the NCP stands in contrast with the acknowledgement by the corporation. There are other plausible sources for the norm, notably ILO Convention 169[50] which, in contrast to the UNDRIP, is legally binding. Moreover, there is considerable disagreement as to whether FPIC represents a standalone right or should be treated more as an overarching principle, with differences in interpretation existing depending on the norm-system within which FPIC is being deployed.[51] In such circumstances, the potential problems caused by silent entanglement are further accentuated.

There is one more group of cases falling within the grey zone category, representing instances where an NCP acknowledged the relevance of other bodies of norms but does not say which ones it is referring to. In the *Atradius Dutch State Business* (2015)[52] specific instance, the NCP noted that the respondent had a duty to 'comply not only with national and regional laws and regulations, but also with relevant international norms and standards, including – but not limited to – the Guidelines', without specifying which norms and standards it considers as relevant.[53]

[48] Switzerland NCP, *Society for Threatened Peoples Switzerland (Final statement)* (16 October 2019).

[49] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples* (adopted 2 October 2007) UN Doc A/RES/61/295.

[50] ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989, entered into force 5 September 1991) C169, Art. 16.

[51] B. O. Giupponi, 'Free, Prior and Informed Consent (FPIC) of Indigenous Peoples before Human Rights Courts and International Investment Tribunals: Two Sides of the Same Coin?' (2018) 25 *International Journal on Minority and Group Rights* 485–529.

[52] Netherlands NCP, *Both ENDS et al.* v. *Atradius Dutch State Business (Final statement)* (30 November 2016).

[53] Although in light of the mediation process, the details of which were mentioned in the final statement, it can be implied that 'relevant standards' referred to the UNGPs and IFC Performance standards.

Similarly, the UK NCP in the *ENRC* (2013)[54] specific instance noted that, in preparing its assessment, it 'consulted open sources for information on relevant international standards (including IFC performance standards and UN conventions and reports on human rights)'. Yet, when assessing the behaviour of the company, it only vaguely notes that '[i]nternational standards (including the OECD Guidelines) oblige companies to consider environmental and social aspects of projects throughout their life cycle'.[55] What standards other than the Guidelines the NCP is referring to remains unclear. The most sensible interpretation of what NCPs are doing here is interpreting the Guidelines as a system inherently open to entanglement, which is in line with the analysis of the development of the instrument in relation to other CSR norms in Section 12.3. This links us back again to the idea of resonance, with NCPs situating the Guidelines into a more extensive project of human rights protection which in turn can be understood as providing legitimacy.

12.4.3 Proximity

The specific instances just covered show that the analysis is steadily moving towards proximity between bodies of norms. Here, the existence of varying shades of entanglement is particularly pronounced. It can range from paying mere lip service to another framework by mentioning it in passing, all the way to a thorough analysis of another system's approach to an issue and the intricate weaving together of norms. The starting point here is those instances where entanglement is arguably unsurprising because the external body of norms referred to is 'integrated' or 'enmeshed' with the OECD Guidelines. The research then turns towards the arguably most interesting examples of entanglement: bodies of norms which are wholly external to the Guidelines.

12.4.3.1 Integrated Normative Systems

As noted earlier, some normative systems enjoy a privileged position in terms of their relationship with the Guidelines as they are explicitly mentioned in the text. The UN Guiding Principles as well as the ILO Tripartite Declaration on Multinational Enterprises stand out in this regard. However, just as with distancing and the intermediate category,

[54] UK NCP, *Rights and Accountability in Development (RAID)* v. *ENRC (Final statement)* (February 2017).
[55] *ENRC*, p. 15.

