

**RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT  
(‘RAID’) v DAS AIR\* AND  
GLOBAL WITNESS v AFRIMEX†**

**SMALL STEPS TOWARDS AN AUTONOMOUS  
TRANSNATIONAL LEGAL SYSTEM FOR THE  
REGULATION OF MULTINATIONAL CORPORATIONS**

*The enforcement framework for the OECD’s Guidelines for Multinational Enterprises has long been the subject of criticism, especially by representatives of private and public actors. But two recent cases have suggested that enforcement actions arising from civil society efforts to utilise the national contact points complaint system may be slowly influencing the emerging discourse of corporate behaviour in ways that will have substantial effect. Beyond providing evidence of a more muscular institutional transnational enforcement structure for soft law codes, the cases serve to outline a framework for the interaction of transnational and national systems of corporate regulation. The multilateral system for governing multinational corporate behaviour will affect not only that behaviour, but also the rules through which corporations may be governed as to their internal affairs and with respect to the character of their legal personality. The cases illustrate the way in which advances in governance issues are being crafted, step-by-step, from out of a system that, while formally non-binding, is increasingly developing the characteristics of a binding governance system. These cases suggest the parameters within which the Guidelines for Multinational Enterprises are beginning to serve as the focal point for the construction of an autonomous transnational governance system that is intended to serve as the touchstone for corporate behaviour in multinational economic relationships.*

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\* UK National Contact Point (‘UK NCP’), *Statement by the United Kingdom National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: DAS Air* (21 July 2008) (Final Statement) <<http://www.berr.gov.uk/files/file47346.doc>> (‘DAS Air’).

† UK NCP, *Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* (28 August 2008) (Final Statement) <<http://www.berr.gov.uk/files/file47555.doc>> (‘Afrimex’).

## I INTRODUCTION

The problem of the multinational corporation has been at the centre of transnational policy discussion for the greater part of the last half-century.<sup>1</sup> For the last decade, attempts to create hard law and harmonised regulatory structures for multinational corporations have been effectively blocked by a great alliance of business and developed state interests.<sup>2</sup> The most prominent among these failures has been the United Nations' *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* ('UN Norms').<sup>3</sup> Moreover, attempts to stretch national law to bring the transnational activities of multinational corporations under the regulatory control of at least some states has been largely unsuccessful,<sup>4</sup> except perhaps within the academic literature.<sup>5</sup>

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<sup>1</sup> See, eg, Peter Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> ed, 2007); Philip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993); David Korten, *When Corporations Rule the World* (2<sup>nd</sup> ed, 2001) 136–8; Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 3; Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 *Melbourne University Law Review* 893.

<sup>2</sup> See Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287; David Weissbrodt, 'Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses' (2008) 26 *Berkeley Journal of International Law* 373, 384–90. As Richard Falk noted with respect to an enhanced role for the UN system in regulating the world economy:

Such possibilities are effectively blocked by market-driven globalism, which specifies the scope of the strategic interests to be pursued by dominant states and excludes from the definition of 'strategic' issues of humanitarian or ecological concern.

Richard Falk, *Predatory Globalization: A Critique* (1999) 61. For a similar pattern, in connection with fashioning international remedial frameworks for environmental damage, see Noah Sachs, 'Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law' (2008) 55 *University of California Law Review* 837, 843.

<sup>3</sup> *Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). The *UN Norms* were effectively abandoned in early 2005, and efforts to formally regulate transnational corporations transferred to other UN offices: see Backer, 'Multinational Corporations, Transnational Law', above n 2, 331–2. For a discussion of the *UN Norms* in the context of global movements for harmonised corporate social responsibility regimes, see, eg, Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006).

<sup>4</sup> For an example of a recent effort within the United States that reveals something of the strategies being developed currently, see Armin Rosencranz and David Louk, 'Doe v Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch' (2005) 8 *Chapman Law Review* 135. The Castan Centre for Human Rights Law at Monash University lists cases asserted against multinational corporations with an extraterritorial element: Castan Centre for Human Rights Law, Faculty of Law, Monash University, *Multinational Corporations and Human Rights: Transnational Human Rights Litigation against Companies* (2009) available from <<http://www.law.monash.edu.au/castancentre>>.

<sup>5</sup> For a discussion of that literature, see, eg, Larry Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) 14 *ILSA Journal of International and Comparative Law* 499, 500–8. The following list provides a sample of some of the more interesting efforts: on using tort law to address corporate violations of international law, see, eg, Nicola Jägers and Marie-José van der Heijden, 'Corporate Human Rights Violations:

This breach in regulation has been filled with a variety of soft law efforts.<sup>6</sup> Prominent among them has been the UN successor regulatory strategy to the *UN Norms* — the *UN Global Compact*.<sup>7</sup> In addition, powerful regional state–private sector organisations have also sought to create soft law regulatory networks that

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The Feasibility of Civil Recourse in the Netherlands’ (2008) 33 *Brooklyn Journal of International Law* 833; Peter Muchlinski, ‘Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 431, 433; on creating foreign direct liability in home countries as a mandatory condition of foreign direct investment in the UK, see Halina Ward, ‘Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options’ (2001) 24 *Hastings International and Comparative Law Review* 451, 461–2; on direct foreign liability in home states, as discussed in the European Union Parliament, and jurisdictional hurdles, see Jan Wouters and Leen Chanet, ‘Corporate Human Rights Responsibility: A European Perspective’ (2008) 6 *Northwestern University Journal of International Human Rights* 262, 294–300; on enterprise liability theory, see Phillip Blumberg, ‘The Transformation of Modern Corporation Law: The Law of Corporate Groups’ (2005) 37 *Connecticut Law Review* 605, 607; José Engrácia Antunes, ‘The Liability of Polycorporate Enterprises’ (1999) 13 *Connecticut Journal of International Law* 197, 203. For a discussion of the multinational regulatory framework from the moral/ethical perspective of religion, see Gerald Russello, ‘Catholic Social Thought and the Large Multinational Corporation’ (2007) 46 *Journal of Catholic Legal Studies* 107.

<sup>6</sup> See, eg, Claire Moore Dickerson, ‘Transnational Codes of Conduct through Dialogue: Leveling the Playing Field for Developing-Country Workers’ (2001) 53 *Florida Law Review* 611; Tadeusz Gruchalla-Wesierski, ‘A Framework for Understanding Soft Law’ (1984) 30 *McGill Law Journal* 37; Hans Baade, ‘Legal Effects of Codes of Conduct for MNEs’ in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 3. This, of course, is not to suggest that efforts to conceive and impose international hard law regulatory regimes have ceased. On the contrary, among certain segments of the global academy and civil society elements, the push has only intensified. The literature is voluminous. For a taste, see David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931; Isabella Bunn, ‘Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community’ (2004) 19 *American University International Law Review* 1265; Pall Davidsson, ‘Legal Enforcement of Corporate Social Responsibility within the EU’ (2002) 8 *Columbia Journal of European Law* 529.

<sup>7</sup> UN Global Compact, *United Nations Global Compact* (2008) <<http://www.unglobalcompact.org>> (*‘UN Global Compact’*): The UN has described the *UN Global Compact* as ‘a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption’. On the genesis of the *UN Global Compact*, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 218–24. The *UN Global Compact* is meant to serve as a nexus point for the development of substantive norms and a means for naturalising those norms in corporate culture. But there was no complaint or enforcement mechanism other than the threat of delisting a non-complying corporation:

The UN Global Compact presents a unique strategic platform for participants to advance their commitments to sustainability and corporate citizenship. ... Indeed, managing the enterprise risks and opportunities related to these areas is today a widely understood aspect of long-term ‘value creation’ — value creation that can simultaneously benefit the private sector and societies at large.

UN Global Compact, *How to Participate: Business Participation* <[http://www.unglobalcompact.org/HowToParticipate/Business\\_Participation/index.html](http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html)>: there are currently more than 4700 business participants. Its programs are ‘all designed to help advance sustainable business models and markets in order to contribute to the initiative’s overarching objective of helping to build a more sustainable and inclusive global economy.

might contribute to a set of behavioural norms among multinational enterprises.<sup>8</sup> Among these has been the Organisation for Economic Co-operation and Development ('OECD'),<sup>9</sup> who has been at the forefront of developing and creating frameworks for the implementation of soft law for corporate governance.<sup>10</sup>

Prominent among the OECD's soft law codes are its *Guidelines for Multinational Enterprises* ('*MNE Guidelines*').<sup>11</sup> The *MNE Guidelines* are the only multilaterally-endorsed and comprehensive code that governments have committed to promoting. The *MNE Guidelines* express the shared values of the governments of those countries that are the source of most of the world's direct investment flows, and home to most multinational enterprises.<sup>12</sup> They are meant to be applied to the worldwide operations of businesses that might be subject to their provisions.<sup>13</sup> They are enforced through bodies called National Contact Points ('NCPs'), established usually within one of the trade or commerce ministries of the adhering states.<sup>14</sup> These NCPs are meant to foster respect for the *MNE Guidelines* (as well as the other related work of the OECD) and provide the institutional framework through which interested stakeholders, usually elements of civil society,<sup>15</sup> can bring allegations of breaches of the behaviour provisions of the *MNE Guidelines* against businesses subject thereto.<sup>16</sup>

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<sup>8</sup> These regional actors include, for example, the Asia-Pacific Economic Cooperation, the Asian Development Bank, the Association of Southeast Asian Nations, the Inter-American Development Bank and the Organization of American States.

<sup>9</sup> The OECD comprises a number of democratic, market economy governments focused on regulating and harmonising development around the world. OECD member states include 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, Slovakia, Spain, Sweden, Switzerland, Turkey, the UK and the US. Eleven other states are not members but have adhered to the *MNE Guidelines*, these states are: Argentina, Brazil, Chile, Estonia, Egypt, Israel, Latvia, Lithuania, Peru, Romania and Slovenia. See generally OECD, *Organisation for Economic Co-operation and Development* <<http://www.oecd.org>>.

<sup>10</sup> See especially OECD, *OECD Principles of Corporate Governance* (2004), available from <<http://www.oecd.org>> ('*OECD Principles*'). The *OECD Principles* can be understood as 'offering non-binding standards and good practices as well as guidance on implementation, which can be adapted to the specific circumstances of individual countries and regions': at 4. Cf Duane Windsor and Kathleen Getz, 'Multilateral Cooperation to Combat Corruption: Normative Regimes despite Mixed Motives and Diverse Values' (2000) 33 *Cornell International Law Journal* 731, 763–4.

<sup>11</sup> Directorate for Financial and Enterprise Affairs, OECD, *OECD Guidelines for Multinational Enterprises* (2000) <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

<sup>12</sup> *Ibid* 5–6, 39–41.

<sup>13</sup> *Ibid* 3.

<sup>14</sup> *Ibid* 33.

