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IF I HAD A HAMMER: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AS ANOTHER TOOL TO PROTECT INDIGENOUS RIGHTS TO LAND

Heather Bowman[†]

Abstract: As developing countries embrace market economies, a primary source of investment is in the form of foreign direct investment through action by Multinational Enterprises (“Multinationals”) inside a country’s borders. Activity by a Multinational is often regulated only by the host country, which may place minimal restrictions on it for fear of losing investment. This places the country’s people and environment at risk. Indigenous peoples affected by poorly planned or managed development have no opportunity to change plans before they are enacted, and have little chance to obtain reparation for damages suffered.

A way of addressing this lack of participation in the development process is through the National Contact Point (“NCP”) review process created by the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (“Guidelines”). NCP review allows an affected group to challenge a specific instance where a Multinational violated the Guidelines. A challenge can be based on future plans, as well as actions that occurred in the past. Raising a specific instance initiates a review process that evaluates the particular concerns of the indigenous people who brought the challenge. Although the NCP itself has no enforcement power, bringing a challenge under the Guidelines may affect third-party relationships with the Multinational, influencing its behavior through peer pressure.

NCP review provides a powerful tool to otherwise underrepresented indigenous peoples in the development context. The use of NCP review to change mitigation procedures at a hydroelectric dam in Laos illustrates the process and its effectiveness. The process of NCP review allows for reconsideration of the development of a mine in Papua New Guinea that brought environmental destruction and civil war to the indigenous people of Bougainville.

I. INTRODUCTION

Global demand for raw materials and national desire for growth creates pressure on developing countries to exploit their natural resources in the quest for outside investment.¹ This untapped wealth frequently lies in areas inhabited by indigenous peoples, who far too often have little or no voice in the development process.² Displacement or environmental changes

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¹ See generally GERARD ELFSTROM, MORAL ISSUES AND MULTINATIONAL CORPORATIONS 1 (1991); Rhona K.M. Smith, *The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411 (1998).

² Protection of indigenous lands against government interference and protection of indigenous peoples against removal from land without full and free consent are considered emerging norms in

caused by development projects may prove devastating to the affected people.³ Developers often have little incentive to listen to the complaints of indigenous peoples.⁴

The worst-case scenario for a social and environmental disaster includes government complicity and indifference to the lives of its people. Government involvement in development can threaten safety and well-being when the government partners with a developer as a shareholder.⁵ Profit sharing may lead to government complicity, or even participation in atrocities.⁶ One example of development gone horribly wrong is found in the experience of the native people of Bougainville, an island of Papua New Guinea (“PNG”).⁷

When the mining conglomerate Conzinc Rio Tinto⁸ found rich copper deposits on Bougainville in 1960,⁹ the Australian government¹⁰ formed a partnership with Rio Tinto to build the Panguna copper mine.¹¹ The government transferred land rights of native villages to Rio Tinto in

international law. However, these rights have yet to be fully recognized. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.07[3][c][i] (2005).

³ See ABDUL AZIZ CHOUDRY, EFFECTIVE STRATEGIES IN CONFRONTING TRANSNATIONAL CORPORATIONS vii-viii (2003).

⁴ Smith, *supra* note 1, at 418.

⁵ See David Kinley & Junko Tadaki, *From Talk To Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 964, 970 (2004).

⁶ *Id.* at 970.

⁷ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); Complaint of Plaintiff, *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. Sept. 18, 2000) (No. 2:00-CV-11695), <http://www.hbsslaw.com/files/Final%20Rio%20Tinto%20Complaint1037668347503.pdf> [hereinafter *Rio Tinto Complaint*]; Roderic Alley, *Ethnosecession in Papua New Guinea*, in ETHNIC CONFLICT AND SECESSIONISM IN SOUTH AND SOUTHEAST ASIA 225, 225-256 (Rajat Ganguly & Ian Macduff eds., 2003); Moses Havini, *The Struggle for Bougainville: Indigenous Peoples Oust Global Mining Giant*, in EFFECTIVE STRATEGIES IN CONFRONTING TRANSNATIONAL CORPORATIONS 59, 59-88 (Abdul Aziz Choudry ed., 2003); PAT HOWLEY, BREAKING SPEARS & MENDING HEARTS 26-27 (2002); Moses Havini & Rikha Havini, *Bougainville—The Long Struggle for Freedom*, <http://www.eco-action.org/dt/bvstory.html> (last visited Apr. 14, 2006); Mineral Resources Forum, *Natural Resources and Sustainable Development, Bougainville Island—Panguna Copper Mine Conflict*, <http://www.natural-resources.org/minerals/development/indigp/Bougainville.htm> (last visited Apr. 14, 2006).

⁸ After a series of mergers and name changes, Conzinc Rio Tinto eventually became part of the Rio Tinto Group, and will be referred to as Rio Tinto throughout this Comment. For a more detailed explanation of the merging and name change process, see *infra* note 187.

⁹ See Mineral Resources Forum, *supra* note 7.

¹⁰ Bougainville was a German colony from colonization until World War II. Between the end of World War II and December of 1973, Bougainville and PNG were under Australian authority as United Nations Trust Territories. Self government was granted to PNG in 1973. In December 1975, PNG gained full independence and Bougainville was declared part of PNG territory. Before PNG gained full independence, Bougainville declared its own independence from both Australia and PNG on September 1, 1975. This independence was not recognized, but a deal was struck in 1976 allowing Bougainville limited autonomy and an independent provincial government. HOWLEY, *supra* note 7, at 26-27; Mineral Resources Forum, *supra* note 7.

¹¹ See *Rio Tinto Complaint*, *supra* note 7, at 1.

exchange for a nineteen percent share in the mine's output.¹² The native Bougainville islanders soon learned that under Australian law, all property under the ground belonged to the State of Australia, contrary to indigenous land practices, and that they were to receive minimal compensation for the surface land destroyed in construction of the open-pit mine.¹³ During peak production, PNG's share of the Panguna mine profits amounted to seventeen percent of the nation's total annual revenue.¹⁴

Conflict over the mine began with land seizures and intensified as development advanced.¹⁵ According to allegations brought by the indigenous people,¹⁶ Rio Tinto failed to exercise proper environmental controls during mine development and operations, causing massive damage to the ecosystem of the island and surrounding ocean.¹⁷ Rio Tinto "chemically defoliated, bulldozed, and sluiced off an entire mountainside" to build the mine.¹⁸ During operation, "billions of tons of toxic mine waste was generated and dumped onto the land and into the pristine waters, filling major rivers with tailings, polluting a major bay dozens of miles away, and the Pacific Ocean as well."¹⁹

When native demands for environmental cleanup and local profit investment were ignored by Rio Tinto, a newly-formed militant group, the Bougainville Revolutionary Army ("BRA"), blew up the electricity pylons for the mine.²⁰ This act of rebellion was primarily intended to draw attention to the wrongs done to the native people rather than to close the mine, but when recognition failed, BRA soldiers began to shoot anyone using the mine access road.²¹

¹² *Id.*

¹³ See HOWLEY, *supra* note 7, at 25. Compensation offered by Rio Tinto in at least one location, Rorovana, was U.S.\$105 per acre and \$2 per coconut tree. These amounts were non-negotiable. The offer was made on July 28, 1969, and had to be accepted by August 1, 1969, or nothing would be paid. Rio Tinto Complaint, *supra* note 7, at 26.

¹⁴ See Rio Tinto Complaint, *supra* note 7, at 37. By peak production, PNG had gained independence and the percentage of annual revenue cited is for the independent nation of PNG. The mine as a source of revenue did, however, influence Australia's decision to allow and support construction. Mining revenue changed PNG from a colonial burden to a source of revenue. See HOWLEY, *supra* note 7, at 26-27.

¹⁵ HOWLEY, *supra* note 7, at 25.

¹⁶ Although the allegations presented in the Bougainville islanders' complaint have not been proven in court, and Rio Tinto did not address them in response briefs, the allegations provide a valuable source of the islanders' continued discontent with the events that occurred on Bougainville. See Rio Tinto Complaint, *supra* note 7, at 2.

¹⁷ *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1123 (C.D. Cal. 2002).

¹⁸ See Rio Tinto Complaint, *supra* note 7, at 3.

¹⁹ *Id.*

²⁰ The demands were made in 1989. See HOWLEY, *supra* note 7, at 36.

²¹ See *id.*

Local riot police responded with violence, and the PNG military was called in, allegedly at the demand of and with assistance from Rio Tinto.²² Military and police violence against ordinary citizens led some to join the BRA, while others joined because of environmental degradation that left them unable to farm or fish.²³ BRA excesses led to the formation of the Resistance, a separate paramilitary group who aligned themselves with the PNG army.²⁴

In 1990, PNG soldiers and police withdrew and the two groups of freedom fighters on Bougainville, the BRA and the Resistance, turned on each other in a bloody civil war.²⁵ The PNG government set up a military blockade around the island to coerce the BRA to surrender and bring peace so that the mine could be reopened.²⁶ The blockade prevented medicine and other essential items from reaching the island, causing the death of at least 10,000 people between 1990 and 1997, including many women who died in childbirth and children who died of preventable diseases.²⁷

Although a class action lawsuit was filed against Rio Tinto in United States Federal District Court,²⁸ this *ex post facto* attempt to make up for some of the losses of the indigenous people is an inadequate response to the problems the mine development has created. No amount of financial compensation, even if granted, could fully make up for the losses suffered by affected individuals, nor will money restore the island's environment to its former pristine state.²⁹ The allegations raised by the indigenous people of Bougainville share company with numerous other claims brought to U.S. courts in an attempt to gain at least some redress for suffering.³⁰

²² See Rio Tinto Complaint, *supra* note 7, at 4.

²³ See HOWLEY, *supra* note 7, at 36-37; Rio Tinto Complaint, *supra* note 7, at 3.