proximity also appears in shades. In some specific instances, NCPs simply note the alignment between the Guidelines and the other body of norms, as the French NCP did in *Michelin Group* (2012) where the UNGPs were mentioned as inspiration for the 2011 revision of the Guidelines.[56] On other occasions, alignment between the two standards is noted in the context of applying a particular rule. This can be seen in relation to the due diligence requirement of the UNGPs in the Danish *PWT Group* (2014).[57] Moreover, NCPs are not always the main drivers behind proximity and the relevance of other bodies of norms is raised by the parties to the complaint. This occurred in the Dutch NCP *Bralima and Heineken* (2015)[58] specific instance. Bralima, Heineken's Congolese subsidiary, was accused of labour misconduct in relation to the departure of a group of employees from its Bukavu brewery in the period between 1999–2003, when an open conflict was ongoing in the Democratic Republic of Congo. Given the historic nature of the complaint, the NCP only played a restricted role and facilitated discussions between the parties. With Heineken already having a human rights policy in place by the time of the specific instance, the NCP encouraged 'Heineken's commitment to continue working on an internal analysis of Heineken's existing policies and processes in the light of the Guidelines and the [UNGPs]'.[59] Another example is the *Norconsult AS* (2015) specific instance, which was resolved through mediation and via a joint statement between the complainants and respondent, endorsed by the Norwegian NCP. In the statement, the respondent committed to respect Indigenous peoples' rights in accordance with ILO Convention 169 and acknowledged the relevance of UNDRIP and the Universal Declaration of Human Rights (UDHR) for its internal human rights policies. It is interesting to see that parties to proceedings also push for proximity through the specific instance procedure – it highlights that the intertwined nature of CSR norms is not only something imposed from above.

Efforts at creating proximity can also take a much stronger form, such as an NCP extensively engaging with the substantive content of other bodies of norms. One example is the Dutch specific instance *VEON*

[56] France NCP, *Tamil Nadu Land Rights Federation* v. *Michelin (Final statement)* (29 February 2016).
[57] Denmark NCP, *Clean Clothes Campaign Denmark and Active Consumers* v. *PWT Group (Final Statement)* (17 October 2016).
[58] Netherlands NCP, *Former employees of Bralima* v. *Bralima and Heineken (Final statement)* (18 August 2017).
[59] *Bralima and Heineken*, p. 5.

(2016),[60] which focused on a labour dispute between VEON, its Bangladeshi subsidiary, and a trade union established at the Bangladeshi operations. The complainants claimed that VEON tried to suppress the employees' attempts to unionize. However, the respondents challenged this by stating that the trade union was illegitimate as it lacked registration with the Bangladeshi authorities – a mandatory requirement under the laws of Bangladesh, but in direct violation of the OECD Guidelines and ILO regulations. The NCP recognized the ILO's competence in this area, noting that 'the ILO has stated on many occasions that the stringent procedural conditions for the registration of trade unions in Bangladesh are not in line with international legislation and necessitate amendment of local legislation'.[61] It suggested to VEON 'to comply with international labour law standards to the fullest extent possible'.[62] In essence, entanglement was utilized here strategically by the NCP in order to assert the authority of a desirable outcome which might be seen as contrary to the requirements of domestic law. Another example of reliance on the substantive provisions is the Dutch *Bresser* (2017)[63] specific instance. The company, a specialist in object relocation, was responsible for the relocation of a fifteenth-century tomb as part of the construction of the Ilisu Dam in Turkey. The complainants claimed that Bresser failed to adequately consult the local population before moving the tomb, violating their right to culture. With the NCP noting that this was the first instance in which the right to culture has been the subject of an NCP procedure, it had to decide whether the matter comes under the scope of the Guidelines. It affirmatively did so, but only through reliance on Principle 12 of the UNGPs and its commentary, as well as Art. 15 of the International Covenant on Economic, Social and Cultural Rights and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage.[64] The unexpected reliance on other bodies of norms in determining whether an issue comes within the ambit of the Guidelines underlines the strong proximity between the Guidelines and the integrated normative systems, in particular the UNGPs.

[60] Netherlands NCP, *UNI Global Union* v. *VEON (Final statement)* (11 February 2020).
[61] Ibid., p. 5.
[62] Ibid., p. 6.
[63] Netherlands NCP, *FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters* v. *Bresser (Final statement)* (20 August 2018).
[64] *Bresser*, p. 4.

Moreover, the case also shows the tendency of NCPs to reach for norms depending on their suitability to the subject matter of the specific instance. This dynamic of 'specialization' is particularly common in instances of entanglement with more traditional normative systems, such as environmental or human rights law.[65] It also stands somewhat in contrast to how proximity is construed between the Guidelines and the UNGPs, with those interactions occurring pretty much universally regardless of the content of the proceedings. The UNGPs are usually utilized to provide detail to norms of a more procedural nature, such as due diligence or the concept of leverage, which find applicability regardless of the subject matter of a specific instance. In contrast, more traditional international law documents (but also ILO standards and, as will be seen, other external bodies of norms) are used more as precision tools to provide details on substantive issues which may relate to a particular right or a particular norm. For example, in the Danish *Greenpeas Enterprise ApS* (2013)[66] specific instance, Art. 8 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition on forced and compulsory labour) was invoked by the NCP in a case addressing the retention of workers' passports against their will, creating 'conditions that can be associated with slavery'.[67] Similarly, in *Mercer PR* (2016),[68] the Australian NCP identified the right to privacy, as contained in Art. 12 of the UDHR and Art. 17 of the ICCPR, as relevant in a specific instance in which a small Australian company distributed personal information concerning an alleged sexual assault.