<sup>15</sup> Civil society actors are themselves the subject of soft law regimes. The International Center for Not-for-Profit Law in Washington DC seeks to expose justifications for government regulation of non-governmental organisations as 'rationalizations for repression, and, furthermore, as violations of international laws and conventions to which the states concerned are signatories': International Center for Not-For-Profit Law and World Movement for Democracy Secretariat at the National Endowment for Democracy, 'Defending Civil Society' (2008) 10(2) *International Journal of Not-for-Profit Law* 30, 30.

<sup>16</sup> *Ibid*.

The enforcement framework for the *MNE Guidelines* has long been the subject of criticism, especially by representatives of private and public actors.<sup>17</sup> Much of this criticism has focused on the purported capture of the *MNE Guidelines* systems by business interests, and the weakness of the enforcement mechanisms, both in terms of procedure and delay.<sup>18</sup> In addition, the mechanics of the system have been the subject of criticism as well.<sup>19</sup> Some academic writers

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<sup>17</sup> See, eg, Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (Christian Aid Report, 21 January 2004) <<http://www.globalpolicy.org/socecon/tncs/2004/0121mask.pdf>>. Civil society elements have been appealing to a broad audience with their views through the development of websites targeting soft law systems, like those founded on the basis of the *MNE Guidelines*. See OECD Watch, *Homepage* <<http://oecdwatch.org>>, which describes itself as

an international network of civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.

OECD Watch is coordinated by a committee with diverse regional representation including the Centre for Research on Multinational Corporations ('SOMO') (Netherlands), ACIDH (Democratic Republic of the Congo), Association Sherpa (France), Brotherhood of St Laurence (Australia), Centre for Human Rights and Environment ('CEDHA') (Argentina), Civil Initiatives for Development and Peace India ('CIVIDEP') (India), ForUM (Norway), Friends of the Earth Europe (Belgium) and Germanwatch (Germany): OECD Watch, *About OECD Watch* <<http://oecdwatch.org/about-us>>. Some of these criticisms are more generally directed at all soft law systems. For example, a civil society actor, who is also one of the network directors of OECD Watch, is SOMO, a non-profit research and advisory bureau that investigates the implications of MNE policies and activity and 'the internationalisation of business worldwide': SOMO, *Homepage* <<http://somo.nl>>. SOMO also scrutinises the operational elements of the *UN Global Compact*. Those criticisms have generated a website and blog centre devoted to the accumulation of evidence of deficiencies of soft law regulatory regimes in general and the *UN Global Compact* in particular. That network gathers and shares informal information about corporate accountability and partnerships between the UN and companies: see Global Compact Critics, *Global Compact Critics* <<http://globalcompactcritics.blogspot.com>>.

<sup>18</sup> OECD Observer, *Cleaner Business* (2003) <[http://www.oecdobserver.org/news/full\\_story.php/aid/1173/Cleaner\\_business.html](http://www.oecdobserver.org/news/full_story.php/aid/1173/Cleaner_business.html)>. There is irony here. According to Ingo Venzke,

[t]he development and enforcement of OECD Guidelines for Multinational Enterprises provides an example of how institutions can seek the support of NGOs in their relationship with principals. NGOs have been involved in the drafting of the Guidelines and promote them in a larger endeavor to increase corporate social responsibility.

Ingo Venzke, 'International Bureaucracies from a Political Science Perspective — Agency, Authority, and International Institutional Law' (2008) 9 *German Law Review* 1401, 1420. See also Natalie L Bridgeman and David B Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism' (2008) 20 *Georgetown International Environmental Law Review* 187, 213–16.

<sup>19</sup> The Special Representative of the Secretary-General, for example, told the Human Rights Council in Geneva in February 2007 that 'some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs' overall performance remains highly uneven': Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/035 (9 February 2007) 15.

have not been impressed by either the concept of soft law systems in general<sup>20</sup> or by the OECD and similar efforts at soft law regulation in particular.<sup>21</sup> That, though, may reflect the innate conservatism and public law orientation of this sector of the knowledge production industry, whatever their politics might be,<sup>22</sup> which retains a certain traditionalist fidelity to the idea that the state ought to be privileged in the constitution of governance systems and that positive law ought to be privileged as the means for the expression of that political authority.<sup>23</sup> The focus of these critical efforts is bent to the production of national or global

<sup>20</sup> For a powerful and sensitive critique offering a refreshed and modernised account of the positivist objection to soft law, see Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075, 1077–81. For a traditional critique, see Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 416–17. See also Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401, 405–6; Heidi S Bloomfield, "'Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System' (1999) 22 *Hastings International and Comparative Law Review* 567.

<sup>21</sup> See, eg, Debbie Johnston, 'Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad' (2008) 66 *University of Toronto Faculty of Law Review* 137; Christopher Franciose, 'A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises' (2007) 30 *Boston College International and Comparative Law Review* 223. This approach has been criticised, pointedly, for creating

a stalemate such that the OECD Guidelines approach, asking nation-states to encourage MNEs to comply with the principles, is analogous to asking a starving person not to steal a loaf of bread. If a country needs the influx of capital, has a corrupt government, or lacks the governmental structure to even begin to protect human rights, what is that country to do?

Rebecca Atkins, 'Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social Responsibility' (2007) 40 *Vanderbilt Journal of Transnational Law* 233, 256.

<sup>22</sup> For an interesting analysis grounded in ideologies of knowledge, see James Kelly, 'Naturalism in International Adjudication' (2008) 18 *Duke Journal of Comparative and International Law* 395.

<sup>23</sup> On this point, consider W Michael Reisman's remarks in G F Handl et al, 'A Hard Look at Soft Law' in Arghyrios Fatouros (ed), *Transnational Corporations: The International Legal Framework* (1994) 333, 337, where he argues that,

many people who use the term 'soft law' pejoratively often are concerned less with the alleged fictitious character of certain prescriptions that purport to be law ... and much more with the redistribution of political power in certain arenas of international lawmaking.

For an expression of this critique as a positive value, see, eg, Jean d'Aspremont, above n 20, who suggests that advocates of soft law regimes are effectively either confused about the nature of the legal field they till or traitors to it. He argues that the eschewal of its fundamental weaknesses by the unconditional proponents of the soft law thesis is symptomatic of the unease currently felt by many international legal scholars: at 1076. This embarrassment drives many scholars to stretch the limits of their field of study. Indeed, in trying to capture acts which are, from a positivist perspective, intrinsically outside the realm of law, they basically seek to enlarge the object of their science and consider international law as anything with an international dimension: at 1088. See also Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

systems of hard law aimed at achieving any number of regulatory goals.<sup>24</sup> Beyond that vector of critique, developing states have criticised the approach as both reflecting the views and values of developed states and as imposed, in fact, on developing states for their own wellbeing but without their consent.<sup>25</sup>

Though the debates about the nature of law and the legitimacy or effectiveness of soft law are certainly important, these debates fall outside the scope of this case note. Instead, this case note looks to praxis for an understanding of the way in which theory may be developing in the field. In that context, two recent cases have suggested the ways in which enforcement actions arising from civil society efforts to utilise the NCP complaint system may be slowly influencing the emerging discourse of corporate behaviour in ways that will have substantial effect. One case, brought by Rights and Accountability in Development ('RAID'), a civil society actor,<sup>26</sup> against DAS Air, determined that the activities of a UK entity outside of the UK violated the *MNE Guidelines* because they constituted breaches of international conventions to which the entity's home country adhered.<sup>27</sup> The other, brought by Global Witness, another civil society actor,<sup>28</sup> against Afrimex Ltd, determined that the activities of a

<sup>24</sup> See, eg, James Jackson, *The OECD* (CRS Report, 19 January 2007); see also Lucien Dhooge, 'Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques' (2004) 21 *Arizona Journal of International and Comparative Law* 441.

<sup>25</sup> See Backer, 'Multinational Corporations, Transnational Law', above n 2, 318: 'This form of "volunteerism" has been criticized by developing countries as lacking input from representatives of developing states. Though crafted by developed countries as voluntary standards, such volunteerism is binding in fact for developing states'. See also Fidel Castro Ruz, 'Una Revolución Solo Puede Ser Hija de la Cultura y de las Ideas' (Speech delivered at the Great Hall of the Central University of Venezuela, Venezuela, 3 February 1999). The English version of this speech is available at <<http://www.cuba.cu/gobierno/discursos/1999/ing/f030299i.html>>.

<sup>26</sup> RAID describes itself as 'a research and advocacy NGO based in Oxford, UK, that promotes respect for human rights and responsible conduct by companies abroad'. It has been fully independent since 2003. Its founders, Patricia Feeney and Tom Kenny, worked together at the Refugee Studies Centre, Queen Elizabeth House, University of Oxford, in 1997 and remain involved with RAID, currently as Executive Director and Senior Research Consultant respectively. RAID describes its mission as being

to promote a rights-based approach to development. RAID works to advance corporate accountability, fair investment and good governance to ensure the human rights of people living in poverty are respected by the private sector, international financial institutions and governments.

RAID, *Rights and Accountability in Development* <<http://raid-uk.org>>.

<sup>27</sup> UK NCP, *DAS Air* (21 July 2008). The complaint alleged breaches under a variety of provisions of the *MNE Guidelines* resulting from DAS Air's failure to apply 'due diligence when transporting minerals from Entebbe and Kigali, which had a reasonable probability of being sourced from the conflict zone in the Democratic Republic of Congo' and its commercial flight activities between Entebbe airport and the conflict zone in eastern Democratic Republic of the Congo ('DRC') coinciding with an occupation of the area by the Ugandan military. A flight ban between the DRC and Entebbe was in place during the applicable period, violations of which were in direct contravention of international aviation law enshrined in the *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) ('*Chicago Convention*'). The UK NCP determined that the complaints were valid: UK NCP, *DAS Air* (21 July 2008) 47–50.

<sup>28</sup> Global Witness was founded in 1993 and now has offices in London and Washington DC. Global Witness sees its mission as being to expose 'the corrupt exploitation of natural resources and international trade systems [and] to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses': Global Witness, *About Us* <[http://www.globalwitness.org/pages/en/about\\_us.html](http://www.globalwitness.org/pages/en/about_us.html)>.

group of corporations were related and therefore the UK entity either failed to properly oversee the operations of its supply chain or participated as part of an enterprise in the violation of the *MNE Guidelines*.<sup>29</sup>

These cases are ripe with possibility. Beyond evidence of a more muscular institutional transnational enforcement structure for soft law codes, the cases serve to outline a framework for the interaction of transnational and national systems of corporate regulation. The multilateral system for governing multinational corporate behaviour will affect not only that behaviour but also the rules by which corporations may be governed as to their internal affairs and with respect to the character of their legal personality.<sup>30</sup> And this is without regard to the law of either home or host state, but instead is grounded in transnational law principles derived from the soft law regime within which the cases arose. But the cases do more than that. Arising in the course of global efforts to manage the regional conflict in the DRC,<sup>31</sup> the cases also suggest the strength of what may become a consensus view regarding the applicability of international law directly to non-sovereign entities like multinational corporations.<sup>32</sup> This case note first briefly describes the institutional and regulatory framework within which the cases arose. It then reviews the cases themselves, drawing out the more relevant arguments. Last, it contextualises these arguments and positions within the national and transnational corporate and international legal regimes.