²⁴ See HOWLEY, *supra* note 7, at 44, n.3.

²⁵ See *id.* at 38, 44.

²⁶ See Rio Tinto Complaint, *supra* note 7, at 1.

²⁷ See *id.* at 4; Mineral Resources Forum, *supra* note 7.

²⁸ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1193 (C.D. Cal. 2002). The case was dismissed on summary judgment, the court invoking the political question doctrine, and is on appeal in the Ninth Circuit as of April 2006.

²⁹ Some of the problems raised by taking such claims to foreign courts will be briefly examined *infra* Part II, but a complete discussion of this problem is beyond the scope of this Comment.

³⁰ Cases include *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (Indonesian plaintiff alleged defendants were liable for environmental and human rights abuses and genocide in connection with mining activities in Indonesia); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (Burmese plaintiffs alleged Unocal was liable or vicariously liable for human rights abuses by the Burmese military in conjunction with the construction of a gas pipeline); *Doe v. Exxon Mobil Corp.*, No. 01-CV-1357 (D.D.C. 2002) (Indonesian plaintiffs allege liability by Exxon for human rights abuses committed by Indonesian military in Sumatra). See generally GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003) (arguing that expansion of the Alien Tort Statute ("ATS") beyond its original intended purpose could threaten globalization by

A method of resolving disputes before significant problems arise is needed to protect indigenous peoples from the negative consequences of international development. This may require resolution attempts even before physical work has begun on a development project. Particularly when the national government is involved with such a project, indigenous peoples need a means of third-party, disinterested project evaluation before the project has proceeded far enough to have caused substantial harm.

This Comment argues that indigenous peoples should use the “soft power”³¹ created in the Organization for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises, Revision 2000, to establish project review that specifically addresses their concerns about development projects. The OECD Guidelines established a system of National Contact Point (“NCP”) review, which can provide an effective method for indigenous peoples to have their concerns addressed before development begins. This review can prevent at least some of the human rights abuses and environmental degradation that may occur either during the course of development or when a disenfranchised people retaliate in an attempt to regain what they believe was wrongfully taken. Indigenous peoples around the Pacific Rim who are facing development that will strip native lands from them should use the tool of NCP review to ensure levels of project review that will protect their land and traditions for themselves and for future generations.

This Comment will evaluate NCP review exclusively as a tool for indigenous peoples to limit the harms of development. Indigenous peoples require protection from the particular harms caused by development projects led by Multinationals,³² as do others in developing countries in the Pacific

leading to curtailed Multinational investment in developing countries for fear of devastating lawsuits in U.S. courts). Seven of thirty-eight ATS cases have been brought from Asian nations.

³¹ See *infra* note 75.

³² Multinationals are only generally defined in the OECD Guidelines for Multinational Enterprises:

A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES pt. 1.I.3 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter GUIDELINES].

The terms multinational corporation and transnational corporation are frequently used interchangeably with the term multinational enterprise. These include the parent company, located in the country of origin,

Rim. Because they are often marginalized and underrepresented in their own national governments, indigenous peoples provide a particularly clear illustration of groups without protection from development. It is important to note that other potential tools are available to indigenous groups, including certain international protections that population groups who are simply poor or marginalized do not have.³³ In contrast, the NCP review process is available to any under-represented group. This Comment will not evaluate the effectiveness of other tools, but will look only at NCP review as one tool that can be used, either alone or in concert with international protections, to allow indigenous peoples to mitigate impacts of future development projects without violence and prior to breaking ground.

Part II will explain how NCP review provides an ideal method for protecting indigenous peoples from poorly planned or mismanaged development, both because of its ability to preempt problems with development projects and because of its capacity to be invoked by any person. Part III evaluates the effectiveness of NCP review. An analysis of challenges to a hydroelectric dam project in Laos shows how NCP review was used to mitigate the effects of development, as indicated by improved environmental and relocation mitigation measures and continuing peace in a historically rebellious region. The NCP official recommendations to the Laotian dam development illustrate the balance found between the needs of indigenous peoples and the awareness of the soft authority of the NCP to enforce its own recommendations. The effectiveness of NCP review as a partial solution to the forced silence of indigenous peoples allows for reconsideration of the Bougainville disaster in Papua New Guinea. By providing a route for adequate communication and developer response, NCP review could have helped avoid the disastrous consequences of the Panguna mine.

and the host country extensions, or foreign subsidiaries. They may be commercial or industrial, and may be state or privately owned. Although many Multinationals are large firms, they may also be small. MICHAEL GHERTMAN & MARGARET ALLEN, AN INTRODUCTION TO THE MULTINATIONALS 2 (1984).

³³ See COHEN, *supra* note 2, § 5.07[3][c]. Particularly relevant to the topics addressed in this Comment is section 5.07[3][c], *Emerging Norms Concerning Land and Territory*. The Inter-American Human Rights Committee, the U.N. Human Rights Committee, and the Inter-American Court of Human Rights have expressly recognized the special relationship indigenous peoples have with their lands. *Id.* § 5.07[3][c][i]. The U.N. Draft Declaration defines “land” broadly, including the right of indigenous peoples to “own, develop, control and use lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources” traditionally used. *See also id.* at n.642 (citing U.N. DRAFT DECLARATION, art. 26). These standards are emerging norms of international law, and are soft law without enforcement mechanisms. *See infra* Part III. Their existence does not mean that action will be taken according to their precepts. Although some countries, such as Australia, Brazil, Canada, and Nicaragua, have laws that protect native rights to land, most do not. *Id.* § 5.07[3][c][ii].

II. NCP REVIEW PROVIDES AN IDEAL METHOD OF PROTECTING INDIGENOUS PEOPLES BECAUSE IT PREEMPTS PROBLEMS WITH DEVELOPMENT PROJECTS AND CAN BE APPLIED GLOBALLY BY ANY PERSON

NCP review, created under the authority of the OECD to provide a dispute resolution forum for those affected by Multinational activity, can be used by indigenous peoples to create a review of development plans and lead to possible mitigation of the development's effect on them.

A. *The OECD is Structured to Influence the Global Economy*

NCP review exists through the enactment of the OECD Guidelines for Multinational Enterprises.³⁴ The OECD itself is made up of thirty member nations³⁵ with a shared commitment to democratic government, and has relationships with approximately seventy other countries and non-governmental organizations (“NGOs”), giving the organization a global reach.³⁶ The OECD influences the global economy through the production of internationally agreed instruments, decisions, and recommendations.³⁷

The OECD was designed as a forum for the governments of market democracies to work together to address the challenges and exploit the opportunities of globalization.³⁸ OECD Acts are “soft law,” non-binding instruments designed to improve policy through focusing peer pressure on non-compliant member nations.³⁹ An important function of the OECD is providing the data necessary for governments to be aware of changes and developments that affect the global economy, in addition to providing advice on how best to deal with those changes.⁴⁰ The OECD is designed to assist governments in fighting poverty and fostering prosperity through “economic growth, financial stability, trade and investment technology, innovation, entrepreneurship, and development co-operation . . . to ensure that economic

³⁴ See GUIDELINES, *supra* note 32, pt 1.I.10.

³⁵ The member states are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. OECD Home, About, http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html [hereinafter OECD Home] (last visited Apr. 14, 2006).

³⁶ *Id.*

³⁷ *Id.* OECD acts address such varied topics as agriculture, tourism, labor and employment, development assistance, nuclear management, international investment and multinational enterprises, and energy. See OECD Decisions, Recommendations and Other Instruments in Force, <http://webdomino1.oecd.org/horizontal/oecdacts.nsf> (last visited Apr. 14, 2006).

³⁸ OECD, THE OECD 7 (2005), available at <http://www.oecd.org/dataoecd/15/33/34011915.pdf>.

³⁹ *Id.* On occasion, these agreements may lead to formal agreements or treaties. *Id.*

⁴⁰ *Id.*

growth, social development and environmental protection are achieved together.”⁴¹

The OECD grew out of the Organization for European Economic Cooperation, created in 1947 to coordinate European reconstruction under the Marshall Plan.⁴² Twenty countries ratified the formation of the OECD, but it has moved beyond providing direct assistance exclusively to its thirty member nations to now supplying information and analysis to more than seventy developing economies.⁴³ As globalization has changed the market, the OECD has progressed from analyses of policy areas in individual countries to an examination of the interaction of various policies on a global scale.⁴⁴

*B. The OECD Guidelines Are Designed to Promote Policies Meant to Contribute to Sound Economic Expansion and Multilateral, Non-Discriminatory Enlargement of World Trade*⁴⁵

The OECD Guidelines for Multinational Enterprises are a set of voluntary standards for responsible business conduct in a variety of areas, including human rights and the environment.⁴⁶ The Guidelines were founded on the notion that international guidelines for Multinationals can “help prevent misunderstandings and build an atmosphere of mutual confidence and predictability between business, labour, and governments.”⁴⁷ Governments adhering to the Guidelines, including the United States, the United Kingdom, Australia, France, and Japan,⁴⁸ are committed to promoting them among Multinational Enterprises operating within or from their territories.⁴⁹

⁴¹ *Id.*

⁴² *Id.* at 9.

⁴³ *Id.*

⁴⁴ *Id.* Such analyses include work on sustainable development and consideration of environmental, social, and economic issues beyond national borders.

⁴⁵ See CONVENTION ON THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Dec. 14, 1960), available at http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html; GUIDELINES, *supra* note 32, at 2-7.

⁴⁶ GUIDELINES, *supra* note 32, at Part I.II.2.

⁴⁷ OECD Home, OECD Guidelines for Multinational Enterprises, Frequently Asked Questions, http://www.oecd.org/document/58/0,2340,en_2649_34889_2349370_1_1_1_1,00.html [hereinafter OECD FAQ] (last visited Apr. 14, 2006).