12.4.3.2 Wholly External Bodies of Norms

Instances of creating proximity between bodies of norms are not only restricted to those standards which are explicitly featured within the OECD Guidelines – entanglement between the Guidelines and wholly external bodies of norms is common. As the following cases show, NCPs adopt a very flexible interpretation of relevant frameworks, treating as

[65] As far as 'traditional' human rights norms are concerned, the specialisation dynamic can lead to the entanglement of norms which are not explicitly mentioned within the Guidelines. This is as a feature of the text of the Guidelines which allows for the consideration of additional human rights standards depending on the subject matter which they address – see 2011 edition of the Guidelines, Chapter IV commentary at [40].

[66] Denmark NCP, *3F* v. *Greenpeas Enterprise APS (Final Statement)* (14 August 2014).

[67] Ibid., p. 6.

[68] Australian NCP, *Australian Women Without Borders* v. *Mercer PR (Final statement)* (9 July 2019).

'applicable law' not only international soft law, but also private agreements and regulatory initiatives of a completely private nature. In addition to having the consequence of 'lumping together' typologically different bodies of norms with little nuance as to their bindingness, such entanglement can have a major legitimizing effect for the external systems due to the meta-regulatory stature of the Guidelines. In some ways, this category of specific instances most closely demonstrates the notion of entanglement as the cases often work with multiple bodies of norms and create linkages between them in an unexpected, even irreverent manner, weaving together a multidimensional web of CSR regulation.

Arguably a more doctrinally conservative collection of cases is represented by those specific instances displaying proximity between the Guidelines and international normative systems developed within international organizations or as a result of agreement between states, and such a dynamic predates the 2011 revision of the Guidelines. In *Vedanta Resources PLC* (2008), Survival International submitted a complaint with the UK NCP concerning Vedanta's planned construction of a bauxite mine in Orissa, India.[69] Survival alleged that Vedanta's operations were inconsistent with the Guidelines and drew on international environmental law and human rights law to substantiate the claims. In coming to its conclusions that the company had indeed breached the Guidelines, the NCP emphasized the rights of Indigenous peoples under international law, 'including the [ICCPR], the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People'.[70] The NCP also found that Vedanta had not engaged in adequate community consultation, interpreting the provision in light of the 2004 Akwé Kon Guidelines produced by the Secretariat of the Convention on Biological Diversity.[71] Thus, the NCP found that the company had breached the Guidelines by reference to an international soft law produced by the secretariat of a multilateral environmental agreement with no formal linkage to them. A post-2011 example is the Dutch *ING* (2017)[72] specific instance, which represented a broad challenge to the respondent's overall climate policy. The claimants

[69] UK NCP, *Survival International* v. *Vedanta Resources plc (Final statement)* (25 September 2009).
[70] Ibid., p. 1.
[71] Ibid., pp. 17–19.
[72] Netherlands NCP, *Oxfam Novib et al.* v. *ING (Final statement)* (19 April 2019).

specifically required ING to report its indirect carbon emissions, accrued through its loans and investments. Despite the broadly framed complaint, the NCP managed to secure cooperation from the respondent and, in doing so, entangled the freshly negotiated Paris international climate agreement into the Guidelines.[73] Not only was the Paris Agreement identified as relevant, but ING agreed to utilize the methodologies of the Paris Agreement in 'measuring, target setting and steering the bank's climate impact'.[74] This indicates another layer to the 'specialization' dynamic, as the international norm might have been chosen not only because of its closeness to the subject matter, but also because it provides effective and appropriate methodologies and solutions which the respondent could incorporate within its CSR policies.