These cases suggest an effective method for operating a soft law system to produce the effects of hard law beyond the state, without challenging state authority directly. The OECD system is moving forward through this form of institutionalising quasi-judicial organs. These efforts are being undertaken in

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<sup>29</sup> Global Witness alleged violations of a variety of provisions in the *MNE Guidelines*: namely, that Afrimex paid taxes to rebel forces; did not adequately monitor their supply chain; and sourced minerals from unsafe mines that used child and forced labour. The UK NCP upheld the majority of those claims, identifying a connected group of companies operating as an enterprise engaged in the business of purchasing natural resources from mines within a DRC conflict zone. However, Afrimex and its related entities were not found to have engaged in activities that could be characterised as corruption or bribery and did not otherwise improperly involve themselves in local politics. The UK NCP found that ‘Afrimex failed to contribute to ... sustainable development in the region; to respect human rights; or to influence business partners and suppliers to adhere to the Guidelines’: UK NCP, *Afrimex* (28 August 2008) 1.

<sup>30</sup> This was made quite clear in the context of the near adoption of the *UN Norms* and is equally applicable in this context. See Backer, ‘Multinational Corporations, Transnational Law’, above n 2, 357–74.

<sup>31</sup> See, eg, Jane Boulden, *Peace Enforcement: The United Nations Experience in Congo, Somalia, and Bosnia* (2001) 21–49; Thomas Turner, *The Congo Wars: Conflict, Myth and Reality* (2007) 146, 147–60, 164–5; Georges Nzongola-Ntalaja, *From Zaire to the Democratic Republic of the Congo* (2004) 15–18; George Zachariah, ‘Regional Framework for State Reconstruction in the Democratic Republic of Congo’ (2004) 58(1) *Journal of International Affairs* 215; Emizet F Kisangani, ‘Conflict in the Democratic Republic of Congo: A Mosaic of Insurgent Groups’ (2003) 20 *International Journal on World Peace* 51; Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (Human Rights Watch Report, 26 April 2005) 118–28.

<sup>32</sup> Cf Julie Mertus, ‘Considering Non-State Actors in the New Millennium: Towards Expanded Participation in Norm Creation and Norm Application’ (2000) 32 *New York University Journal of International Law and Politics* 537; Jennifer Johnson, ‘Public–Private–Public Convergence: How the Private Actor Can Shape Public International Labor Standards’ (1998) 24 *Brooklyn Journal of International Law* 291; Jordan Paust, ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 *Vanderbilt Transnational Law Journal* 801.

parallel — and to some extent, informally coordinated — with other soft law implementation endeavours, among the more significant of which may be those of the *UN Global Compact*, and current projects to operationalise a ‘protect, respect and remedy’ regulatory framework focused on human rights and transnational corporations.<sup>33</sup> For this reason alone, the cases are important for development of the law of multinational obligation and the system under which such obligations are overseen. The movement towards effective substantive implementation, however, leaves open the question of the content of that obligation. These cases suggest a more open-ended approach to corporate liability; a willingness to ignore corporate legal personality (and the municipal legal framework under which it remains strongly protected); an acceptance of the substitute sovereign obligations of corporations under conditions of conflict or weak public governance; and the direct effect of international conventions to multinational corporations. They provide another step in the reconstitution of supranational governance and the allocation of governance rights and obligations beyond the state. These tendencies ought to be controversial; they are also justifiable or dismissed on the basis of strong, though incompatible, principles. Still, the interrogation undertaken in this case note is not meant necessarily to embrace or reject this normative system in the making. Ideological predisposition is avoided in favour of a stance that seeks to understand the

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<sup>33</sup> For a general discussion, see John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008). The object of the *UN Global Compact* was to serve as a means of mainstreaming a set of corporate behaviour through engagement with corporate participants: *UN Global Compact*, above n 7. Related to the *UN Global Compact* system was the elaboration of the *UN Millennium Development Goals* (that set goals to: end poverty and hunger; universal education; gender equality; child health; maternal health; combat HIV/AIDS; environmental sustainability; and global partnership): UN, *Millennium Development Goals, End Poverty 2015* <<http://www.un.org/millenniumgoals/bkgd.shtml>>. Currently, the UN is exploring the feasibility and possible form of a governance structure under a ‘protect, respect and remedy’ policy framework, grounded in functionally distinct but coordinated obligations of states and corporations. Much of the work is being overseen by Special Representative Ruggie. See ‘Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises’ (Press Release, 29 July 2005, UN Doc SG/A/934): ‘The mandate includes identifying and clarifying standards of corporate responsibility and accountability with regard to human rights’. Ruggie had been intimately involved in developing the architecture of UN approaches to transnational corporate governance under the *Global Compact* and the development of substantive norms under the *UN Millennium Development Goals*.

Professor Ruggie previously served as Assistant Secretary-General and senior adviser for strategic planning from 1997 to 2001. Among his many responsibilities, he was one of the main architects of the United Nations Global Compact, and he led the Secretary-General’s successful effort at the Millennium Summit in 2000 to propose and secure the adoption of the Millennium Development Goals

In this role, Ruggie has headed a large network of actors charged with conceptualising systems that might mainstream the ‘protect, respect and remedy’ framework, along with its substantive norms. This mainstreaming in turn embraced the idea developed by Ruggie that ‘international political authority derives not only from rules and procedures, but also from the principles that establish the normative framework for multilateral agreements’: Georg Kell and David Levin, ‘The Evolution of the Global Compact Network: An Historic Experiment in Learning and Action’ (Paper presented at The Academy of Management Annual Conference, Denver, US, 11–14 August 2002) 4. See also John Ruggie, *Winning the Peace: America and World Order in the New Era* (1996).

workings of those systems on their own terms. As such, the issue is one of institutional development and tension.<sup>34</sup> It is, in this sense, more a warning than a prescription for action.

## II THE REGULATORY CONTEXT

The *MNE Guidelines* are recommendations for responsible business conduct addressed by governments to multinational enterprises operating, or incorporated in, adhering countries.<sup>35</sup> The theme of the OECD Ministerial level meeting that approved the revised *MNE Guidelines* in 2000 was ‘Shaping Globalisation’.<sup>36</sup> The integration of national economies into one global economy is accelerating and intensifying, driven by new technologies and new opportunities. These new opportunities are not only to reap profit, but also to stimulate development and improved social conditions around the world.<sup>37</sup> The revised *MNE Guidelines* will be an important instrument for shaping globalisation. They provide a government-backed standard of good corporate conduct that will help to level the playing field between competitors in the international market place.<sup>38</sup> They will also be a standard that corporations themselves can use to demonstrate that they are important agents of positive change throughout the developing as well as the developed world.<sup>39</sup>

The *MNE Guidelines* are framed as recommendations by governments addressed to multinational enterprises operating in or from adhering countries. As the Canadian Government has stated:

Although endorsed by adhering Governments, the Guidelines are voluntary and are not intended to override local laws and legislation. The Guidelines are not intended to introduce differences of treatment between MNEs and domestic enterprises — they reflect good practice for all.<sup>40</sup>

They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.<sup>41</sup>

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<sup>34</sup> Left to another day is the more complicated project of determining the utility of this system, its normative value and conformity to transnational constitutional principles of democratic accountability, rule of law and the like. For a discussion of several of these issues, see Oren Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’ (2003) 10 *Indiana Journal of Global Legal Studies* 25, 43.

<sup>35</sup> *MNE Guidelines*, above n 11, 5–6

<sup>36</sup> *Ibid* 3.

<sup>37</sup> *Ibid* 6.

<sup>38</sup> *Ibid* 5–6. This sense of competitive inequality, fed by traditional legal frameworks, has driven the discourse, at least from the perspective of host states, for some time. See, eg, Sudhir K Chopra, ‘Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity’ (1994) 29 *Valparaiso University Law Review* 235.

<sup>39</sup> *MNE Guidelines*, above n 11, 5.

<sup>40</sup> Foreign Affairs and International Trade Canada, *Canada’s National Contact Point (NCP) for the OECD Guidelines for MNEs: What Are the Guidelines?* (2009) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/guidelines-principes.aspx?lang=eng>>.

<sup>41</sup> For a discussion of the *MNE Guidelines*, see, eg, Business and Industry Advisory Committee to the OECD, *Business Briefs for the OECD MNE Guidelines* (2009) <[http://www.biac.org/pubs/briefs\\_mne\\_guidelines.htm](http://www.biac.org/pubs/briefs_mne_guidelines.htm)>.

The enforcement and naturalisation work of the OECD are implemented through its system of NCPs.<sup>42</sup> These entities are established through government ministries and are charged with the implementation of adhering state obligations under the *MNE Guidelines* and other relevant soft law produced or implemented through the *MNE Guidelines*.<sup>43</sup> The NCPs serve several purposes. With respect to the *MNE Guidelines*, a principal obligation is the establishment of procedures for handling complaints brought by proper parties alleging violations by multinational corporations of their obligations under the *MNE Guidelines*.<sup>44</sup> These procedures vary widely,<sup>45</sup> but all include provisions for complaint intake, mediation, and ultimately more formal hearing of complaints.<sup>46</sup> But because the *MNE Guidelines* are not legally binding, the usual protections accorded in binding proceedings are not necessarily observed.<sup>47</sup> However, multinational entities tend to take these proceedings seriously because of the potentially severe consequences of a determination of violation, including adverse consequences

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<sup>42</sup> Nigel D White and Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 *European Journal of International Law* 965, 977. White and MacLeod further state, at 978: 'Notwithstanding the stakeholder participation approach utilized by the OECD, the fact remains that the Guidelines are voluntary in nature and limited in scope and that their value is predicated upon the effectiveness of the NCPs': at 978.

<sup>43</sup> For example, the Australian NCP is the Executive Member of the Foreign Investment Review Board (who is also the General Manager of the Foreign Investment and Trade Policy Division at the Treasury) and which has been charged with the obligation to

provide a forum for discussion with relevant stakeholders, including businesses, non-government organisations, and other government departments and agencies, on matters relating to the Guidelines. Consultations are held at least once a year to complement the schedule of meetings of the OECD Committee on Investment. These sessions aim to provide a forum for stakeholders to address issues under the Guidelines with the ANCP and to promote the Guidelines as a useful framework for business.