⁴⁸ Adhering nations include the thirty member nations and nine non-member countries: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania, and Slovenia. See OECD, GUIDELINES for Multinational Enterprises, About, http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1,00.html (last visited June 1, 2006).

⁴⁹ See GUIDELINES, *supra* note 32, at 5.

The Guidelines are one of many business codes of conduct, but the only multilaterally endorsed, comprehensive code that governments have committed to promoting.⁵⁰ Adhering countries are home to most of the world's Multinationals⁵¹ and supply more than sixty percent of the world's goods and services.⁵² Thus, the Guidelines express the shared values of member governments, and influence the majority of Multinational investment.⁵³

C. *The OECD's Goal of Promoting Sustainable, Stable Global Growth Reaches Fruition in NCP Review*

The Guidelines are implemented through a system of National Contact Points ("NCPs"), government offices responsible for promoting and encouraging observance of the Guidelines.⁵⁴ Each national NCP helps resolve Guideline implementation issues related to specific instances of business conduct in its country.⁵⁵ In addition, each NCP is meant to further the effectiveness of the Guidelines by informing prospective investors of them and ensuring that the Guidelines are known and available.⁵⁶

The existence of an NCP for each adhering country is essential to determine how effective the Guidelines are in each country.⁵⁷ Observance of the Guidelines by member countries is voluntary; each adhering country invests the Guidelines with importance as it sees fit.⁵⁸ Each nation determines the organization of its NCP, with the expectation that all will function in a visible, accessible, transparent, and accountable manner.⁵⁹ The majority of NCPs are single-department entities with consultative structures that allow for input from labor, business, and NGOs; other NCPs have been established as tripartite or quadripartite entities that incorporate multiple government bodies but do not provide for input from non-governmental entities.⁶⁰

A party affected by a business practice in violation of the Guidelines can bring a challenge, known as a specific instance, for review before a NCP

⁵⁰ OECD FAQ, *supra* note 47.

⁵¹ *Id.*

⁵² The OECD, *supra* note 38, at 8.

⁵³ OECD FAQ, *supra* note 47.

⁵⁴ See GUIDELINES, *supra* note 32, pt. 1.I.1-5.

⁵⁵ *Id.* pt. 2.I.

⁵⁶ *Id.* pt. 2.III.I.B.2.

⁵⁷ *Id.*

⁵⁸ OECD FAQ, *supra* note 47.

⁵⁹ See GUIDELINES, *supra* note 32, pt. 2.III.I.A.

⁶⁰ See, e.g., The Australian National Contact Point, <http://www.ausncp.gov.au/content/what.asp?areaid=7> (last visited Apr. 14, 2006).

if the Multinational's home country is an adhering member of the Guidelines.⁶¹ The NCP of the home country provides review regardless of where the specific instance occurred.⁶² Thus, although a minority of nations worldwide is adhering members, the majority of international commerce falls within the realm of NCP review.⁶³ Remedies for violations usually consist of recommendations made by the NCP, and the majority of challenges so far have ended in settlement.⁶⁴ Another possibility, although uncommon, is for the home nation to take legal action based on the complaints.⁶⁵

D. NCP Review Is Advantageous in the Context of Protecting Indigenous Peoples' Rights

The NCP review process creates a method for indigenous peoples to create an additional level of project review by requiring disinterested third-party evaluation of a project before construction begins or land is seized, in an attempt to ensure that minimum standards for development projects are met and to protect the well-being of affected parties.⁶⁶

1. Review Prior to Project Construction Contributes to Sustainable Global Development

The loss of land or change in environment in a subsistence-based economy can be devastating to the people directly affected, but the failure to develop may be equally damaging to the government of a developing country attempting to participate in a market-based global economy.⁶⁷

⁶¹ NCP review can also be used by a party to obtain review when the party and the Multinational share nationality. A specific instance was brought to the United States NCP by a U.S. NGO and against a U.S. corporation. See OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: SPECIFIC INSTANCES CONSIDERED BY NATIONAL CONTACT POINTS 11 (June 2005), <http://www.oecd.org/dataoecd/15/43/33914891.pdf>.

⁶² GUIDELINES, *supra* note 32, pt. 2.III.I.C.

⁶³ THE OECD, *supra* note 38, at 6.

⁶⁴ SOMO, Table of Cases Raised by NGOs at National Contact Points (Jan. 2005), http://www.corporate-accountability.org/eng/documents/2005/feb_2005_update_on_oecd_cases_raised_by_ngos_at_national_contact_points_by_oecd_watch_pdf_38_kb.pdf [hereinafter Table of Cases].

⁶⁵ For example, UK government officials have responded to allegations against British Petroleum for seeking tax and law exemptions and undue influence of foreign governments. See *id.* at 4.

⁶⁶ GUIDELINES, *supra* note 32, pt. 1.I.

⁶⁷ The analysis presented in this Comment takes for granted the development of market based economic development, which itself is a target of criticism. This Comment does not argue for a new world order, but addresses an issue of ongoing concern in the world as it now exists. For criticism of the economic strategies that changed Third World pastoral economies to free market economic regimes, see generally MAKERE STEWART-HAREWIRA, THE NEW IMPERIAL ORDER, INDIGENOUS RESPONSES TO GLOBALIZATION 146-163 (2005).

Development is necessary for these nations, and international investment is a crucial source of the required development capital.⁶⁸ Although some funding comes from foreign nations or international organizations, such as the World Bank or the International Monetary Fund, much investment is provided by Multinationals as foreign direct investment (“FDI”).⁶⁹

Multinationals do not generally police their own behavior, and the governments of developing countries face difficulties in controlling Multinational activity. Peripheral interests, such as the effect of a development project on indigenous peoples or on the physical environment, is not the primary concern of Multinationals, which are only legally obliged to consider the welfare of their stockholders—individuals rarely directly affected by the development projects of held companies.⁷⁰ Because Multinationals provide an important source of development funding for developing nations, poor nations eager for investment capital may turn a blind eye to actions by Multinationals that cause harm or have the potential to cause harm to the host country’s people.⁷¹ At times, the nation itself may partner with the Multinational to financially benefit from the investment opportunity, again at terrible cost to the nation’s people.⁷² In such a situation, the threatened or injured people often have no access to outside

⁶⁸ See CARLOS M. CORREA & NAGESH KUMAR, PROTECTING FOREIGN INVESTMENT: IMPLICATIONS OF A WTO REGIME AND POLICY OPTIONS 141-162 (2003).

⁶⁹ See JOHN H. DUNNING, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 528-29 (1992) (“Multinationals are the primary repositories of the capital, technology and organizational capabilities necessary to promote the economic welfare of societies”). Multinational corporations are the primary mechanism of foreign direct investment. See Sidney E. Rolfe, *The International Corporation in Perspective*, in THE MULTINATIONAL CORPORATION IN THE WORLD ECONOMY 5, 5-6 (Sidney E. Rolfe & Walter Damm eds., 1970). FDI is distinguished from foreign investment, which includes both FDI and loans. See MICHAEL J. TWOMEY, A CENTURY OF FOREIGN DEVELOPMENT IN THE THIRD WORLD 1 (2000); CORREA & KUMAR, *supra* note 68, at 1-3.

⁷⁰ See Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT’L ENVTL. L. REV. 149, 158 (2005).

⁷¹ See Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT’L L. REV. 1399, 1417 (2003) (stating that pressures and opportunities arising from international trade liberalization may cause a government to lessen its maintenance of human rights); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (allegations of environmental and human rights abuses in a joint venture between a developer and the government of Papua New Guinea); *Nat’l Coal. Gov’t of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (allegations of human rights abuses during joint-venture between the Burmese government and an American corporation in construction of natural gas pipeline). This problem may be further exacerbated by the information asymmetry between the governments of developing countries and the track record of the Multinational in other developing countries with regard to social responsibility. See CORREA & KUMAR, *supra* note 68, at 148.

⁷² See Thomas, *supra* note 71, at 1417 (stating that pressures and opportunities arising from international trade liberalization may cause a government to lessen its maintenance of human rights); *Sarei*, 221 F. Supp. 2d 1116; *Nat’l Coal. Gov’t of Union of Burma*, 176 F.R.D. 329.

help.⁷³ Without governmental concern for the well-being of its people, a group that finds itself in the path of an important national development project has little chance to voice its objections.⁷⁴

The Guidelines address these issues by providing a way for parties to communicate before irreversible action is taken. Furthermore, NCP review forces developers to respond to the specific concerns raised by the affected people. In a situation where a developer does not provide an opportunity for the affected people to express their concerns, NCP review may be the only means of communication between opposing sides.

2. *The OECD Guidelines Provide an Ideal Means of Encouraging Multinational Responsibility Because They Apply Globally and Their Soft Authority Does Not Threaten Multinational Independence*

As soft law, NCP review is particularly appropriate for indigenous peoples in developing countries.⁷⁵ The OECD Guidelines and the NCP review process embody some of the greatest advantages of soft law: compromise and broad applicability. Soft law allows non-state actors to participate more actively in international relations than is possible under a traditional law-making process.⁷⁶ The Guidelines were established by the OECD, an international organization without the power to adopt binding instruments;⁷⁷ a soft law agreement is the only method for the OECD to be

⁷³ See Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 59-61 (2006).

⁷⁴ See John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 36, 102-103 (1998) (arguing that national sovereignty provides nations alone with the ability to truly promote sustainable development).