However, coupling also happens with bodies of norms which are not normally considered law or which might originate outside of a state-centric environment, and again this is not limited only to the post-2011 version of the Guidelines. In *Intex Resources ASA and the Mindoro Nickel Project* (2009),[75] the complaint concerned alleged violations of the human and environmental rights of Indigenous peoples that would be affected by Intex Resources' planned nickel mine and factory in the Philippines. The Norwegian NCP concluded that the company had, inter alia, failed to properly consult the affected groups, thus breaching the Guidelines. As Intex had previously declared its adherence to the IFC Social and Environmental Performance standards and the Equator Principles, the Norwegian NCP repeatedly drew on the content of those standards when determining whether the company had complied with the Guidelines' recommendation 'to consider the views of other stakeholders'. In addition, the NCP referred to the UNDRIP, ILO Convention 169 in order to interpret and 'flesh out' the recommendations of the Guidelines.[76] In this instance, the NCP made full use of the in-text references to other bodies of norms in the Guidelines, as well as the fact that the company itself had proclaimed adherence to the IFC Performance standards.

[73] Ibid., p. 3.
[74] Ibid., p. 4.
[75] Norway NCP, *Future in Our Hands (FIOH)* v. *Intex Resources ASA* (*Final Statement)* (28 November 2011).
[76] Ibid., p. 21 *et seq*.

In the *KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co., and Karl Rieker GmbH & Co. KG* (2013)[77] specific instance, the German NCP provided an illustration of how private agreements can be entangled. The case concerned a fire at the Tazreen Fashion factory in Dhaka, Bangladesh, in November 2012. The complainant asserted that the respondent companies were jointly responsible for the fire because they continued to produce clothing at the site, even though an independent safety assessment carried out in 2011 found that safety measures were inadequate. All three enterprises were producing clothes in the factory indirectly through subcontractors. While the complaint against C&A was forwarded to the Brazilian NCP,[78] the German NCP did investigate the allegations against KiK and Karl Rieker. It did not consider the two respondents' direct liability for the fire to be substantiated, however, as both companies proved that they discontinued production at Tazreen Fashion over six months before the fire.[79] The NCP did initiate mediation proceedings for the part of the claim which concerned breaches of the duty of care in relation to the safety measures within the factory. As part of the mediation, the NCP and the parties relied upon the Bangladesh Safety Accord to which KiK and Karl Rieker were both signatories. While all parties were supportive of the measures taken as part of the Accord, it is interesting that these were not deemed to be sufficient and the NCP recommended other supplementary measures.[80] The dialectic deployed in the mediation shows that entanglement in a single case can be nuanced, with efforts to increase proximity but also to distance norms and create hierarchy. Entanglement can thus be used to further both legitimization and delegitimization. The parties and the NCP embraced the measures of the Accord, recognizing it as relevant. Yet, at the same time, the NCP limited its legitimacy by stating that the Guidelines require supplementary measures to be taken. In doing so, it reinforced the meta-regulatory status of the Guidelines and provided a hint as to the emergence of a hierarchy between the two bodies of norms.

A very similar dynamic can be seen in the *Rabobank* (2014)[81] specific instance, in which the Dutch NCP considered the respondent's provision

[77] Germany NCP, *Uwe Kekeritz* v. *KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co., and Karl Rieker GmbH & Co. KG (Final statement)* (November 2014).
[78] As a result of the legal structures of C&A's operations in Bangladesh at the time, the entity responsible in this case was the Brazilian subsidiary of C&A.
[79] *KiK Textilien*, pp. 3–4.
[80] *KiK Textilien*, p. 6.
[81] Netherlands NCP, *Friends of the Earth* v. *Rabobank (Final statement)* (15 January 2016).

of loans to the Indonesian palm oil company Bumitama. Interestingly, a central part of the complaint became obsolete during the proceedings, as Bumitama terminated the contract for the plantation which formed the primary subject of the complaint. Nevertheless, the Dutch NCP considered that some parts of the complaint still merited further consideration, allowing it to analyse more generally Rabobank's policy in relation to palm oil supply chains. A core part of this assessment was devoted to Rabobank's membership of the Roundtable for Sustainable Palm Oil (RSPO), which is a global multi-stakeholder sustainability initiative. A company wishing to become a member of the RSPO (and thus be able to use the RSPO trademark ecolabel) has to undergo a certification process, which itself is based on another set of private principles for sustainability standards – the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance Credibility Principles, which perform a meta-regulatory role within the sustainability standards sector. By engaging the RSPO, the Dutch NCP is, possibly unknowingly, entangling the Guidelines with two layers of normative systems. Proximity within this specific instance takes the form of the NCP's cautious optimism about the RSPO in stating that its grievance mechanism and commitment to a multi-stakeholder approach can be seen as good practice within the palm oil production sector.[82] However, the NCP also notes the need for the respondent to develop its own practices beyond the RSPO, even suggesting disengagement as an option of last resort.