Australian NCP, *The Australian National Contact Point for the OECD Guidelines for Multinational Enterprises* (2009) <[http://www.ausncp.gov.au/content/contact\\_point.asp?areaid=18](http://www.ausncp.gov.au/content/contact_point.asp?areaid=18)>. On the other hand, in Canada, the NCP 'is an interdepartmental committee chaired by the Department of Foreign Affairs and International Trade': Foreign Affairs and International Trade Canada, *Canada's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (MNEs)*, above n 40.

<sup>44</sup> *MNE Guidelines*, above n 11, 34–5.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Stephen Tully, 'The 2000 Review of the OECD Guidelines for Multinational Enterprises' (2001) 50 *International and Comparative Law Quarterly* 394, 401; OECD Watch, *Positive and Negative Aspects of the Guidelines* <<http://oecdwatch.org/about-oecd/guidelines>>; Michael Baumann, Germanwatch, 'Opening Address' (Speech delivered at 'Responsible Globalization? The OECD Guidelines for Multinational Enterprises: A Discussion', Berlin, Germany, 2002) 6.

with investors and consumers,<sup>48</sup> and the possibility that the findings might lead to formal charges of violations of law.<sup>49</sup>

The NCP structure has, however, been criticised by civil society actors.<sup>50</sup> The criticism, in part, derives from what appears to be a renewed interest in the *MNE Guidelines*, after their revisions in 2000, as an effective alternative to developing structures of multinational enterprise regulation at the transnational level.<sup>51</sup> For some elements of civil society, the structure of the *MNE Guidelines* and their enforcement mechanisms might be seen as a potential means for creating a soft law consensus on regulatory frameworks for multinational corporations, and building a hard law transnational regulatory framework from that foundation. As a consequence, civil society actors have been working to increase both the visibility and legitimacy of the enforcement mechanisms of these soft law systems.<sup>52</sup> But, at the same time, such actors have increasingly turned to the enforcement mechanisms of *MNE Guidelines* to bring pressure on multinationals to conform to what is hoped to be an increasingly harmonised, consensus-based

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<sup>48</sup> On the importance of soft consequences to multinational enterprises and their effect in disciplining behaviour of multinational corporations, see Larry Catá Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator' (2007) 39 *Connecticut Law Review* 1739.

<sup>49</sup> First, '[t]o the extent that the implementation mechanism is effective, the binding nature of the procedural prescriptions creates a *de facto* constraint for MNEs to implement the soft law Guidelines for MNEs': Gefion Schuler, 'Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises' (2008) 9 *German Law Journal* 1753, 1771. Second, the findings and discussions produced through the processes of complaint resolution within the NCP system might develop substantial and targeted evidence to the extent that it constitutes a violation of the law of the home or host state. For the moment, however, courts may be, but are not yet, obligated to heed the content of NCP decisions 'when determining issues of public interest in litigation involving multinational enterprises': Jernej Čerňič, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 98. Thus, 'the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion ... and occasionally to charges in actual courts': Ruggie, *Protect, Respect and Remedy*, above n 33, [54].

<sup>50</sup> Patricia Feeney, *Model National Contact Point* (OECD Watch Report, September 2007) 5 <[http://oecdwatch.org/publications-en/Publication\\_2223](http://oecdwatch.org/publications-en/Publication_2223)>.

<sup>51</sup> According to Elisa Morgera:

The 2000 Review and the discussions on corporate accountability at the 2002 World Summit on Sustainable Development (WSSD) revived environmental NGOs' interest in the OECD Guidelines ... particularly after the failure of the proposal at WSSD to initiate negotiations on an international legally binding instrument on corporate liability ... In addition, the renewed commitments of national governments helped to increase the profile and the status of the OECD Guidelines, as they were expressly referred to in the final Communiqués of the G8 Evian Summit in June 2003.

Elisa Morgera, 'An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy and Outstanding Questions in the Lead Up to the 2006 Review' (2006) 18 *Georgetown International Environmental Law Review* 751, 755.

<sup>52</sup> One of the more prominent civil society critics has been RAID, the entity that brought the complaint in *DAS Air*. See RAID, *Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008* (RAID Report, November 2008) <[http://raid-uk.org/docs/UK\\_NCP/NCP\\_report.pdf](http://raid-uk.org/docs/UK_NCP/NCP_report.pdf)>.

standard of global business behaviour based on a specific interpretation of the *MNE Guidelines*.<sup>53</sup> As RAID suggested on its website:

RAID advocates for binding corporate accountability frameworks, particularly the development of international norms on the human rights responsibilities of companies. A major focus of RAID's work involves demanding corporate adherence to the international human rights framework and other relevant corporate responsibility instruments, including the OECD Guidelines for Multinational Enterprises.<sup>54</sup>

In the UK, the UK NCP employs the expertise of officials from both the Department for Business, Enterprise and Regulatory Reform ('BERR') and the

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<sup>53</sup> This is not unique to the *MNE Guidelines* framework. Civil society elements have come to play an increasingly important role in the construction of transnational and international norm-making (either as hard or soft law). In effect, they supplement or substitute for the democratic element of state governance. See, eg, Arnold Pronto, 'Some Thoughts on the Making of International Law' (2008) 19 *European Journal of International Law* 601, 605. This is troublesome to some: see, eg, Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society' (2000) 11 *European Journal of International Law* 91, 112–19. Indeed, the OECD has encouraged this point of view. For its part, the OECD has sought to coordinate, at least informally, the work of the NCPs with other governance frameworks, particularly those being developed under the auspices of the UN. Thus, for example, Ruggie participated prominently in the annual meeting of the OECD National Contacts Points, held in Paris in June 2008. See John Ruggie, *Keynote Presentation* (Paper presented at the Annual Meeting of National Contact Points, Organisation for Economic Co-operation and Development, Paris, 24 June 2008) <<http://www.oecd.org/dataoecd/9/63/40933850.pdf>>. At that meeting, Ruggie noted that:

We have learned a great deal about business and human rights since 2000, when the Guidelines were last revised and the NCP process was established. We understand the challenges more clearly, and we know better what works, and what doesn't, in devising effective responses. No doubt the OECD in due course will want to draw on this experience in updating the human rights component of its own system: at 4.

He offered five critiques of the *MNE Guidelines*, including the need to extend the direct reach of international obligations to corporations, especially in weak governance zones; the need for greater specificity of international obligations with respect to which corporations ought to be sensitive; the need to develop corporate internal process guidelines for grievances from stakeholders; a greater use of the *MNE Guidelines* to corporate supply chains, and the refinement of multinational corporation-home state cooperation; and oversight with respect to investments in weak governance zones: at 4–6. Further, he offered six principles 'widely believed to form the basis of effectiveness in human rights grievance mechanisms': at 6. These principles included legitimacy, accessibility, predictability, equity in participation, rights compatibility, and transparency. He reflected the view that

the OECD is not expected to solve the many challenges of business and human rights by itself; indeed, they are not all under the control of governments and businesses located within the OECD countries and adhering states. But the Guidelines and NCPs are critical, and in some respects unique, elements in the overall architecture. And cooperation with other international actors, including the United Nations, will yield greater benefits all around: to individuals and communities, to businesses, and to our respective institutions and their missions: at 7–8.

Some of these notions, of course, found their way into the opinion in *Afrimex*: see the discussion below nn 152–153, 232, 270 and accompanying text.

<sup>54</sup> RAID, *RAID's Current Work: Promoting Corporate Accountability and the Human Rights Responsibilities of Business* (2007) <<http://raid-uk.org/work.htm>>.

Department for International Development ('DFID').<sup>55</sup> The UK NCP is one of several entities within the UK Government concerned with overseeing policy on corporate social responsibility.<sup>56</sup> External members of the UK NCP include experts from trade unions, business and civil society,<sup>57</sup> who are extensively consulted in all aspects of UK NCP activities.<sup>58</sup> RAID, for example, has been an active stakeholder in the work of the UK NCP in the UK.<sup>59</sup> This reflects a consensus view among governance elites that civil society participation enhances legitimacy, democratic values and engagement among critical stakeholders in the governance context.<sup>60</sup> Others, however, have criticised civil society as

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<sup>55</sup> BERR, *UK National Contact Point for the OECD Guidelines: Annual Return to the OECD Investment Committee — 2007/2008* (UK BERR Report, 26 January 2009) 1 <<http://www.berr.gov.uk/files/file49810.pdf>>. BERR serves as an umbrella organisation for a number of soft law corporate social responsibility initiatives that have the support of the UK Government, such as the *UN Global Compact*, Extractive Industries Transparency Initiative and the *OECD Risk Awareness Tool* when promoting the *MNE Guidelines*: at 2.

<sup>56</sup> *Ibid* 1–2. The UK Government states that:

The NCP participates in the Government-wide Inter-Departmental Group on Corporate Social Responsibility. Through these contacts the NCP ensures that the Guidelines feature prominently in wider UK policy on corporate social responsibility. ... The UK Government is fully committed to this important work, and has increased NCP [staffing] resources. From March 2008, 2 BERR officials are now working full time, plus 20% of DFID official on the Guidelines.

<sup>57</sup> *Ibid* 2.

<sup>58</sup> See, eg, The Corner House and RAID, *The UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises UK: Response to the Stakeholder Consultation* (The Corner House and RAID Report, 12 January 2006) <[http://www.corporate-accountability.org/eng/documents/2006/uk\\_national\\_contact\\_point2006.pdf](http://www.corporate-accountability.org/eng/documents/2006/uk_national_contact_point2006.pdf)>.

<sup>59</sup> RAID and The Corner House have filed more than 12 complaints with the UK NCP and four international NCPs. Thus, they might be considered to have 'substantial experience upon which to draw' when making recommendations: *ibid* 1.

Further, RAID and The Corner House, as elements of civil society, have recommended broader and more autonomous power for NCPs and a more effective system of enforcement of the *MNE Guidelines*, raising

several concerns about the implementation of the complaints procedure in the UK. [They recommend] that the NCP's office be given the status of an ombudsman; independence of any government department; and responsibility for mediating between a company and complainant and for determining compliance.

The Corner House and RAID, *The UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises Response to the Stakeholder Consultation: Summary* <<http://www.thecornerhouse.org.uk/summary.stml?x=523532>>.