⁷⁵ NCP review is created under the OECD Guidelines, whose legally non-binding norms are distinguished from traditional concepts of law, which have enforceable, precise, legally binding obligations. See Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 51, 51 (Charlotte Ku & Paul F. Diehl eds., 2003); John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, in HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE 8, 8 (John J. Kirton & Michael J. Trebilcock eds., 2004). The Guidelines contain language that encourages or discourages certain behavior but have no power to force or prohibit action by a Multinational. GUIDELINES, *supra* note 32, pt. I.I.1. Soft law, like the Guidelines, has been criticized in international affairs for its lack of enforceability because it has no independent judiciary or enforcement body. See Abbot & Snidal, *supra* at 51. Hard law relies on state power not only for creation and implementation of laws, but also for their enforcement. See Kirton & Trebilcock, *supra* at 9. Recommendations made by a NCP generally are not enforceable on their own accord. See GUIDELINES, *supra* note 32, pt. I.1. Enforcement only occurs when a national government chooses to take independent action based on an NCP complaint. For example UK officials have acted on complaints against British Petroleum. See Table of Cases, *supra* note 64.

⁷⁶ COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 13 (Dinah Shelton ed., 2000).

⁷⁷ See GUIDELINES, *supra* note 32, at forward.

involved in an international agreement. Soft agreements facilitate compromise, may be drafted and accepted more quickly than hard law,⁷⁸ and allow arrangements between actors who operate under a power imbalance, or sovereign states protective of their autonomy.⁷⁹ The minimal enforcement power of the Guidelines, and low threat of the Guidelines to state sovereignty allowed for agreement between a large number of countries in creating the guidelines.⁸⁰ Soft law instruments also create methods by which such instruments can be applied to multiple, diverse legal systems.⁸¹ The language of Guideline provisions, while phrased to be not strictly binding, can be applied in all adhering and destination countries.⁸²

NCP review itself can function to facilitate compromise between different stakeholders in a development project, and works effectively despite any power imbalance between the negotiating parties.⁸³ Through their role as stakeholder representatives, NGOs can actively participate in international relations. Perhaps most importantly, the review process provides the framework for discussion that can help preempt problems that would later require adjudication. Soft law helps avoid the need for adjudication by “providing a framework for negotiation and other non-adjudicative forms of dispute resolution by creating expectations as to the frame of reference for the conduct of negotiations.”⁸⁴

The advantages of soft law become obvious when the governments of developing countries are faced with a choice between inviting much-needed investment into their countries, and protecting the environment and rights of marginalized, indigenous peoples. Using government regulations to protect the natural environment and the safety of the people affected by development projects may not be a practical or likely solution for a country that desires to provide jobs for its people or increase its national revenues.⁸⁵ A developing country that establishes high environmental or social standards

⁷⁸ See Abbot & Snidal, *supra* note 75, at 52; SHELTON, *supra* note 75, at 13. *But cf.* C.M. Chinkin, *The Challenge of Soft Law: Development Change in International Law*, 38 INT'L & COMP. L. Q. 850, 852 (1989) [hereinafter Chinkin, *Soft Law*] (arguing that “[d]espite the potential disadvantages of treaties the reality is that the process of negotiating a soft law instrument can often be as complex and lengthy as that for the negotiation of a treaty”).

⁷⁹ Abbot & Snidal, *supra* note 75, at 52-53.

⁸⁰ See OECD Home, *supra* note 35.

⁸¹ SHELTON, *supra* note 75, at 12.

⁸² See GUIDELINES, *supra* note 32, *passim*.

⁸³ See Table of Cases, *supra* note 64.

⁸⁴ Chinkin, *Soft Law*, *supra* note 78, at 862.

⁸⁵ See Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 395-396 (2005); José E. Alvarez, Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 61 (2002).

may push some FDI to a country with lower standards.⁸⁶ Few countries that feel they desperately need this money would pass even minimal restrictions on investment, for fear that they would turn away investment possibilities.⁸⁷ Forcing a Multinational to take specific action to protect human rights or the environment is not within the power of most indigenous groups in developing countries.⁸⁸ Limitations that apply to a Multinational regardless of location, rather than those that apply only in certain destination countries, protect all destination countries equally without punishing those that desire protection. The Guidelines accomplish this by applying to development projects regardless of their location, when the Multinational originates in an adhering state.⁸⁹ As such, the Guidelines afford destination countries some degree of protection from abuse by Multinationals, without the need to pass laws that would, in effect, deter business and investment.

3. *The NCP Review Process Is Ideal for Indigenous Peoples in Developing Countries Because Its Neutral Forum Provides a Flexible Approach to Parties and Ripeness*

When a national government is implicated in wrongdoing, particularly when the State has a weak judicial system, a plaintiff cannot anticipate fair treatment from national courts.⁹⁰ National courts may also be inadequate in size or experience for lengthy, complicated trials.⁹¹ The courts of a foreign nation may be prohibitively expensive, if not legally unavailable.⁹²

⁸⁶ Alvarez et al., *supra* note 85, at 61.

⁸⁷ *Id.*

⁸⁸ See Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 56-59 (2001).

⁸⁹ GUIDELINES, *supra* note 32, at Declaration I (“[Adhering governments] jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines.”).

⁹⁰ One illustration of this is the decision by the Inter-American Commission on Human Rights regarding the case of Mary & Carrie Dann. (Case No. 11.140) (Report No. 113/01, Oct. 15, 2001). The Shoshone sisters petitioned in federal court, claiming the U.S. federal government’s assertion of title over tribal lands was racially discriminatory. After this petition was rejected, the Commission issued a decision in 2001 “acknowledging the rights of indigenous peoples in general to their traditional lands and finding that the United States had deprived Mary and Carrie Dann of their lands held under aboriginal title through unfair procedures.” Like a NCP, the Commission does not have authority to render a binding decision, but its decisions may draw international attention to a nation’s shortcomings. COHEN, *supra* note 2, § 5.07[2][e].

⁹¹ See ELFSTROM, *supra* note 1, at 36-38 (examining the government of India’s choice to bring suit on behalf of injured plaintiffs in U.S. court).

⁹² In the United States, actions of nations are rarely subject to prosecution because of sovereign immunity or the application of the “act of state” doctrine. Individual plaintiffs cannot sue in the United States a corporation involved in a particular project without a sufficient connection between the defendant and the United States. Every sovereign state is bound to respect the independence of every other sovereign state. *Domestic Effect of Foreign Acts or Laws, Act-of-State Doctrine*, 48 C.J.S. *International Law* § 27 (2006); see also *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1169 (C.D. Cal. 2002) (discussing the risk

International courts may be closed to individual plaintiffs, and formal arbitration may be too costly.⁹³ Furthermore, taking claims to foreign courts implicates issues of sovereignty and may be detrimental to world trade.⁹⁴ NCP review provides an alternative to proceedings in these courts, and thus an increased likelihood that the plaintiff's claims will be heard in an unbiased and capable venue.

Using courts also presents issues related to ripeness. Before environmental or human rights devastation takes place, plaintiffs do not have standing to bring a claim because the issue is not yet ripe for judicial decision-making.⁹⁵ If a population waits until after the negative event has occurred, the claim may be ripe, but the damage has been wrought, and no amount of restoration, even if available, can fully restore life or land. Mitigation measures, if they are carried out, may seem inadequate to the displaced people, particularly if representatives of the government or the developer do not take the time to listen and respond to their concerns.⁹⁶

NCP review sidesteps problems of ripeness because it may occur at any point during the development process, including the initial stages of project planning,⁹⁷ while the Multinational is engaged in its work within the country,⁹⁸ or even after the Multinational has withdrawn from the affected country.⁹⁹ This broad timeline for applicability allows claims to be made whenever, and even before, problems arise.

of attracting an action for champerty or maintenance in a PNG court, but holding that contingency fee contracts are available for legal fees.)

⁹³ See generally JEAN ALLAIN, *A CENTURY OF INTERNATIONAL ADJUDICATION: THE RULE OF LAW AND ITS LIMITS* (2000); JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION* §1.1 (2d ed. 1997).

⁹⁴ See HUFBAUER & MITROKOSTAS, *supra* note 30, at 9, 37-43.

⁹⁵ In the United States, at least, the doctrine of ripeness prevents pre-enforcement judicial review when those who will eventually feel the impact of the action is not yet felt when conducting daily affairs. See 2 Am. Jur. 2d *Administrative Law* §457 (2006).

⁹⁶ For further discussion of this point, see *infra* Part III.A..

⁹⁷ This is the case in NT2 development. See Proyecto Gato et administrative law., Complaint Letter (Nov. 23, 2004), <http://www.proyectogato.be/NCPcomplaint.htm> [hereinafter NT2 Complaint].

⁹⁸ Decisions based on specific instances raised during the course of multinational activity in the host country include: Netherlands National Contact Point, *Joint Statement by NNCP, Adidas, and ICN* (Dec. 12, 2002), http://www.oecd.org/document/59/0,2340,en_2649_34889_2489211_1_1_1_1,00.html (follow "Joint statement by the Netherlands NCP, Adidas and the India Committee of the Netherlands and Background report" hyperlink); Swedish National Contact Point, *Statement with Reference to Specific Instances Received Concerning Atlas Copco and Sandvik* (June 2003), http://www.oecd.org/document/59/0,2340,en_2649_34889_2489211_1_1_1_1,00.html (follow "Statement from the Swedish NCP concerning Atlas Copco and Sandvik" hyperlink); United Kingdom National Contact Point, *Statement on DeBeers* (April 24, 2004), <http://www.dti.gov.uk/ewt/statements.htm> (follow "De Beers" hyperlink).

⁹⁹ The U.N. brought its claim against Avient after the Multinational had ceased all activity in the Congo. See United Kingdom National Contact Point, *Statement on Avient* (Sept. 8, 2004), <http://www.dti.gov.uk/ewt/statements.htm> (follow "Avient" hyperlink).