Thus, just as in the previous specific instance, we can identify a dual dynamic of both proximity and distancing with an external standard. On one hand, the NCP legitimizes the body of norms as a good practice, on the other, it delegitimizes it by encouraging the respondent to look beyond. The sense of hierarchy emerging between the Guidelines and the RSPO is further reinforced by the fact that in *RSPO* (2018),[83] a complaint was brought directly against the Roundtable before the Swiss NCP for the alleged failures of its complaint mechanism in dealing with a land dispute between local communities in Indonesia and one of its member companies. While the NCP was limited to the role of a mediator and did not directly draw upon an external standard, the specific instance is notable for the way in which it interacts with the RSPO as an external

[82] Ibid., p. 4.

[83] Switzerland NCP, *TuK Indonesia* v. *Roundtable for Sustainable Palm Oil (Final statement)* (5 June 2019).

system. The NCP carries out a somewhat supervisory role, relying on its own leverage over the RSPO to push the sustainability standard itself towards compatibility with the Guidelines. Thus, proximity and distancing both seem to be present, drawing the bodies of norms closer but also alluding to a hierarchy between them and, in doing so, demonstrating another shade of the complexity of entanglement.

The *Bresser* specific instance and a number of others have already shown NCPs drawing on multiple bodies of norms in one proceeding. The final part of this section focuses on three specific instances featuring this dynamic which were brought within the UK NCP system. These arguably represent the strongest examples of proximity, invoking multiple normative systems and showing extensive interaction by the NCP. The first specific instance is *GCM Resources plc* (2012),[84] concerning plans by the respondent to develop a mine in Bangladesh. The complaint dates back to 2004 when GCM Resources began the planning and consultation process for the mine. However, the company's activities were still effectively incomplete and on hold at the time of the complaint. Thus, parts of the specific instance were handled under the 2000 version as well as the 2011 version of the Guidelines. The respondent had undertaken an ESIA as part of its planning and consultation process which the NCP considered in light of the standards applied by the World Bank and the IFC. While the NCP acknowledged that the self-regulatory practices adopted by GCM Resources and based on the IFC standards were sufficient, it pointed out inadequacies in relation to the respondent's communication of its plans to affected communities.[85] In relation to adverse human rights impacts before September 2011, the NCP noted that the UNGPs were available to businesses from 2010 and also that human rights concerns were incorporated in the IFC standards. The NCP also noted the 'company's plans recognise the ILO standard on Indigenous Peoples'.[86] When considering activities happening after September 2011, the NCP reiterated the relevance of the UNGPs and highlighted the applicability a new set of IFC Performance Standards, issued in 2012. The NCP also noted that the respondent's updated plans will have to consider the right to FPIC, as contained within UNDRIP.[87]

[84] UK NCP, *International Accountability Project and World Development Movement* v. *GCM Resources plc (Final statement)* (November 2014).
[85] Ibid., p. 13.
[86] Ibid., p. 15.
[87] Ibid., p. 18.

The *GCM Resources plc* specific instance underscores that engagement with human rights norms intensified in the post-2011 Guidelines, but also shows that human rights considerations were clearly present even before. Interestingly, the NCP indicated that the IFC Performance Standards played a major role in this regard. The way in which the concepts of ESIA and FPIC were treated is also notable – in contrast to the examples of silent entanglement in *NORDEX SE*, *WWF* or *Credit Suisse*, the UK NCP in *GCM Resources plc* was very explicit about connecting ESIA with the IFC Performance standards and FPIC with UNDRIP. This again shows that entanglement is nuanced, with proximity being a more dominant dynamic in the UK context.

The second UK-specific instance to consider is *G4S plc* (2013),[88] which also concerned actions spanning both the 2000 and 2011 versions of the Guidelines. The complaint was addressed against the respondent's provision and maintenance of security equipment (CCTV, baggage scanners) at Israeli checkpoints within the Palestinian occupied territory and within Israeli prisons. At the outset of its fact-finding, the NCP noted the relevance of the 2004 International Court of Justice (ICJ) *Israeli Wall Advisory Opinion*[89] and the UK's acceptance of the advisory opinion.[90] In contrast to *GCM Resources plc*, the NCP predominantly focused on the respondent's human rights obligations after 2011, putting the UNGPs under the spotlight and drawing extensively on their provisions, especially those in regard to the termination of a business relationship.[91] Private standards were also engaged – the NCP recognized the relevance of the International Code of Conduct for Private Security Providers, 'of which G4S was a founder signatory in 2010'.[92] However, the NCP also explicitly dismissed another private initiative suggested by G4S (Voluntary Principles on Security and Human rights) as it was principally relevant to the sectors of mining and energy.[93] Showcasing both proximity and distancing, the approach in *G4S plc* is another good example of the specialization dynamic mentioned earlier.