<sup>60</sup> See, eg, Asher Alkoby, 'Global Networks and International Environmental Lawmaking: A Disclosure Approach' (2008) 8 *Chicago Journal of International Law* 377; Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 *Harvard Environmental Law Review* 537, 585–6; Peter Spiro, 'New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions' (1995) 18 *Washington Quarterly* 45, 51; Debora Spar and James Dail, 'Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations' (2002) 3 *Chicago Journal of International Law* 171, 179; Maria Dakolias, 'Legal and Judicial Development: The Role of Civil Society in the Reform Process' (2000) 24 *Fordham International Law Journal* S26, S34. But for a cautionary analysis, see Ramiro Salvochea, 'Clientelism in Argentina: Piqueteros and Relief Payment Plans for the Unemployed — Misunderstanding the Role of Civil Society' (2008) 43 *Texas International Law Journal* 287.

undemocratic autonomous actors who seek to capture transnational governance for their own ends.<sup>61</sup>

The procedures for handling complaints from start to finish, along with bureaucratic commitments respecting time decision and the like, are set forth in a set of published procedures available from the internet site of the UK NPC.<sup>62</sup> In keeping with the structure of the *MNE Guidelines*, the UK NPC's focus is centred on mediation, though it has been turning more often to the assessment process as of late.<sup>63</sup> To date, it has considered about 15 specific instances of complaints brought by elements of civil society.<sup>64</sup>

The intake procedure adopted by the UK NCP is fairly simple. To commence the process, a simple amount of rudimentary information is required.<sup>65</sup> The information provided on the UK NCP form is used to initially assess the strength of the claim and the value of going forward with mediation efforts.<sup>66</sup> The UK NPC contemplates a multi stage procedure consisting of an initial assessment,<sup>67</sup> mediation or examination,<sup>68</sup> and drafting and publication of the

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<sup>61</sup> See, eg, Kenneth Anderson, 'The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations' (2001) 2 *Chicago Journal of International Law* 371; but see Gráinne De Búrca, 'Developing Democracy beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 221.

<sup>62</sup> BERR, *UK NCP Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises* (28 April 2008) <<http://www.berr.gov.uk/files/file46072.pdf>> ('UK NCP Procedures').

<sup>63</sup> BERR, *Annual Return*, above n 55, 6. The procedures of the UK NCP for dealing with complaints include a multi stage procedure: *ibid.* Other NCPs follow a similar regime. The Canadian NCP, for example, has resorted to mediation as a first, and often crucial, step in virtually all of the four complaints lodged since 2001. Foreign Affairs and International Trade Canada, *Canada's National Contact Point: Specific Instances* <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx>>. See generally Schuler, above n 49.

<sup>64</sup> BERR, *Annual Return*, above n 55, 7–11.

<sup>65</sup> The BERR website states that it requires information about the applicant's identity, interest in the matter, the relevant company and location of the company's activity, relevant parts of the *MNE Guidelines*, description of the company's noncompliant activity, any supporting evidence, and indications as to what parts of the submission can be revealed to the company: BERR, *The UK's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises: Raising a Complaint* <<http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>>.

<sup>66</sup> *Ibid.*

<sup>67</sup> BERR, *UK NCP Procedures*, above n 62, [3]. These are identified as 'Stage 1' of the process. It is possible for the UK NCP to decline to proceed after this initial review stage. If it considers the information received to warrant further examination, then the process will move to 'Stage 2'.

<sup>68</sup> *Ibid.* [4]. This is referred to as 'Stage 2' of the process. Because the preferred outcome is an agreement among the parties, the next stage starts with facilitated mediation: at [4.1.1]–[4.1.2]. The procedures for mediation are elaborated at [4.2]–[4.4]. If mediation fails, then the proceedings move to an examination stage: at [4.1.3]. 'The objective of the examination is for the NCP to investigate the complaint in order to assess whether the complaint is justified': at [4.5.1]. The procedures are flexible and under the control of the UK NCP examiners, so that

[t]he examination is likely to involve the NCP collecting further information or statements from the complainant or the Company. It may also seek advice from other relevant government departments, UK diplomatic missions or overseas DFID offices, business associations, NGOs or other agencies. If appropriate it will seek informed independent opinion: at [4.5.3].

final statement.<sup>69</sup> The rules do not contemplate the application of the law of either the place where the purported breaches occurred or the law of the place where the undertaking has its headquarters or is chartered. Neither do the rules impose other rules or procedures that mimic judicial or administrative proceedings with legal effect. And, of course, it is precisely because these proceedings are administrative and not binding that this sort of flexibility is possible. As will become apparent, that flexibility permits any NCP to utilise a ‘rules framework’ detached from municipal law. Indeed, these proceedings suggest that the *MNE Guidelines* serve as something like an autonomous transnational system,<sup>70</sup> subject principally to its own substantive rules that incidentally draw on an aggregated and generalised municipal and international law as a basis for the application of its norms.

### III THE CASES

The UK NCP handed down two significant decisions in *Afrimex* and *DAS Air*. The object of my analysis of those decisions is not merely to describe the proceedings and outcome, but to suggest a way of reading the final statements that draws out the important developments of each case.

#### A *RAID v DAS Air* (21 July 2008)

The complaint brought by RAID in 2005<sup>71</sup> was grounded in allegations arising from a purported violation by DAS Air of certain UN embargoes within a conflict zone in the eastern region of the DRC.<sup>72</sup> RAID pointed to a list of specific activities that, it argued, constituted breaches of a number of the general prohibitions of the *MNE Guidelines*.<sup>73</sup> Much of this was fuelled by the worldwide demand for the metallic ore columbite-tantalite, colloquially known

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<sup>69</sup> Ibid [5]. This is ‘Stage 3’ of the process. After review, the final statement is passed to the Minister and lodged with the House of Commons and House of Lords Libraries: at [5.2]. The procedures provide a 10 day period to seek review of either the statement or any earlier determination to decline to examine the complaint: at [5.3].

<sup>70</sup> See, eg, Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (2004) 3; Peer Zumbansen, ‘Transnational Law’ in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006) 738, 738–54.

<sup>71</sup> UK NCP, *DAS Air* (21 July 2008) [1].

<sup>72</sup> Ibid.

<sup>73</sup> RAID pointed to general provisions of the *MNE Guidelines*, above n 11, including: first, s I.7 (supremacy of municipal regulation of multinational corporations within their territories ‘subject to international law’ and an obligation, when multinational enterprises are subject to conflicting requirements by adhering countries, of good faith cooperation among states); second, s II.1 (obligating multinational corporations to ‘contribute to economic, social and environmental progress with a view to achieving sustainable development’); third, s II.2 (obligating multinational enterprises to respect the human rights of those affected by their activities but only as consistent with the host government’s international obligations and commitments); fourth, s II.5 (requiring such entities to ‘refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues’); and fifth, s II.10 (requiring such enterprises to encourage business partners to apply compatible principles of corporate conduct): see UK NCP, *DAS Air* (21 July 2008) [11].

as coltan.<sup>74</sup> The specific activities at the heart of the complaint included: DAS Air's operation of aircraft in aid of the Ugandan invasion of DRC territory; air transport into DRC occupied by the Ugandan military during 2000–01; operating civilian aircraft in a conflict zone; transporting coltan from Kigali, Rwanda; and transporting cobalt from Entebbe, Uganda, that had a reasonable probability of having originated in the DRC during the conflict period.<sup>75</sup>

The case was brought against DAS Air in the UK because, though the activities giving rise to the complaint occurred in the regions around the DRC, the entity itself was registered in the UK.<sup>76</sup> During the course of the complaint resolution process, however, DAS Air and its related entities had become subject to a ban on operations within EU airspace,<sup>77</sup> as a consequence of which (as one reason among others) DAS Air's assets were liquidated in 2007.<sup>78</sup> This had a substantial effect on the proceedings. From the time of its cessation of operations, DAS Air also ceased participating in the proceedings in late October 2006.<sup>79</sup> That, however, served as no impediment to the proceedings, or the determination of a breach by DAS Air;<sup>80</sup> the proceedings continued with the assistance of RAID only, though the remedies available were limited accordingly.<sup>81</sup> Whether that conclusion to the proceedings serves as an impediment to the use of the conclusions in other cases in the UK or by other NCPs in their deliberations is another matter.<sup>82</sup>

RAID's complaint was structured broadly, seeking a declaration of a continuing violation for nearly the entire period of the current conflict in the DRC during which DAS Air operated in the region, commencing in 1998 (the start of the second conflict) and continuing until December 2001 (when the airline stopped flying).<sup>83</sup> However, the *MNE Guidelines*, under which the complaint was made, did not take effect until 2000 and the UK NCP would have been required to apply an earlier version of the *MNE Guidelines* to those flights absent consent from the company; a consent that in this case was not

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<sup>74</sup> The price of the material had increased enormously as its demand for use in capacitors increased with the surge in the demand for small handheld electronics: UK NCP, *DAS Air* (21 July 2008) [12].

<sup>75</sup> *Ibid* [10].

<sup>76</sup> DAS Air was described as 'a long established UK based air freight services business operating routes between Europe and West Africa and between East Africa and the Middle East': *ibid* [7].

<sup>77</sup> The ban on operating as air carrier applied to DAS Air and a number of related entities and went into effect in 2006: *Commission Regulation (EC) No 1543/2006 of 12 October 2006 Amending Regulation (EC) No 474/2006*, [2006] OJ L 283/27. That Regulation states:

There is evidence that the operator DAS Air Cargo (DAZ) certified in Kenya is a subsidiary of Dairo Air Services (DSR) certified in Uganda. The two carriers operate the same aircraft. Therefore, any measure decided with regard to DSR should equally be applicable to DAZ: at [8]

<sup>78</sup> UK NCP, *DAS Air* (21 July 2008) [8].

<sup>79</sup> *Ibid* [25].

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid* [16].

<sup>83</sup> *Ibid* [9].

forthcoming.<sup>84</sup> The solution was relatively straightforward. The emphasis of the UK NCP was on the three flights that occurred after June 2000, when the current version of the *MNE Guidelines* were released. The other 32 flights that constituted the bulk of the evidence of the breaches were used as circumstantial evidence of continued breach.<sup>85</sup> But the *MNE Guidelines* themselves were not applied directly with respect to the pre-2000 flights to avoid retroactive application without consent.<sup>86</sup>

The political context in which the case arose proved to be a critical factor in framing the analysis and determinations of the UK NCP. The company was operating within the DRC, a territory marked by substantial violence and in which the apparatus of government was weak or absent.<sup>87</sup> The violence was sustained and complex enough to warrant substantial intervention by the UN and regional powers, all dedicated to restoring some semblance of public governance and a reduction in violence and associated apparent lawlessness.<sup>88</sup> The particular object of the RAID complaint appeared to be to contextualise the economic behaviour of DAS Air within this conflict zone,<sup>89</sup> and to elaborate a basis for articulating behaviour norms consonant with the political obligations of state and non-state actors in conflict zones in which the UN or regional governments had taken an interest.<sup>90</sup> The *MNE Guidelines* were to be applied within a normative political framework in which international organisations were structuring a matrix of controls to contain and manage away the conflict within the DRC and economic activity was viewed as a source of conflict and a cover for illegitimate economic activity in support of illegitimate political activity.<sup>91</sup> In this case, the *MNE Guidelines* effectively appeared to serve as an interlinked set of norms useful to advance the management goals for that conflict.