Although standing to bring a claim is broadly allowed under the Guidelines, NGOs commonly bring claims on behalf of various groups.¹⁰⁰ A petitioning party's methods of gathering data to support its claim are limited only by practical considerations, as illustrated by the costs incurred by the Nam Theun II NGO representatives who commissioned private studies to support their challenges.¹⁰¹ NGOs may also participate in NCP organized events designed to promote the Guidelines in destination countries.¹⁰²

Since 2000, thirty-nine NCPs have examined a total of forty-seven instances where a petitioner claimed a violation of the Guidelines.¹⁰³ NGOs have brought twenty-two challenges, with several NGOs having brought challenges in multiple countries.¹⁰⁴ Nineteen cases are currently pending,¹⁰⁵ at least fourteen cases have settled,¹⁰⁶ and other cases concluded with the NCP's formal decision.¹⁰⁷

4. *The NCP Review Process Is Effective Because It Is a Form of Alternative Dispute Resolution that Can Provide Equitable Outcomes to Indigenous Peoples*

Alternative dispute resolution ("ADR") provides an alternative both to informal protest and to the traditional legal opportunities which may be lacking for indigenous peoples. The NCP review process is a form of ADR that is particularly appropriate for indigenous peoples because it allows concerns to be addressed while protecting against power imbalance between indigenous peoples and Multinationals by limiting the forum and forcing the opposing party to come to the table.¹⁰⁸

¹⁰⁰ See generally OECD Watch, Cases, <http://www.oecdwatch.org/406.htm> (last visited Apr. 14, 2006).

¹⁰¹ INTERNATIONAL RIVERS NETWORK AND ENVIRONMENTAL DEFENSE, *Summary: Nam Theun 2 Technical Reviews* (Feb. 2005), <http://www.irn.org/programs/mekong/pdf/namtheun/050316annex1.pdf>; International Rivers Network, Technical Reviews, <http://www.irn.org/programs/mekong/namtheun.php?id=namtheuntech.html> (last visited Apr. 14, 2006).

¹⁰² See OECD FAQ, *supra* note 47.

¹⁰³ OECD Watch, Cases, *supra* note 100.

¹⁰⁴ See Table of Cases, *supra* note 64.

¹⁰⁵ OECD Watch, Cases, *supra* note 100.

¹⁰⁶ See OECD, *OECD Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points 2-11* (June 2005), <http://www.oecd.org/dataoecd/15/43/33914891.pdf> [hereinafter Specific Instances].

¹⁰⁷ OECD Watch, Cases, *supra* note 100. Other cases ended for a variety of reasons, including decisions reached in parallel legal proceedings, a finding of no Guidelines violations, withdrawal by the submitting party, and inadequate investment nexus to the NCP country. See also Specific Instances, *supra* note 106, at 2-11.

¹⁰⁸ See GRENIG, *supra* note 93, §1.1 (1997).

ADR benefits the affected indigenous group because outcomes are not reduced exclusively to a win or lose formulation, as they commonly are in an adjudicative context.¹⁰⁹ As players with little power, inadequate resources, and no negotiating leverage, traditional methods of resolving disputes are largely unavailable or inadequate for indigenous peoples.¹¹⁰ NCP review provides a method for resolving disputes that indigenous people can access, and that allows for widespread involvement of community members. By allowing more interested voices in the process of creation, solutions may benefit all affected parties.

The NCP review process is particularly appropriate for indigenous peoples, compared to some traditional ADR methods. For instance, indigenous peoples are often unable to force negotiation independently, or negotiate fairly if the process does begin, due to their lack of power.¹¹¹ NCP substitutes its process for negotiation leverage by providing a forum for indigenous peoples to ensure that Multinationals become aware of and respond to their concerns. A common result of such forums has been voluntary mitigation on the part of the Multinationals,¹¹² or settlements that successfully resolve the alleged violations, before an NCP decision is even reached.¹¹³

¹⁰⁹ Christine Chinkin, *Alternative Dispute Resolution under International Law*, in REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 123, 124 (Malcolm D. Evans ed., 1998) [hereinafter Chinkin, *Alternative Dispute Resolution*].

¹¹⁰ Unfavorable outcomes could also disrupt any beneficial precedent in countries that have acknowledged some indigenous rights. See Michael Mirande, *Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving Across Cultures*, 11 TUL. ENVTL. L.J. 33, 35-38 (1997).

¹¹¹ On Bougainville, some negotiation demands by the Panguna Landowners Association and other groups were ignored or denied. The most successful negotiation, in the sense that an agreement was signed, occurred to prevent a native group from appealing a case to an Australian appeals court. The landowners claim that only the threat of military and police force led them to enter what they saw as an interim and inadequate solution. Havini, *supra* note 7, at 73-74; HOWLEY, *supra* note 7, at 25.

¹¹² See Steve Inskip, *Wolfensohn Reflects on the World Bank*, audio broadcast on National Public Radio, May 10, 2005, <http://www.npr.org/templates/story/story.php?storyId=4645837> (follow "Listen" hyperlink to download audio) (indicating that challenges to NT2 led to improved mitigation and environmental protection) [hereinafter NPR Interview].

¹¹³ In this context, settlement may indicate a more successful resolution of the alleged violations; a number of actual decisions have left the NGOs that brought the claims disappointed or unsatisfied. See Table of Cases, *supra* note 64. If during the process of review, the Multinational voluntarily changes behavior or plans, then there is no need to monitor or force compliance. The only publicized instance of NCP review having a measurable negative consequence on a Multinational is in the *Avient* case, a challenge to Avient's alleged contribution to conflict in the Democratic Republic of the Congo by providing military equipment. Avient claimed that banks, organizations, and governments used the allegations as reasons why they could not do business with Avient. The NCP for the United Kingdom clarified that the Guidelines are not meant to act as an instrument of sanction or to hold a corporation to account, but to be a problem-solving mechanism with view to the parties coming together to an agreement. See *Statement on Avient*, *supra* note 99.

III. THE NCP PROCESS AS APPLIED: ENABLING SUCCESS IN LAOS AND RECONSIDERATION OF THE BOUGAINVILLE DISASTER

NCP Review under the OECD Guidelines is a potent and promising tool to ensure that the process of development does not do irreparable harm while it is trying to accomplish good.

A. *Mitigating the Effects of the Nam Theun II Dam in Laos*

The OECD NCP process is clearly illustrated by the challenges brought against EDF, the French lead developer of the Nam Theun II (“NT2”) hydroelectric dam in Laos, subject to review by the French NCP. The dam, when constructed, will disrupt traditional farming and fishing activities of 50,000 to 130,000 people,¹¹⁴ open pristine rainforest to logging and development, and encroach on the habitat of several endangered species.¹¹⁵ NT2 is not the first hydroelectric project in Laos, and at least five previously constructed projects have caused devastating changes to the affected people and environment, without bringing the promised economic benefits.¹¹⁶

The case for NT2 is strongly supported by its promised financial benefits to the nation of Laos.¹¹⁷ Laos is one of the world’s least developed countries and is very poor; the majority of the population lives on less than a dollar a day.¹¹⁸ Because of its primitive infrastructure, development opportunity is limited.¹¹⁹ NT2 promises a poor country with few natural resources an opportunity to turn one of its few ample natural resources—rain—into an exportable commodity—electricity—that can be sold in Southeast Asia’s rapidly growing energy market.¹²⁰

¹¹⁴ See WWF (World Wildlife Fund), *Position Statement: Nam Theun 2 Project, Lao PDR* (May 9, 2003), <http://assets.panda.org/downloads/namtheun2dampositionpapermay2003.pdf>.

¹¹⁵ See David J.H. Blake, *Review of the Nakai-Nam Theun Social and Environmental Management Framework and First Operational Plan (SEMPOP-1) for the Nam Theun 2 Hydropower Project* (Jan. 2005), <http://www.irn.org/programs/mekong/pdf/namtheun/NT2FishImpacts.05.02.09.pdf> [hereinafter *SEMPOP-1*]; *Divisive Dam Likely to Go Ahead*, NATION, Feb. 8, 2004.

¹¹⁶ For a case study of the consequences of five previous hydroelectric projects, see INTERNATIONAL RIVERS NETWORK, *The Legacy of Hydro in Laos*, <http://www.irn.org/programs/mekong/> (follow “Legacy of Hydro in Laos” hyperlink) (arguing that affected people are worse off after dam construction and raising questions of whether the Lao government has the capacity and political will in future hydroelectric projects to ensure adequate monitoring, full and fair distribution of compensation, and environmental protection).

¹¹⁷ See Nam Theun 2 Power, *How Will the Project Benefit the Lao Macro Economy?*, http://www.namtheun2.com/faq/faq_lao.htm (last visited Apr. 14, 2006).

¹¹⁸ U.S. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: LAOS* (Jan. 10, 2006), <http://www.cia.gov/cia/publications/factbook/print/la.html>.

¹¹⁹ *Id.*; WWF, *supra* note 114; NPR Interview, *supra* note 112.

¹²⁰ See Yuthana Praiswan, *Nam Theun 2 to Help Cut Power Bills*, BANGKOK POST, Feb. 7, 2006. Ninety-five percent of the power generated at NT2 will be sold to Thailand. *Id.*

The project funding structure for NT2 provides an enticing form of international investment. NT2 is a Build-Own-Operate-Transfer¹²¹ Project.¹²² Anticipated direct revenue for Laos through dividends, taxes, and royalties is approximately U.S.\$1.9 billion over the concession period of twenty-five years, or U.S.\$75 million per year—representing 4.4 percent of the country's GNP and thirty percent of the annual national budget.¹²³ At the end of the direct revenue period, ownership of NT2 will be transferred to the government of Laos at no cost, although the project is designed to function beyond this time.¹²⁴

Building NT2 will undoubtedly have consequences on both local people and the environment.¹²⁵ NCP review provided a way for the affected people to try to ensure that the consequences will be adequately mitigated.¹²⁶ Specific concerns raised by the NGOs under seven provisions of the Guidelines challenged inadequate mitigation for the impact on displaced villagers and plant and animal species.¹²⁷

Individual challenges focused on the human rights of displaced people.¹²⁸ More than one thousand subsistence farming families—a total population of over six thousand—will be displaced by the reservoir formation,¹²⁹ and the traditional farming and fishing of 50,000 to 130,000 people will be disturbed.¹³⁰ Displaced farmers will lose their houses and the land their families have used for rotational farming for hundreds of years,

¹²¹ As a Build-Own-Operate-Transfer enterprise, EDF will construct and operate NT2 and maintain ownership of the dam for the direct revenue period of 25 years. See Letter from EDF to French National Contact Point for the OECD Guidelines for Multinational Enterprises (Dec. 8, 2004) (translation by EDF of French original), <http://www.reports-and-materials.org/EDF-letter-NCP-OECD-8-Dec-2004-English-translation.doc> [hereinafter EDF Letter].