[88] UK NCP, *Lawyers for Palestinian Human Rights (LPHR)* v. *G4s plc (Final statement)* (March 2015).

[89] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

[90] Such as the FCO Overseas Business Risk and FCO Human Rights and Democracy reports. *G4S plc*, p. 11.

[91] Ibid., p. 13.

[92] Ibid., p. 14.

[93] Ibid.

Finally, the *KPO Consortium* (2013)[94] instance involved a consortium of companies from three OECD member countries (Italy, the UK and the USA) operating an oil and gas production facility in Kazakhstan. After mutual agreement between the relevant NCPs, the UK NCP took care of handling the complaint and engaged KPO as a single entity. The adverse human rights impacts arose in relation to two households located within a protective zone around KPO's facility and who were consequently entitled to resettlement and compensation. Just as before, the issues were of a long-term nature, dating back to the 1990s and potentially involving three different versions of the Guidelines. The UK NCP changed tack from the previous specific instances by ingeniously applying the extensive human rights provisions of the 2011 Guidelines even to situations where the adverse impact arose before 1 September 2011 but was still ongoing.[95] This enabled the UK NCP to draw on the UNGPs and their predecessor, the UN Protect, Respect and Remedy Framework.[96] The IFC Performance Standards were also considered relevant, as KPO received a loan from the IFC, making their provisions directly applicable to the project.[97] The UK NCP went into some detail in considering how the IFC's standard for involuntary resettlement applied to the situation, noting that the situation wasn't a typical case for the IFC standard but that KPO should have nevertheless applied it as good practice.[98]

The three specific instances show that the UK NCP's approach is closest in resemblance to a more traditional, adversarial method of adjudication.[99] Maheandiran suggests that the nature of the approach adopted by an NPC can have an impact on the objectives and structure of the specific instance procedure.[100] It can be argued that this is also true for the dynamics of entanglement, with the UK approach showing the most extensive entanglement with multiple bodies of norms. As a consequence of establishing liability within its approach, the UK NCP necessarily considers the applicability of particular norms and systems in

[94] UK NCP, *Crude Accountability* v *KPO Consortium (Final statement)* (November 2017).
[95] Ibid., p. 9.
[96] *KPO Consortium*, p. 16.
[97] Ibid., p. 16. In fact, the complainant NGO even utilized the IFC's complaints system before resorting to the NCP procedure.
[98] Ibid., p. 18.
[99] B. Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System under the OECD Guidelines for Multinational Enterprises' (2015) 20 *Harvard Negotiation Law Review* 205–44.
[100] Ibid., pp. 227–37.

detailed fashion. This can seem counterintuitive, as a more traditional adjudication mechanism would probably draw clear lines between bodies of norms in an effort to determine the applicable law, thus moving closer towards distancing and possibly separation of systems. Yet the same dynamic within the open system of the Guidelines appears to go in the opposite direction and increase proximity between bodies of norms.

12.5 Implications and Observations

The open formulation of the OECD Guidelines gives ample room for NCPs to resort to external bodies of norms and to position themselves in the context of a broader and evolving discourse around CSR. As shown in Sections 12.3 and 12.4, the openness of the Guidelines has increased over time, creating structural opportunities for entanglement. However, as demonstrated by the specific instances covered, the NCP procedures are incredibly varied and have the effect of producing a web of entanglement. An NCP's understanding of its own role or its organizational structure and available resources can affect the degree to which it is willing to promote entanglement with external norms. The more restricted an NCP's understanding of the scope of the Guidelines and its role in the complaints process, the more reluctant it will be to make a compliance assessment. In contrast, as has been demonstrated in the last three UK-specific instances, an NCP that perceives its role as more than being a simple mediator will be more inclined to take a proactive approach in assessing the validity of a complaint which can increase the likelihood of entanglement.