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<sup>84</sup> See BERR, *Approach of the NCP to Any New Complaint that Alleges a Breach of the OECD Guidelines Taking Place before June 2000* (2008) 1 <<http://www.berr.gov.uk/files/file47556.pdf>>:

If after 21 August the NCP receive a complaint about the activities of a multinational enterprise that takes place before June 2000, the NCP will consider the complaint in accordance with the revision of the Guidelines in effect at the time in question, unless the parties to the complaint consent to the application of the current revision of the Guidelines.

<sup>85</sup> See UK NCP, *DAS Air* (21 July 2008) [16]:

The NCP did not make a determination on the 32 flights that took place before the current version of the Guidelines came into force but did consider these flights when determining the status of the 3 flights that took place after June 2000. The NCP believes that past behaviour is pertinent to the analysis.

<sup>86</sup> Ibid.

<sup>87</sup> See generally *ibid* [18].

<sup>88</sup> See generally above n 31.

<sup>89</sup> RAID and other civil society actors had been involved in a number of actions targeting economic activity in the conflict zone region of the DRC: RAID, *Our Work: RAID's Current Work, Promoting Fair Investment in the DR Congo's Mining Sector* (2007) <<http://raid-uk.org/work.htm>>.

<sup>90</sup> In this context, the focus of the UN Security Council on 'links between the exploitation of the natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict' would prove significant: UK NCP, *DAS Air* (21 July 2008) [17].

<sup>91</sup> *Ibid* [18]–[19]. Indeed, DAS Air had already been identified as active in that respect.

In this environment, it was logical that the UK NCP rely heavily in support of its conclusions on factual determinations that appeared to have been generated through the investigative work of an international and a national commission. The first was the work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo ('UN DRC Panel').<sup>92</sup> The second was the work of the Ugandan Judicial Commission under Justice Porter, commonly known as the Porter Commission.<sup>93</sup> RAID had relied on three key elements of these reports. The first was a political conclusion of the UN DRC Panel with respect to the character of the conflict in the DRC and its relationship to natural resource exploitation.<sup>94</sup> The second was the UN DRC Panel's recounting of a belief in DAS Air's participation.<sup>95</sup> The last was the Porter Commission's conclusion that Ugandan military bases were being used to hide civilian incursions into the conflict zone.<sup>96</sup>

The later assertions were drawn from supporting records included in the Porter Commission Report.<sup>97</sup> The UK NCP rejected DAS Air's initial response that the data used by the Porter Commission was fabricated for its failure to provide any proof beyond its statement to that effect.<sup>98</sup> The crucial foundation to the UK NCP findings was proof that DAS Air flights occurred. Breach could be inferred from the fact of the flights in the following way. First, international law required that governments close the air space between Uganda and the DRC during the relevant period.<sup>99</sup> Second, the Ugandan Government in its Porter Commission Report concluded that it was likely that civilian flights between DRC and Uganda did occur during the conflict and in contravention of relevant international conventions.<sup>100</sup> Third, relying on the data supplied in the Porter Commission Report, the UK NCP determined that the DAS Air flights during the relevant period were civilian in nature.<sup>101</sup>

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<sup>92</sup> Ibid [17]–[20]. Its purpose was to collect information on illegal exploitation of resources in the DRC and the possible implications for DRC sovereignty as well as to evaluate the veracity of allegations that such activity prolonged the conflict there: UN DRC Panel, *Final Report*, UN Doc S/2003/1027 (23 October 2003) 4.

<sup>93</sup> UK NCP, *DAS Air* (21 July 2008) [21]–[24]: The purpose of the Porter Commission was 'to look into allegations made in the UN Report, specifically about Uganda'.

<sup>94</sup> Ibid [18].

<sup>95</sup> Ibid [19].

<sup>96</sup> Ibid [23].

<sup>97</sup> Ibid [27].

<sup>98</sup> Ibid [29].

<sup>99</sup> The UK NCP pointed to the Preamble of the *Chicago Convention* (above n 27). According to the UK NCP, this prohibition was recognised by the Ugandan Government at the time: UK NCP, *DAS Air* (21 July 2008) [31]. Air space was reopened upon the signing in 2004 of a Memorandum of Understanding between the two states: at [30].

<sup>100</sup> UK NCP, *DAS Air* (21 July 2008) [32], [35].

<sup>101</sup> Ibid [35]: the UK NCP also said:

Having reviewed the Porter Commission report the NCP accepts its conclusions and considers that the flights undertaken by DAS Air between Entebbe and DRC were likely to have been civil flights defined as military to circumvent International Aviation Conventions.

The records of flight activity before mid-2000 were crucial to this conclusion, as well as to the determination that the flights contributed to human rights abuses: at [36]–[40].

The UK NCP also considered the internal operations of DAS Air within the DRC in connection with its transport activities.<sup>102</sup> The UK NCP first accepted the conclusion by the UN DRC Panel that the DRC conflict was fuelled by the desire to exploit natural resources in the area and the private sector's responsibility in those activities.<sup>103</sup> It presumed an obligation on the part of private entities to exercise heightened care in such situations so as to avoid complicity in lawless or illegal activity.<sup>104</sup> It then considered the extent of the influence that DAS Air could have had in its contracts with third parties to transport coltan from Kigali to Europe.<sup>105</sup> The Commentary to the *MNE Guidelines* suggested a contextual analysis for the determination of obligation.<sup>106</sup> The UK NCP found that DAS Air did not undertake due diligence on the supply chain because it failed to question the source of the materials that it transported.<sup>107</sup>

On this basis, the UK NCP concluded that DAS Air had failed to meet the requirements of the *MNE Guidelines*.<sup>108</sup> The UK NCP affirmed an expectation that all UK multinational enterprises ('MNEs') abide by international conventions,<sup>109</sup> including the *Chicago Convention*.<sup>110</sup> In addition, the labelling of flights by UK MNEs as military when they were in fact civilian was also prohibited.<sup>111</sup> Perhaps most noteworthy is the UK NCP's adoption of UN Security Council *Resolution 1592*<sup>112</sup> as a 'business requirement' that companies operating in the area must observe despite the fact that the Resolution is intended for nations, not corporations.<sup>113</sup>

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<sup>102</sup> Ibid [41]–[46]. The relevant details from the *DAS Air* decision are as follows:

RAID alleges that this coltan and cobalt was sourced from the conflict zone in Eastern DRC. DAS Air stated they were merely contracted by the freight forwarders to transport the minerals; that all merchandise transported by DAS Air is customs-cleared before it is transported and DAS Air had not at any time been aware that any coltan transported by it originated from DRC: at [41].

<sup>103</sup> Ibid [42]. See also *ibid* [17]–[20].

<sup>104</sup> Ibid [43].

<sup>105</sup> Ibid [44].

<sup>106</sup> According to the 'Commentary on the OECD Guidelines for Multinational Enterprises' in *MNE Guidelines*, above n 11, 39, 41:

The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise ...

<sup>107</sup> UK NCP, *DAS Air* (21 July 2008) [44].

<sup>108</sup> Ibid 1.

<sup>109</sup> Ibid [51].

<sup>110</sup> Governments have agreed on the principles and arrangements of the *Chicago Convention* 'in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically': *Chicago Convention*, above n 27, preamble.

<sup>111</sup> UK NCP, *DAS Air* (21 July 2008) [52].

<sup>112</sup> SC Res 1592, UN SCOR, 5155<sup>th</sup> mtg, UN Doc S/RES/1592 (30 March 2005) ('*Resolution 1592*').

<sup>113</sup> UK NCP, *DAS Air* (21 July 2008) [53].

B *Global Witness v Afrimex (28 August 2008)*

Like the complaint in *DAS Air*, the complaint against Afrimex, brought by Global Witness in February 2007,<sup>114</sup> was precipitated by the global markets for coltan, turbulence in the DRC and coordinated efforts to target actors that might have contributed to the continuation of the violence.<sup>115</sup> Global Witness alleged that Afrimex paid taxes to rebel forces in the DRC and that it failed to practice due diligence regarding its supply chain because it sourced minerals from mines that used child labour.<sup>116</sup> These activities were said to constitute breaches of a number of the provisions of the *MNE Guidelines*.<sup>117</sup> Afrimex vigorously contested the allegations and the resultant legal conclusions.<sup>118</sup>

As in the *DAS Air* proceedings, the complaint sought to include activities that occurred before June 2000, when the current version of the *MNE Guidelines* came into force. Global Witness looked to activities that took place between 1998 (the start of the second conflict in the DRC) and February 2007 (when the

<sup>114</sup> UK NCP, *Afrimex* (28 August 2008) [6]. The UK NCP noted that the parties met three times for mediation: at [28].

<sup>115</sup> See *ibid* [8]–[12]. The UK NCP went to some lengths to contextualise its analysis within international efforts to manage the violence in the DRC. The UK NCP oriented its approach toward two key findings of the UN DRC Panel. The first was that the DRC conflict was ‘mainly about access, control and trade of five key mineral resources’: at [9]. The second focused on ‘the role of the private sector in the exploitation of natural resources and the continuation of the war’: at [9]. In some cases, private companies sustained the war directly by trading arms for natural resources. Others facilitated access to financial resources that were used to purchase weapons. Some mineral-trading companies had prepared the field for illegal mining activities in the DRC. The UN’s continuing concern about these activities was the catalyst for managing the crisis by controlling the factors of production of violence: arms, wealth and trade: at [12]. This broader context figured prominently in the UK NCP’s recommendations: at [71]–[74].

<sup>116</sup> *Ibid* [6].

<sup>117</sup> *Ibid* [13]. ‘Global Witness alleges that Afrimex (UK) Ltd did not comply with Chapter II (General Policies), Chapter IV (Employment and Industrial Relations) and Chapter VI (Combating Bribery) of the Guidelines’: at [13]. Specifically, Global Witness alleged violations of the obligations on multinational corporations to:

- properly consider established policies in the countries in which they operate; consider views of other stakeholders on the company’s contribution to economic, social and environmental progress and sustainable development (*MNE Guidelines*, above n 11, s II.1);
- respect the human rights of those affected by the company’s activities, consistent with the international obligations of the host state (s II.2);
- encourage business partners and subcontractors to apply practices compatible with the *MNE Guidelines* (s II.10); and
- abstain from improper involvement in local politics (s II.11).

In addition, Global Witness asserted claims grounded in violations of s IV (Employment and Industrial Relations), alleging

- a failure to contribute to the ‘effective abolition of child labour’ (s IV.1b);
- a failure to ‘contribute to the elimination of coerced or compulsory labour’ (s IV.1c); and
- a failure to take steps to ensure occupational health and safety (s IV.4.b).