¹²² The Nam Theun II Power Company (NTPC) was founded in 2002 as a concession agreement with the Lao government. The principal shareholder in the development, future head contractor for construction, and service provider to the operator NTPC is Électricité de France (EDF), a network of associated companies headquartered in France. The project consists of development, construction, and operation of a trans-basin diversion hydropower project using water from the Nam Theun River, a Mekong River tributary. The anticipated area of impact stretches from the Nakai Plateau to the lower Xe Bang Fai river confluence with the Mekong River. See NT2 Complaint, *supra* note 97.

¹²³ See EDF Letter, *supra* note 121.

¹²⁴ See *id.*

¹²⁵ See WORLD BANK, *Nam Theun 2 Power Project*, <http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P076445> (last visited Apr. 14, 2006).

¹²⁶ GUIDELINES, *supra* note 32, pt. 3.36.

¹²⁷ See NT2 Complaint, *supra* note 97.

¹²⁸ GUIDELINES, *supra* note 32, pt. 1.II.2 (“Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”).

¹²⁹ Response to Letter from EDF to the National Contact Point of France 4 (Feb. 25, 2005), http://www.amisdelaterre.org/IMG/pdf/response_edf_ncp_feb_05_final.pdf [hereinafter NCP Response Letter].

¹³⁰ See WWF, *supra* note 114.

including their rice paddies and land for buffalo grazing.¹³¹ Forests used for gathering non-timber products will be logged and flooded.¹³² The concerned NGOs claim the Mitigation Compensation Program calls for replacement by *one* of four possible livelihood options per family: (1) 0.66 hectares of irrigated agricultural land; (2) grazing lands for livestock and provision of at least two large animals per family; (3) reservoir fisheries; or (4) commercial forestry from land along the reservoir.¹³³ The plan also encourages the creation of service or business enterprises, including tailoring, machine repair, and tourism,¹³⁴ although support for these services is not planned.¹³⁵

Challengers allege that the mitigation provisions listed in the Mitigation and Compensation Program are overly ambitious, inadequate, not based on an evaluation of the impacted region,¹³⁶ and in violation of OECD Guidelines Chapter V, “Environment.”¹³⁷

The NGO International Rivers Network (“IRN”)¹³⁸ commissioned its own studies of the resettlement options.¹³⁹ Based on the IRN studies, the NGO complaint lists several actions necessary for the developer to reach compliance with the Guidelines.¹⁴⁰ These focus primarily on the inadequacy of information supporting the mitigation plans and call for cumulative economic analysis of the proposals, evidence that experience with other

¹³¹ See NCP Response Letter, *supra* note 129, at 4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See NT2 Complaint, *supra* note 97.

¹³⁷ GUIDELINES, *supra* note 32, pts. 1.V.1 (“Establish and maintain a system of environmental management appropriate to the enterprise, including: (a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities. (b) Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives.”); *id.* pt. 1.V.3 (“Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.”)

¹³⁸ IRN, an NGO based in the United States is one of seven NGOs from around the world which worked in cooperation to bring the complaint against EDF. The other NGOs are Proyecto Gato (Belgium), Amis de la Terre (France), Mekong Watch (Japan), World Rainforest Movement (Uruguay), Finnish Asiatic Society (Finland), and CRBM (Italy). See NT2 Complaint, *supra* note 97.

¹³⁹ See David J.H. Blake, *A Review of the Nam Theun 2 Environmental Assessment and Management Plan (EAMP) as It Pertains to Impacts on Xe Bang Fai Fisheries* (Jan. 2005), <http://www.irn.org/programs/mekong/pdf/namtheun/NT2FishImpacts.05.02.09.pdf>; David J.H. Blake, *A Review of the Adequacy of Compensation Measures for Communities Living Along the Xe Bang Fai River Nam Theun 2 Hydropower Project, Lao PDR* (Jan. 2005), <http://www.irn.org/programs/mekong/pdf/namtheun/NT2Compensation.05.02.09.pdf>; see also *SEMFOP-1*, *supra* note 115.

¹⁴⁰ See NCP Response Letter, *supra* note 129, at 2-3.

dams in the region is informing plans for NT2, and a further analysis of aquaculture and livestock options.¹⁴¹

After reviewing the challenges to EDF's proposed actions and EDF's reply in support of its plan, the French NCP held that no breach of the Guidelines could be attributed to the company.¹⁴² In fact, the French NCP found that EDF had gone beyond Guideline requirements to sign an agreement committing itself to social responsibility.¹⁴³ The NCP did make two official recommendations, however, because of the NCP's responsibility "to watch over the *effective* implementation of the company's commitments to comply with international environmental and social standards."¹⁴⁴

The first recommendation is that EDF must remain involved in implementing all the compensatory measures, as agreed to with the Lao government.¹⁴⁵ The NCP encourages EDF, along with the Lao developer, to pursue appropriate protection measures regarding the potential effects of its activities on the environment.¹⁴⁶

The second recommendation specifically addresses the interaction between Multinationals and "countries where the legal and regulatory system with regard to environmental and social matters is said to be weak."¹⁴⁷ The NCP suggests that EDF should "do their utmost to implement the internationally-acknowledged best practices that they follow in their own country on the construction site and for the people affected by their activity," and proposes that the fundamental standards of the International Labor Organization¹⁴⁸ are "appropriate rules of conduct for the companies within the scope of their activities."¹⁴⁹

Finally, while not an official recommendation, the NCP proposes consultations on at least an annual basis regarding follow-up of project

¹⁴¹ *Id.*

¹⁴² See FRENCH NATIONAL CONTACT POINT, *Recommendations of the French National Contact Point (PCN) Intended for EDF and Its Partners with Regard to the Implementation of the "Nam Theun 2" Project in Laos* (Apr. 1, 2005), <http://www.reports-and-materials.org/French-NCP-Nam-Theun-2-recommendations-1-April-2005.doc> [hereinafter *Recommendations*]. An unofficial translation of the French original by EDF is available at <http://www.minefi.gouv.fr/TRESOR/pcn/compcn010405.htm>.

¹⁴³ *See id.*

¹⁴⁴ *See id.* (emphasis in original).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Eight ILO Conventions on four subjects have been identified by the ILO governing body as fundamental to the rights of human beings at work, regardless of the level of development of the country. These subjects are: freedom of association, the abolition of forced labor, equality, and the elimination of child labor. See International Labour Organization, *Fundamental ILO Conventions*, <http://www.ilo.org/public/english/standards/norm/whatare/fundam> (last visited Apr. 14, 2006).

¹⁴⁹ *See Recommendations, supra* note 142.

development, its impacts, and the remedial measures taken, in order to maintain a high level of best practices.¹⁵⁰

NCP review can bring specific challenges to the attention of the World Bank and other prospective investors in order to create an additional level of evaluation in areas of particular concern to the indigenous people.¹⁵¹ Although the level of care desired by the indigenous people may be higher than the World Bank's minimum development floor, this additional review ensures at least that minimum.¹⁵²

Unable to independently fund NT2 development, EDF was reliant upon World Bank investment for the project, and hoped to reach agreement in early 2005.¹⁵³ The NGO complaint brought particular issues to the consideration of the World Bank.¹⁵⁴ If the proposed safeguards and mitigations had not met the World Bank's minimum standards, it would not have agreed to invest in May 2005.¹⁵⁵

Protest, including challenges raised through the NCP review process, caused major changes to the mitigation efforts and environmental controls used in constructing NT2.¹⁵⁶ Although the protest did not prevent the dam's construction, it did change mitigation and compensation plans in a way intended to benefit the people and the environment.¹⁵⁷ Further evidence of

¹⁵⁰ *Id.*

¹⁵¹ As of March 2006, the NT2 project in Laos is the only resolved NCP challenge that relates to pre-development review based on the direct effects on indigenous peoples. For recent reports of NCP cases, see OECD Watch, Home, <http://www.oecdwatch.org/content.htm> (last visited Apr. 14, 2006). A June, 2005 challenge to a Brazilian hydroelectric dam, while possibly affecting local indigenous people, is based on challenges to the financial structure of the development. See OECD Watch, OECD Watch Newsletter 7 (Mar. 2006), http://www.oecdwatch.org/docs/OW_news_March_06_Eng.pdf; OECD Watch, News, <http://www.oecdwatch.org/416.htm> (last visited Apr. 14, 2006).

¹⁵² Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791, 1793 (2005) (arguing that World Bank standards are "a minimum floor that any environmentally and socially sensitive project should meet.") (citing Press Release, Friends of the Earth et al., Memorandum on Camisea Project Violations of World Bank Safeguard Policies (Oct. 17, 2002), http://www.bicusa.org/bicusa/issues/misc_resources/338.php).

¹⁵³ See Nam Theun 2 Power, <http://www.namtheun2.com/> (last visited Apr. 14, 2006); WORLD BANK, *Proposed Nam Theun 2 Hydroelectric Project in Lao: PDR World Bank Responses to IRN-ED Technical Reviews* (Mar. 21, 2005), <http://siteresources.worldbank.org/INTLAOPRD/Resources/IRN-EDF-Review-Response-March-21.pdf>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Development studies had already been released to the World Bank and to the public by November 23, 2004, when the NGOs sent their initial complaint. See NT2 Complaint, *supra* note 97. The additional agreement on social responsibility EDF signed is dated January 24, 2005. See Recommendations, *supra* note 142. Although it is impossible to know if the complaint alone initiated this additional commitment to social responsibility, a decision to do so at this time indicates sensitivity to the issues.