Variety is not limited to NCPs only, as the parties to the proceedings have also been shown to drive entanglement. The broad formulation of who can initiate a specific instance procedure and the diverse range of entities which have found themselves in the position of respondents[101] means that an extensive group of actors can bring their perspective (and the bodies of norms to which they adhere) to the table. And, as the specific instances of *Bralima and Heineken* or *Norconsult AS* highlight, NCPs are often willing to endorse entanglement driven by the parties. Additionally, the form and substance of (external) norms also affect the likelihood of entanglement. For example, the World Heritage Convention as a 'list-based treaty' invites entanglement more readily

[101] Corporations, but also state-owned enterprises, state ministries, institutional investors and even sustainability standard bodies and NGOs.

than framework conventions such as the Convention on Biological Diversity, which does not have a clearly defined scope and contains only general provisions.[102]

Indeed, the categorization of specific instances adopted within this chapter can be deceptive, as it simplifies a very nuanced picture of entanglement in which multiple dynamics can be present in a single case. Even examples of the same dynamic can take various forms and can be framed in different terms, with different language corresponding to the different shades of entanglement. The UK-specific instances are again informative in this regard. In *GCM Resources* and *G4S*, when the NCP considered a particular norm or standard as applicable, it would often (but not exclusively) use the phrase 'the NCP notes' and then refer to the relevant provision in question, possibly engaging with it in more detail. The *KPO* instance stands in contrast to this, with the wording of 'notes' and a particular norm being much less used, and has been largely replaced by two separate subsections within the specific instance ('Applicable Standards' and 'Guidance Available on Human Rights') which include the majority (but, again, not all) of the standards referred to. Given that *KPO* represents a more recent instance, the change might indicate a move towards more systematization in engagement with norms external to the Guidelines. Another NCP to draw upon is the Dutch one, which has also utilized the combination 'note'/'notice' and a particular norm on occasions,[103] but has also relied on other formulations such as 'in light of'[104] a particular system, especially when it makes recommendations as to the conduct expected of a respondent. In general, some formulations are becoming standardized but the shades of entanglement are really characterized by diversity, mirroring the Guidelines' system, and maybe some indifference by the NCPs as to the language they use.

This indifference is also visible in the way in which NCPs treat bodies of norms with different legal status. Across the specific instances, one can see a strong tendency to 'lump together' systems and standards with little consideration for their legal authority or the manner in which they apply to a respondent in NCP proceedings. The issue seems to be partly structural. While the Guidelines in their chapter on concepts and

[102] N. Affolder, 'The Market for Treaties' (2010) 11 *Chicago Journal of International Law* 159–96, at 185.
[103] See e.g. *VEON*, *ING*.
[104] See e.g. *Heineken*.

principles differentiate between 'applicable laws' on the one hand and 'internationally recognised standards' on the other,[105] thus prima facie recognizing the distinction between law in the strict sense of the word and other bodies of norms, in other parts of the Guidelines the distinction is much more fluid. For example, the chapter on human rights lumps together binding treaties and non-binding declarations without differentiating between them. It is thus unsurprising to see NCPs being indifferent in this regard, such as in *Norconsult AS* or *Vedanta Resources PLC*, where the NCPs drew on the non-binding UNDRIP and Akwé Kon Guidelines. This is particularly problematic when the NCP works with a number of bodies of norms with different levels of bindingness. A similar concern is the application of norms which are not addressed to corporations in the first place, but rather to states. Of course, the Guidelines do provide a sort of transpositionary function in this regard, yet it is still surprising to see that NCPs pay very little consideration as to how normative systems developed for application in a state-centric (and thus very different) context can be applied to corporations. Thus, while instances of entanglement between transnational CSR norms and international law may strengthen the coherence of global law through active coordination by the Guidelines, this may also lead to adverse effects as to the integrity and normative force of international law. In this regard, Affolder has drawn attention to how 'corporate adoption and translation of treaty norms' may 'ultimately undermine a treaty's goals' as companies 'cherry-pick among treaty provisions, interpret treaty commitments in their least onerous forms, and obscure the ways in which corporate activities impede treaty implementation by selectively reporting on instances where corporate policies and actions advance treaty norms'.[106] From the evidence, it seems that NCPs might be complicit in allowing corporations to do so through a mere lack of diligence within the specific instance procedure.