Lastly, and least successfully, Global Witness alleged bribery and, specifically, that Afrimex failed to ensure that the remuneration of agents was appropriate and for legitimate services only (s VI.2) and made illegal contributions to candidates and political organisations (s VI.6).

<sup>118</sup> UK NCP, *Afrimex* (28 August 2008) [14]–[16]. The parties attempted mediation on three occasions, the substance of which remains confidential, but were unable to agree to a mediated settlement: at [28].

complaint was filed).<sup>119</sup> The UK NCP considered that activity indirectly. It limited its findings to those activities that took place after adoption of the current version of the *MNE Guidelines*, but again considered pre-2000 activity as circumstantial evidence relevant to post-2000 conduct to the extent that it determined appropriate.<sup>120</sup>

The complaint was brought against Afrimex, a UK-registered company founded in 1984.<sup>121</sup> The determination was based on the confluence of two streams of analysis. The first related to the situation in the relevant territory — the conflict zone of the DRC.<sup>122</sup> The second focused on the relationship among a group of entities that together were responsible for the actions at issue, for the purpose of assigning responsibility to any one or more of them.<sup>123</sup> The conclusions and data produced from the field work of UN officials proved crucial in making fact determinations and in supporting the UK NCP's conclusions about the state of affairs in the region at the time.<sup>124</sup> That data was particularly important in the determination of the character and effect of the relationship between Afrimex and other companies: namely, Société Kotecha and SOCOMI.<sup>125</sup>

As in *DAS Air*, the work of the UN DRC Panel played a critical role.<sup>126</sup> Its report was the source of the presumptions that the conflict in the DRC was significantly motivated by the desire to control exploitation rights over the region's mineral natural resources, which was (in the UN DRC Panel's view) 'the engine of the conflict'.<sup>127</sup> Illegal mining activity in the DRC included the direct trade of arms for natural resources by international corporations operating in the DRC.<sup>128</sup> In a crucial part of the UN DRC Panel's *First Report*, Afrimex was one of the companies named.<sup>129</sup> Afrimex was subsequently listed in Annex III of the UN DRC Panel's *October 2002 Report* as having violated the *MNE Guidelines*.<sup>130</sup> After dialogue with Afrimex, the UN classified Afrimex in Category 1, a 'resolved' case that required no further action.<sup>131</sup> The discussions

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<sup>119</sup> Ibid [7].

<sup>120</sup> Ibid. The UK NCP stated that 'past behaviour is pertinent when considering behaviour that occurred after June 2000': at [7].

<sup>121</sup> Ibid [21].

<sup>122</sup> See ibid [8]–[12].

<sup>123</sup> See ibid [17]–[26].

<sup>124</sup> Ibid [20].

<sup>125</sup> Ibid.

<sup>126</sup> Ibid [9].

<sup>127</sup> UN DRC Panel, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2001/357 (12 April 2001) [215] ('*First Report*').

<sup>128</sup> UK NCP, *Afrimex* (28 August 2008) [9].

<sup>129</sup> UN DRC Panel, *Final Report*, above n 92, Annex I, 1.

<sup>130</sup> UN DRC Panel, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2002/1146 (16 October 2002) Annex (*Business Enterprises considered by the Panel to be in Violation of the OECD Guidelines for Multinational Enterprises*) 7 ('*October 2002 Report*').

<sup>131</sup> UN DRC Panel, *Final Report*, above n 92, Annex I, 1.

that took place between Afrimex and the UN following this report are summarised in the letter that Ketan Kotecha sent to the UN.<sup>132</sup>

In addition, the UK NCP took note of other UN activity related to the conflict in DRC to support the presumption of an ‘explicit link between minerals and funding of rebel groups’.<sup>133</sup> They also noted the resolutions of the UN Security Council that also addressed the conflict situation in the DRC.<sup>134</sup>

After satisfying itself of the nature of the context against which Afrimex’s activity was to be judged, the UK NCP reached the central issue of the case: Afrimex’s connection to both the DRC and the suspect activity.<sup>135</sup> Afrimex vigorously contested the existence of that connection.<sup>136</sup> For that purpose, it would be necessary to connect Afrimex to: Société Kotecha and SOCOMI.<sup>137</sup> Although Afrimex was able to present enough evidence to convince the UK NCP that there was clear separation between the businesses,<sup>138</sup> the overlap between the directors of each respective corporation was enough to convince the UK NCP that Afrimex ‘was in a position to significantly influence Société Kotecha and SOCOMI’.<sup>139</sup> It would thus treat the three companies as ‘linked’.<sup>140</sup> This is an ambiguous result not grounded in law or legal terminology. It neither suggested that the companies were substantially each other’s alter ego nor that one necessarily dominated the other, but that they might tend in that direction sufficiently (and consequently be legally liable for each other’s acts under Anglo-American municipal law), at least for the analysis that followed.

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<sup>132</sup> UK NCP, *Afrimex* (28 August 2008) [10]. See Evidence to International Development: Sixth Report, House of Commons, UK, 17 October 2006, Written Evidence vol II (HC 923-II), annex (Letter from Mr Ketan Kotecha, Afrimex (UK) Limited to Mr Melvin Holt, United Nations Expert Panel, 22 May 2003) <<http://www.publications.Parliament.uk/pa/cm200506/cmselect/cmintdev/923/923we11.htm>>. The resolution was based on information provided by the company and at variance with the materials submitted to the UK NCP in the instant proceedings. As a consequence, the credibility of the *Afrimex* submissions suffered: ‘Afrimex has told the NCP that this letter “was perhaps misjudged” but the NCP considers it to indicate that Afrimex has either misdirected the UN or the NCP in regards to the relationship between these companies’: UK NCP, *Afrimex* (28 August 2008) [20]. Indeed, one of the significant problems for the UK NCP was the poor credibility of the evidence presented by Afrimex: UK NCP, *Afrimex* (28 August 2008) [44].

<sup>133</sup> UK NCP, *Afrimex* (28 August 2008) [11].

<sup>134</sup> *Ibid* [12]. Among these were the 2003 arms embargo on all foreign and Congolese militias operating in the territory of North and South Kivu and Ituri. These measures were extended in 2008.

<sup>135</sup> *Ibid* [13]; [29]–[57].

<sup>136</sup> *Ibid* [16]. Afrimex described itself as being several steps removed from the mine in question and denied that they had ever bought minerals directly from the mine.

<sup>137</sup> *Ibid* [17]–[21].

<sup>138</sup> *Ibid* [21]–[24].

<sup>139</sup> *Ibid* [27]. For that purpose, the UK NCP applied something akin to a veil-piercing or enterprise analysis. It spoke the traditional language of common law equity in a corporate law determination but without deference to a standard for determination within the municipal law of the UK (or any of its parts), the DRC or Uganda. Thus, in considering whether these companies were associated, the UK NCP considered a variety of factors: first, interlocking directors; second, common shareholders; third, familial relationship among shareholders and directors (father–son relationship); fourth, the economic relationship between Afrimex and Société Kotecha (principal customer); and fifth, merger of operational activities, that is, providing services relating to the checking and coordinating of mineral deliveries. These factors did not lead to a clear finding of definite association: at [26].

<sup>140</sup> *Ibid* [27].

Having determined the ‘link’, the UK NCP then applied the *MNE Guidelines* requirements to the amalgamated entity (whatever the legal nature of their formal or effective connection) in the factual context of the conflict situation in that part of the DRC in which the complained events occurred.<sup>141</sup> The UK NCP was of the belief that Afrimex was in a strong position to influence SOCOMI with respect to the issue of the character of the taxes and licensing fees paid to Rassemblement Congolais pour la Democratie (‘RCD-Goma’), a rebel group that operated within the DRC conflict zone.<sup>142</sup> The UK NCP then concluded that Afrimex failed to apply due pressure to SOCOMI to stop these practices.<sup>143</sup>

Because SOCOMI was not the only supplier to Afrimex, the UK NCP also considered the issue of the violation of the supply chain conduct rules of the *MNE Guidelines*.<sup>144</sup> The UK NCP also found that Afrimex failed to conduct a due diligence inquiry with regard to the supply chain relationship between these entities.<sup>145</sup> The UK NCP looked to the work of the Special Representative Ruggie,<sup>146</sup> for a transnational definition of the term due diligence for application in the context of the *MNE Guidelines*.<sup>147</sup> Because Afrimex had such influence over its suppliers that it could have required greater compliance with the *MNE Guidelines*, the UK NCP considered that Afrimex failed to perform the due diligence required when dealing with its suppliers in a conflict zone such as the DRC.<sup>148</sup> Indeed, the dangers inherent in doing business in the conflict zone itself evidenced the need for greater scrutiny.<sup>149</sup> But Afrimex chose to apply a

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<sup>141</sup> Ibid [29]–[57].

<sup>142</sup> Ibid [38]. The information provided by

IPIS [International Peace Information Service] implies that Afrimex was SOCOMI’s only export customer during the period of the statistics collected in 2000/01. If this is the case, Afrimex was the reason that SOCOMI traded in minerals and therefore Afrimex is responsible for SOCOMI paying the license fees and taxation to RCD-Goma: at [38].

<sup>143</sup> Ibid [39]. The UK NCP considered that SOCOMI, an associated company, had an obligation to cease trading minerals for the period that the RCD-Goma was involved in conflict: at [39].

<sup>144</sup> Ibid [40].

<sup>145</sup> Ibid [40]–[57].

<sup>146</sup> Business and Human Rights Resource Center, *UN Special Representative on Business and Human Rights* (2009) <<http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>>.

<sup>147</sup> The scope of the due diligence requirement for human rights ‘is determined by the context in which a company is operating, its activities, and the relationships associated with those activities’: Ruggie, *Protect, Respect and Remedy*, above n 33, [25]. This standard was emphasised in the conclusions of the UK NCP: UK NCP, *Afrimex* (28 August 2008) [77].

<sup>148</sup> UK NCP, *Afrimex* (28 August 2008) [50]–[51].