¹⁵⁶ The former president of the World Bank, James Wolfensohn, acknowledged that challenges to the plans for Nam Theun II resulted in improved provisions for people in the region and more care taken to protect wildlife and biodiversity. For audio of the interview, see NPR Interview, *supra* note 112.

¹⁵⁷ *Id.*

the influence of NCP review is provided by EDF's first-ever partnership with an NGO, CARE France,¹⁵⁸ in 2005.¹⁵⁹ According to EDF, this partnership will contribute to EDF's sustainable development policy, particularly as it concerns the effect on populations local to the NT2 project.¹⁶⁰

The NCP review process provided the indigenous people affected by NT2, as represented by NGOs, the ability to express their concerns in a meaningful way and compel the developer of the dam to respond. It is unlikely these challenges would have been raised in the absence of the NCP review process, which provided the affected people with a forum for voicing their concerns.

B. The Continued Peace of the People Affected by Nam Theun II Development Shows the Effectiveness of NCP Review as a Partial Solution to the Silence of Indigenous Peoples

The Hmong, one of the indigenous peoples who will be displaced by NT2,¹⁶¹ have a long history of rebellion in Laos.¹⁶² During the French colonial period, French insensitivity to Hmong interests, "especially their failure to appreciate the devastating effect of tax increases on the already low Hmong standard of living, periodically incited large numbers of Laotian Hmong to armed rebellion."¹⁶³ Until the late 1940s, Hmong were treated as second-class citizens by the ethnic Lao, forced to literally grovel before Lao officials, charged higher prices, and paid lower wages than Lao people.¹⁶⁴ This led to a series of rebellions that were eventually subsumed in the Communist uprising.¹⁶⁵

Given this history, the involuntary resettlement necessary to build NT2 could be expected to face fierce local resistance. Although involuntary resettlement of the Hmong has not begun in earnest,¹⁶⁶ the current lack of

¹⁵⁸ CARE works internationally with poor communities to supply a sustainable response to poverty. See, e.g., CARE, Home, <http://www.care.org> (last visited Apr. 14, 2006); Press Release, CARE, EDF Group Signs a Partnership with CARE France (May 2005), <http://www.edf.com/55468d/Homecom/Whoware/Commitments/FichiersEN/PDFCAREEN> [Hereinafter CARE Press Release].

¹⁵⁹ See CARE Press Release, *supra* note 158.

¹⁶⁰ See *id.*

¹⁶¹ See *SEMFOPI-1*, *supra* note 115, at 6.

¹⁶² See KEITH QUINCY, *HONG: HISTORY OF A PEOPLE* 115-116 (1988).

¹⁶³ See *id.* at 116.

¹⁶⁴ See *id.* at 140-141.

¹⁶⁵ See *id.* at 140-156.

¹⁶⁶ See Nam Theun 2 Power, *supra* note 153. A later report indicates that the first group of villagers are to be relocated in the second half of 2006, with all resettlement completed by September of 2007. See Nam Theun 2, *Semi-Annual Progress Report: Period July to December 2005*, Document No. NTPC

substantial disputes is promising.¹⁶⁷ Preliminary construction began in 2004,¹⁶⁸ and the Nam Theun River was diverted in March 2006.¹⁶⁹ Peaceful development in traditionally held Hmong lands indicates that something in this development process is being done right. Admittedly, disputes could arise in the future, particularly as resettlement begins in earnest or if significant problems with compensation arise. Significant steps, however, have been taken to preempt such problems.

An indigenous group without peaceful, legal alternatives to change an impending situation may turn to what seems like the only option—protest.¹⁷⁰ Regardless of its initial form, protest holds an inherent risk of escalation to violence.¹⁷¹ In a regime where government protest is outlawed, even peaceful protest, in the form of rallies, sit-ins, or non-payment of taxes, may be perceived as a threat to the government and may not remain peaceful for long.¹⁷² For certain groups, like the Lao Hmong, with a long history of armed rebellion, protest may lead to violence.¹⁷³ Even traditionally peaceful people, such as the Bougainville islanders of PNG, may resort to aggression when they feel they have no alternatives.¹⁷⁴

C. *Reconsidering the Disaster of Bougainville and Envisioning the Future of the NCP Process*

Specific problems in the process of developing Bougainville's Panguna mine, exacerbated by failed or non-existent environmental controls, led to environmental degradation, rebellion, and civil war. During the development process, the indigenous people were treated as "ignorant savages, incapable of participating in a discussion to reach a consensus on a

B091802000001A, 37 (Jan. 15, 2005), http://www.namtheun2.com/gallery/lib_anreport/NTPC-%20B09-1802-000001-A.pdf [hereinafter *Progress Report*].

¹⁶⁷ No protests or uprisings have been reported. Four complaints have been made to the grievance offices organized to allow villagers affected by construction to express concerns and requests. These complaints include damage to a fish pond and roofs, that have now been repaired, and revisions have been made to the procedures that caused the initial damage. Another complaint arose over compensation issues during preliminary resettlement, but this has also been resolved. A request made about road conditions is under consideration. See *Progress Report*, *supra* note 166 at 45.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ See Laos News Agency, *Nam Theun River Successfully Diverted*, VIENTIANE TIMES, Mar. 7, 2006.

¹⁷⁰ See generally CHOUDRY, *supra* note 3.

¹⁷¹ One of the earliest protests on Bougainville, in 1969, was the formation of a human chain across land to be surveyed and bulldozed for a port. Rio Tinto responded to this peaceful protest with violence. See Havini, *supra* note 7, at 68-69.

¹⁷² See JONATHAN A. FOX & L. DAVID BROWN, *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 16 (1998).

¹⁷³ See QUINCY, *supra* note 162, at 115-116.

¹⁷⁴ See Havini & Havini, *supra* note 7.

resolution which would be beneficial to all parties.”¹⁷⁵ According to project plans, only a minimal amount of the profit from the mine was to be invested in Bougainville’s infrastructure development, despite the direct and substantial effects on local inhabitants.¹⁷⁶

Environmental devastation, land loss, and social unrest led to indigenous demands for environmental cleanup and local profit investment.¹⁷⁷ Francis Ona, the leader of the Panguna Landowners Association,¹⁷⁸ attempted to deal with the mine by demanding ten billion kina¹⁷⁹ from Rio Tinto to compensate for environmental damage caused by development.¹⁸⁰ Ona also demanded a fifty-percent share in the mine’s profits, consultation on all new projects, and localization of ownership within five years.¹⁸¹ When mine authorities refused to listen, Ona formed the BRA, and began a guerrilla assault on mine facilities and personnel.

1. Rio Tinto and the PNG Government Failed to Protect the Environment or to Consult the Indigenous People Affected by the Mine, Leading to the Disaster for Bougainville

Two primary causes of the Bougainville rebellion include the colonial government’s lack of consultation about the mine with the indigenous people, and the environmental damage the mine caused.¹⁸² The mining agreement created by the Australian government “left no room for discussion and consultation, and the PNG government likewise refused to engage in consultation and consensus building”¹⁸³ with the native people.

Although the concessions Ona demanded from Rio Tinto before beginning his guerrilla campaign to close the mine were deliberately exaggerated to ensure that they would be dismissed, thus justifying future violence,¹⁸⁴ the essential elements of his demands were reasonable: money to fix environmental damage caused by the mine, local investment of mine profits, and localized ownership.

¹⁷⁵ See HOWLEY, *supra* note 7, at 25.

¹⁷⁶ *Id.* at 26.

¹⁷⁷ *Id.* at 36.

¹⁷⁸ The Panguna Landowners Association was an association of native landholders allied with the Bougainville government and founded to raise issues related to mine finance and pollution. It later developed into an insurrectionary organization with a policy of arson and violence toward mining personnel. *Id.* at 28.

¹⁷⁹ This is approximately equivalent to U.S.\$10 billion. Alley, *supra* note 7, at 230.

¹⁸⁰ See *id.*; see also HOWLEY, *supra* note 7, at 36.

¹⁸¹ Alley, *supra* note 7, at 230.

¹⁸² HOWLEY, *supra* note 7, at 28.

¹⁸³ *Id.* at 1.

¹⁸⁴ Alley, *supra* note 7, at 230.

2. *The NCP Review Process Would Have Provided a Way for the Indigenous People to Have Their Complaints Heard, Ideally Before Development Began*

Using the NCP review process would have allowed the indigenous people of Bougainville to bring a specific instance before the National Contact Point of either Australia or the United Kingdom.¹⁸⁵ Rio Tinto is a corporation based in Australia and the United Kingdom,¹⁸⁶ both OECD members.¹⁸⁷ NCP review would have given the indigenous people of Bougainville a way to have their concerns heard by a disinterested third party, either before development began, or at any point during construction or operation.

The primary information necessary to challenge project adequacy is the information provided by the developer for investors, or provided to comply with public disclosure requirements. Not only does this provide information for review, it also ensures that the developer has a complete mitigation plan prior to the start of development. The affected indigenous people allege Rio Tinto took no environmental precautions in building or running the Panguna mine and made no environmental or cultural assessments before construction began, despite promising to protect the environment.¹⁸⁸ Mitigation information available during Panguna development may not compare to the exhaustive documentation for NT2, but the Guidelines provide that Multinationals should “ensure that timely, regular, reliable, and relevant information is disclosed regarding their activities, structure, financial situation, and performance.”¹⁸⁹ Reporting

¹⁸⁵ The current NCP review process only became available in 2000, long after the Panguna mine was constructed and its unfortunate consequences felt. This analysis is only meant to illustrate the effectiveness of the NCP review process, and is not a criticism of the people of Bougainville.