The laxness in the NCPs' approach might be partially attributed to the perceived lack of enforceability and compliance with the specific instance procedure.[107] As the Guidelines are soft law and the specific instances do not create legal obligations or benefit from formalized enforceability,

[105] 2011 edition of the Guidelines, chapter I [1].
[106] Affolder, 'The Market for Treaties', 162.
[107] A. Marx and J. Wouters, 'Rule Intermediaries in Global Labor Governance' (2017) 670 *The ANNALS of the American Academy of Political and Social Science* 189–206, at 195.

NCPs can feel induced to be 'generous' with the application of bodies of norms to a particular context. However, they would be well advised to exercise caution in this regard as the decisions reached within a specific instance are hardly inconsequential. As Nieuwenkamp highlights, the exercise of pressure by civil society, making diplomatic protection conditional upon compliance, or the consideration of specific instances in decisions on the availability of export credits are only some of the ways in which the Guidelines can have a major impact on corporate behaviour.[108] In fact, some elements of the Guidelines are already undergoing a process of 'hardening' by being transposed into domestic legislation, such as in the case of the due diligence obligation within the US Dodd–Frank Act which uses the Guidelines' provisions as a reference point.[109]

Finally, it is notable what a prominent role has been assumed by straddling practices within NCP proceedings, and in particular the concept of due diligence. In the post-2011 specific instances analysed in this chapter, the due diligence obligation of the respondent has been invoked in the vast majority of cases. In the NCP system, due diligence has outgrown the image of an import from the UNGPs and it is being construed as inherent to the Guidelines. Such blurring of the origins of the norm, coupled with its application in non-human rights-specific contexts, provides attestation to its quality as a straddling practice which distorts the boundaries of individual normative systems. The OECD system doesn't only apply the due diligence principle, it also develops it further, going as far as producing a number of guiding documents for the carrying out of due diligence.[110] A similar dynamic can be identified in relation to ESIAs and the concept of FPIC, with the examples of silent entanglement identified showing that the norms are being interpreted as cross-cutting norms and not necessarily 'belonging' to a single normative system. Thus, straddling practices are emerging as one of the tools of entanglement within the system of the Guidelines.

[108] Nieuwenkamp, 'The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct', 174.

[109] Ibid., 175; Cullen, 'The Irresistible Rise of Human Rights Due Diligence', 744.

[110] E.g. OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018); or OECD, 'OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector' (2017).

12.6 Conclusion

At the outset of this chapter, the inherent pluralism within the regime of CSR regulation of business conduct was noted as a dominant feature. Even though the analysis zoomed in on one particular focal point for entanglement, the OECD Guidelines, multiplicity and variation did not leave the picture. Instead, the system of the Guidelines can be still characterized by a plurality of bodies of norms which are the target of engagement and a plurality of shades of entanglement. Thus, in a sense the OECD Guidelines are reflective of the dynamic which exists in the wider world of CSR normativity. As the section dealing with coordinated legal entanglement has shown, the openness of the Guidelines can be attributed to the structural features of the system which provide the necessary flexibility for the interaction with other bodies of norms. Moreover, the manner in which the UNGPs were integrated into the Guidelines shows that these structural features are not accidental – rather, they represent deliberate decisions to create linkages between CSR systems, arguably motivated by the potential benefits which accrue from cooperation between bodies of norms within the field of CSR.

If the provisions of the Guidelines lay the groundwork for extensive entanglement, the implementation mechanism of NCPs does a very good job in building up the rest of the structure. It is in Section 12.4 where the true scope of entanglement within the system of the Guidelines is demonstrated. Although the dialectic of distancing and proximity is utilized in order to frame the discussion, Section 12.4 illustrates that the identified shades of entanglement are often not easily subsumed within either of the main categories mentioned. This is exacerbated by the fact that entanglement often happens with multiple bodies of norms at once. Overall, NCPs appear to be more likely to engage other bodies of norms in ways which enhance proximity between them, often creating irreverent linkages with both public and private frameworks. While some bodies of norms are relied upon in general contexts, other external norms are used as specialized precision tools when their provisions are closely related to the subject matter of a specific instance. The use of certain norms is characterized by silence as to the normative system in which they originate, underlining their status as straddling practices which can span across multiple bodies of norms. On the distancing end of the spectrum, we saw only limited efforts at drawing borders between systems – instead, efforts at distancing were utilized to hierarchically

position the Guidelines against other bodies of norms or as instances of the specialization dynamic. Despite such efforts, however, the picture of CSR which emerges is certainly not of a top-down, integrated system, but rather one which is best defined as a polycentric and multilayered web of bodies of norms.