¹⁸⁶ The Rio Tinto Group (Rio Tinto) is composed of Rio Tinto PLC, a British and Wales corporation, and Rio Tinto Limited, an Australian corporation. The Rio Tinto Group owns and operates subsidiaries worldwide as holding companies. The present day Rio Tinto emerged from the 1995 union of RTZ Corporation plc and Conzinc Riotinto of Australia into RTZ/CRA, which later changed its name to Rio Tinto. Bougainville Copper Limited (BCL) is a PNG corporation, 53.6% owned by Rio Tinto in 2000. The Panguna mine was developed by Conzinc Rio Tinto, and at the time of mine construction and management, Rio Tinto held a higher percentage of stock and exercised complete control of BCL, with London executives controlling all major mine decisions. See Rio Tinto Complaint, *supra* note 7, at 8-10; Rio Tinto, About the Company: History, <http://www.riotinto.com/aboutus/history.aspx> (last visited Apr. 14, 2006).

¹⁸⁷ See OECD Home, *supra* note 35.

¹⁸⁸ See Rio Tinto Complaint, *supra* note 7, at 2-3. Plaintiffs also allege that Rio Tinto has a “long history of wanton disregard for the environment and local populations,” including violations of environmental regulations in Australia, the United Kingdom, India, Namibia, and South Africa. Rio Tinto also has been the subject of United Nations resolutions, a UN sponsored court case, and numerous demonstrations in Western Europe. *Id.* at 27-31.

¹⁸⁹ GUIDELINES, *supra* note 32, pt. 1.III.1.

should include environmental and social reporting¹⁹⁰ and systems of managing risk.¹⁹¹ This information would have provided the people of Bougainville information on which to base their complaint.

The OECD Guidelines contain numerous provisions under which the indigenous people could have raised challenges, many falling within the chapter on environment.¹⁹² One specific problem that could have been addressed by NCP review is inadequate compensation for land seizures. Native and Australian colonial concepts of property at the time of the mine land grants were vastly different.¹⁹³ Under the Australian standard applied, all land below the surface belonged to the State, a concept of land rights that greatly benefited the colonial administration.¹⁹⁴ Traditional indigenous conceptions of land were all-encompassing.¹⁹⁵ In the words of the indigenous people, land is:

our physical life; it is marriage; it is status; it is security; it is politics; in fact, it is our only world ... We have little or no experience of social survival detached from the land. For us to be completely landless is a nightmare for which no dollar in the pocket or dollar in the bank will allay.¹⁹⁶

This statement indicates that cash compensation for land, no matter how financially generous, would be inadequate mitigation for tearing up the structure of social life. OECD Guidelines Part 1.II states that “[e]nterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.”¹⁹⁷ Although the use of “should” eliminates any force from this provision, it does lay out an obligation to consider established policies, and to consider stakeholder views, a category the landless villagers fall into.

¹⁹⁰ *Id.* pt. 1.III.2.

¹⁹¹ *Id.* pt. 1.III.5.b.

¹⁹² *Id.* pt. 1.V.

¹⁹³ See HOWLEY, *supra* note 7, at 25; Alley, *supra* note 7, at 227.

¹⁹⁴ Granting underground land rights to Rio Tinto led to the government partnership and profit sharing. See HOWLEY, *supra* note 7, at 25.

¹⁹⁵ See Alley, *supra* note 7, at 227.

¹⁹⁶ *Id.*

¹⁹⁷ Stakeholders, under the Guidelines, include the local community, business interests, employees, customers, suppliers, contractors, and the public-at-large. See GUIDELINES, *supra* note 32, pts. 3.3, 3.35. Stakeholders may also include creditors, investors, and the representative bodies of employees. See OECD PRINCIPLES OF CORPORATE GOVERNANCE, Principle IV, Organisation for Economic Co-Operation and Development (OECD) Doc. SG/CG(99)5 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf>. More generally, stakeholders are people who affect and are affected by the performance of a company. See Petros Vellas, *International Project Finance: Social Accountability of Project Companies as a Credit-Risk Mitigation Tool for Lenders*, 16 I.C.C.L.R. 178, n.1 (2005).

This loose language allows the “established policies” of the indigenous people to be considered equally with the “established policies” of the Australian government. Although Australia’s policy at the time of the Bougainville disaster did not allow indigenous control over underlying land, the indigenous people themselves have established policies, or customs, that made land ownership the fundamental basis for social interaction. Because neither the Australian nor the indigenous practice is necessarily more valid under the Guidelines, indigenous customs could be considered equally in the course of land seizure. Mitigation measures, in order to be adequate, could consider the value of land that extends beyond money, perhaps by providing alternative acceptable land rather than cash.

The notion that native custom should be considered equally with colonial practice is supported by the PNG Constitution. At the time of PNG independence, the PNG constitution adopted custom as part of the underlying law, along with the principles and rules of common law and equity.¹⁹⁸ Embracing custom rather than looking merely to colonial legal traditions acknowledges the continuing value of local tradition in establishing national law.¹⁹⁹ Although this Constitution did not yet exist when construction began on the Panguna mine, its adoption corroborates the idea that indigenous custom should be evaluated on equal terms with colonial rule when an enterprise “take[s] fully into account established policies in the countries in which [it] operate[s], and consider[s] the views of other stakeholders.”²⁰⁰

“Consider” is another weakly worded requirement. The provision, however, is enough to provide a basis for NCP review. This opens the door to third-party evaluation of the project and its effects, and may even lead to discussion and settlement between the parties, a far better outcome than violence, civil war, and destruction.

Because the NCP has no enforcement power, it has no power to police actors.²⁰¹ Given its limitations, what makes NCP review most effective is that it provides a way to prevent development until adequate mitigation measures exist. NCP review could have recognized and taken into account

¹⁹⁸ See PAPUA N.G. CONST. scheds. 2.1, 2.2; Alyssa A. Vegter, Comment, *Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership*, 14 PAC. RIM L. & POL’Y J. 545, 556 (2005).

¹⁹⁹ Adopting custom also recognizes the wide range of custom brought by the many indigenous populations of PNG, limiting the use of custom only if it is inconsistent with constitutional law, statute, or is “repugnant to the general principles of humanity.” Papua N.G. Const. sched. 2.1(2). Thus, the customs of customary ownership or property laws that have developed in various regions, as seen in local land courts. See Vegter, *supra* note 198, at 564-565.

²⁰⁰ GUIDELINES, *supra* note 32, pt. 1.II.

²⁰¹ See *id.* pt. 1.I.1.

indigenous customs in Bougainville. Rather than being treated as ignorant savages, incapable of discussion, the indigenous people could have been treated with respect, and their concerns heard. Simply being allowed to participate could have done a great deal to prevent the rebellion and civil war.

Furthermore, participation in the process would likely have some influence on Rio Tinto. Rio Tinto might not have treated the indigenous people as “ignorant savages” once they were known to be capable of participating in a complex international dispute resolution process. NCP review would also have provided incentive for restraint by bringing Rio Tinto’s actions to public attention.

NCP review is not perfect. Even if specific instances were raised against Rio Tinto, government actions would escape review.²⁰² The government could not have been forced to use any of the profits for developing infrastructure on Bougainville, nor would it have prevented the government from calling in the army to protect the mine or restore peace. Arguably, however, and according to allegations, both the Australian and the PNG governments were lured into agreements and actions that hurt Bougainville’s indigenous people because of pressure from Rio Tinto, primarily through fear of financial consequences.²⁰³ Without the pressure exerted by Rio Tinto, the governments would not have acted as they did. If Bougainville’s indigenous people had been able to obtain NCP review before development of the mine began, that pressure might not have been placed on the governments.

By providing a forum for review in which indigenous people could have expressed their concerns about development, the disastrous consequences of the Panguna development could have been avoided. Development can be designed to minimize the negative effects on people and land; NCP review provides a way for affected indigenous people to influence that design.

IV. CONCLUSION

The process provided by NCP review can and should be used to the benefit of indigenous people in the development context. Several attributes

²⁰² NCP review does not extend to the actions of sovereign states, although it does cover state-owned multinationals. *Id.* pt. 1.I.3.

²⁰³ See Rio Tinto Complaint, *supra* note 7, at 1, 23, 26, 43. One specific alleged instance of financial intimidation by Rio Tinto was when Rio Tinto threatened to pull out of the Panguna mine along with all other planned investment in PNG unless the government managed to reopen the Panguna mine through the use of military force. *Id.* at 43.

of the NCP review process make it ideal for indigenous people. The process allows third-party disinterested review of development projects before development actually begins and cannot be undone. The process requires a response from the Multinational involved in the process, while indigenous concerns expressed without the process could simply be ignored by the Multinational. As soft law, the Guidelines retain the flexibility to address problems across borders and between disparate groups.

NCP review helps prevent problems caused by the international nature of Multinationals. An affected group is not limited to the courts of its own country, or to international fora. A group can circumvent inadequate or unfair processes in its own country and use NCP review in Multinational's home country. There, too, the Multinational has less chance of avoiding challenges brought against it.

As shown in the NT2 development in Laos and in the reconsideration of the Bougainville disaster in Papua New Guinea, NCP review can be applied to development disputes throughout the Pacific Rim. Review is not limited to indigenous peoples; it can be used to create an additional level of review by any group affected by development. Two sides exist in every development project, and there is often an imbalance of power between them. NCP review can help level the playing field, regardless of the resources of the players.

NCP review cannot solve all the problems inherent in international development. It can, however, provide an opportunity for indigenous peoples affected by development to express their concerns about development and mitigation, to receive a response to those concerns, and to receive an impartial evaluation of future plans. When a developer originates from an adhering country, indigenous peoples should use this tool to improve plans, mitigation, and project review.