<sup>149</sup> Ibid [56]. As the UK NCP noted:

Mr Kotecha confirmed to the IDC [International Development Committee] that he had never visited a mine to determine whether forced labour occurred and that his business practices were based on the assurances provided by his suppliers. The NCP recognises that Eastern DRC is a dangerous place, FCO travel advice is not to travel to eastern and north eastern DRC, with the exception of Goma and Bukavu, where advice is against all but essential travel. This is due to continued insecurity and lawlessness in these areas. Instability and fighting between Congolese army and insurgents in North Kivu province have led to a very high number of civilians being displaced. The NCP fully understands why Mr Kotecha would be unwilling to visit the mines to establish the conditions but that in itself illustrates the requirement for increased due diligence.

monitoring standard that, while perhaps acceptable outside of conflict zones, was insufficient in areas where government authority is weak,<sup>150</sup> particularly because the supply chain created opportunities for extracting rents.<sup>151</sup> Furthermore, the UK NCP found that Afrimex failed to encourage its business partners to apply principles of corporate conduct compatible with the *MNE Guidelines*.<sup>152</sup> The UK NCP, however, rejected the assertion that Afrimex engaged in conduct that amounted to bribery.<sup>153</sup>

On the basis of this analysis, the UK NCP concluded that Afrimex was well aware of the situation in the DRC and especially in the conflict zone.<sup>154</sup> It determined that Afrimex was active in the conflict zone during relevant periods, and though it paid no taxes, its associated enterprises did, constituting a breach of the *MNE Guidelines*.<sup>155</sup> Afrimex also breached its *MNE Guidelines* obligations by failing to encourage its business partners to embrace the conduct norms of the *MNE Guidelines*.<sup>156</sup> The UK NCP also determined that Afrimex failed to appropriately discipline its supplier chain, stating that it ‘expects UK business to respect human rights and to take steps to ensure it does not contribute to human rights abuses’.<sup>157</sup>

The UN NCP offered a slew of recommendations.<sup>158</sup> These included several requiring Afrimex to directly apply a number of international norms and standards.<sup>159</sup> Afrimex offered to formulate a corporate responsibility document under which it would operate in the future.<sup>160</sup> The UK NCP noted the relevance of the *OECD Risk Awareness Tool for Multinational Enterprises in Weak*

<sup>150</sup> Ibid [57]. As the UK NCP noted:

The reliance on oral assurances from the suppliers and the subsequent written statements amount to insufficient due diligence for a company sourcing minerals in the conflict zone in Eastern DRC. The NCP is concerned that these assurances lack substance and are not underpinned by any checks.

See also at [47]–[49], [54]–[55].

<sup>151</sup> Ibid [50].

<sup>152</sup> Ibid [61].

<sup>153</sup> Ibid [52]. The NCP accepted that Afrimex did not pay taxes in DRC, and therefore abandoned that element of the complaint: at [60].

<sup>154</sup> Ibid [58]. Afrimex had been doing business in the DRC since the time of the Mobutu regime in the 1980s. And, in any case, it had been the object of investigative activity of the United Nations and a British television report: see [58].

<sup>155</sup> Ibid [59]. The actions violated provisions requiring MNEs to respect human rights consistent with the host government’s legal obligations (*MNE Guidelines*, above n 11, s II.1), and to contribute to progress with a view to sustainable development (s II.2).

<sup>156</sup> UK NCP, *Afrimex* (28 August 2008) [61]. The NCP concluded this constituted a breach of *MNE Guidelines*, above n 11, ss II.1, II.2, II.10.

<sup>157</sup> UK NCP, *Afrimex* (28 August 2008) [62].

Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfil the requirements of the Guidelines.

These actions and omissions constituted breaches of several sections of the *MNE Guidelines*, above n 11, s IV.1.b (‘Contribute to the effective abolition of child labour’), s IV.1.c (‘Contribute to the elimination of all forms of forced or compulsory labour’), s IV.4.b (‘Take adequate steps to ensure occupational health and safety in their operations’).

<sup>158</sup> See UK NCP, *Afrimex* (28 August 2008) [63]–[77].

<sup>159</sup> See *ibid* [64]–[67], [72]–[74].

<sup>160</sup> *Ibid* [63]–[67].

*Governance Zones* ('*OECD Risk Awareness Tool*'),<sup>161</sup> which was developed as part of the OECD Investment Committee's implementation of the *MNE Guidelines*.<sup>162</sup>

The *Afrimex* decision of the UK NCP stresses the growing importance of the *MNE Guidelines* in influencing corporate behaviour across territorial borders. In particular, corporations may be held responsible for the actions of third parties in their supply chains if they fail to apply a due diligence check on these supply chain. Most importantly, it suggests the importance of soft law principles as a substitute for hard law in weak government areas, and the power of transnational legal standards to supplement and supplant national standards.<sup>163</sup>

#### IV THE ANALYTICAL CONTEXT

The cases present an interesting advance in both the jurisdiction and jurisprudence of the *MNE Guidelines*. Together they illustrate the way in which advances in governance issues are being crafted, step-by-step, from a system that, while formally non-binding, is increasingly developing the characteristics of a binding governance system.<sup>164</sup> They suggest that the political economy of governance no longer necessarily depends on the state and 'law' but now functions in a regulatory context in which municipal and international law converge within hybrid systems of regulation that are not formally law but

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<sup>161</sup> OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006) <[www.oecd.org/dataoecd/26/21/36885821.pdf](http://www.oecd.org/dataoecd/26/21/36885821.pdf)>. See also below nn 285–288.

<sup>162</sup> UK NCP, *Afrimex* (28 August 2008) [67]:

The Risk Awareness tool consists of a list of questions that companies should ask themselves when considering actual or prospective investments in weak governance zones. These questions cover obeying the law and observing international relations; heightened managerial care; political activities; knowing clients and business partners; speaking out about wrongdoing; and business roles in weak governance societies — a broadened view of self interest.

See also UK NCP, *Afrimex* (28 August 2008) [67]–[70]. The *OECD Risk Awareness Tool* defines the relevant standard by recognising

that creating the conditions for progress in zones where authorities are unable or unwilling to assume their responsibilities is an important international policy objective and that governments, international organisations and multinational enterprises can each draw on their distinct competences to contribute to the efforts of strengthening governance in such zones: *OECD Risk Awareness Tool*, above n 161, 5.

<sup>163</sup> See UK NCP, *Afrimex* (28 August 2008) [75]–[76]. As the UK NCP declared:

The UK Government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuse, such as that which prevails in Eastern DRC. The NCP urges UK companies to use their influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain.

<sup>164</sup> Venzke, above n 18, 1419–20 notes that

[b]ureaucracies interpret statutory provisions to their advantage. This is in particular the case where more specific procedural norms are lacking and it is a common characteristic of constituent documents of international organizations or mandating resolutions.

provide a functionally similar normative framework.<sup>165</sup> But the governance framework is neither municipal nor international; it draws on soft law produced through the organs of the UN,<sup>166</sup> the work of the International Court of Justice,<sup>167</sup> and the findings of other NCPs,<sup>168</sup> as permitted under the *MNE Guidelines*. Instead, the *MNE Guidelines* are beginning to serve as the focal point for the construction of an autonomous transnational governance system that is meant to serve as the touchstone for corporate behaviour in multinational economic relationships.<sup>169</sup>

Indeed, that transnational system is acquiring its own unique qualities that distinguish it from both the municipal and international law systems from which it draws. There are a number of common, if conventional, points worth stressing that relate to that development. First, the cases evidence the way in which international law rules are coming to have a direct effect on multinational transactions. Second, they suggest the way in which governance systems imply an obligation on the part of enterprises to undertake sovereign responsibilities under certain circumstances. Third, the cases point to the process rules being developed for the processing of complaints against multinational corporations. And lastly, the cases suggest the, sometimes significant, variance there may be developing between the application of *MNE Guidelines* and the corporate law of the municipalities within which the activities at issue may have occurred.

Ultimately, under the guise of ‘soft’ law, the OECD may be able to construct a system of customary law and practice as binding as any hard law system.<sup>170</sup> What makes this soft law ‘hard’ *in effect* is precisely its naturalisation of behavioural norms *within* entities that incorporate those practices in corporate

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<sup>165</sup> David Westbrook writes that

[t]his essay, then, has come full circle. The effort to make government through markets true — to discipline markets by an external standard that comports with our own sense of truth, thereby relieving the sense of alienation — has led us back toward whatever truth may be possible through market participation.

David Westbrook, *City of Gold: An Apology for Global Capitalism in a Time of Discontent* (2004) 248. Westbrook suggests, at 249, with telling relevance to the *MNE Guidelines* regulatory project, that

[p]olitical economy thus becomes constitutional, not only in trying to shape society through markets, but in deciding what sort of market participation will be made available, that is, what a good government through markets might be, a government that one might ... hope would be so popular, even loved, that its inhabitants would not be alienated.

<sup>166</sup> See UK NCP, *DAS Air* (21 July 2008) [41], [54].

<sup>167</sup> *Ibid* [36].

<sup>168</sup> See UK NCP, *Afrimex* (28 August 2008) [37].

<sup>169</sup> In this respect it represents another, and potentially important, method, for solidifying transnational governance in the face of the traditional failure of either international or local law to meet the challenge. See, Larry Catá Backer, ‘From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations’ (2008) 39 *Georgetown Journal of International Law* 591. For a discussion of the significance of private-group-network norm-making, see Robert Ahdieh ‘The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts’ (2005) 6 *Chicago Journal of International Law* 231.

<sup>170</sup> This is a conclusion that continues to be vigorously resisted by those who take the view that hard law ought to be directly formulated and applied without any soft law intermediation, an intermediation usually viewed with substantial suspicion. See, eg, Weissbrodt, above n 2, 384–90.

culture, rather than its imposition from *outside* the community of actors by the formal fiat of positive legal command. These behavioural norms become binding because they are embraced and internalised, or hard-wired into the practices and routines of the corporate environment, rather than imposed externally. What remains to be realised is a rationalisation and elaboration of the system.<sup>171</sup> That the methodology will be grounded in contract speaks to origins in private rather than public law; it does not speak to the binding effect on the regulated community.<sup>172</sup>

There is much irony here. Through ‘voluntary’ guidelines, the OECD framework may be able to accomplish what was so fiercely resisted in the form of the more formally binding and institutionalised model of the *UN Norms*.<sup>173</sup> But critical to this effort is the quasi-judicial work of the NCPs that are meant to serve as, approximately, the nascent common law courts of this rising transnational system of customary law.<sup>174</sup> It is in this respect that the objectives of the *UN Norms* might well be realised in a more binding manner than under the more formally binding but disruptive framework of the *UN Norms*. And thus a greater irony, especially for those traditionalists wed to notions of necessary confluences between positive law and legitimacy.

Of course, there are some who might be tempted to argue that, if the development of a stronger enforcement mechanism through the *MNE Guidelines* is really proceeding as described here, then instead of leading to the formation of custom (or a sort of common law), it would inevitably point toward the hard law (by treaty, convention or otherwise). This is certainly an intoxicating argument, especially to those wed to the notion of ‘hard law is best’.<sup>175</sup> It is grounded in the old notions of hierarchy of regulation in which positive law produced by some legitimate political body (usually but not necessarily states) articulates and enforces a certain set of norms in accordance with whatever legitimating procedures are used for that purpose (usually involving a legislature vested with

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<sup>171</sup> For a discussion from the related area of *lex mercatoria*, see Klaus Berger, *The Creeping Codification of Lex Mercatoria* (1998); Graft Peter Callies, ‘Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law’ (2002) 23 *Zeitschrift für Rechtssoziologie* 185.

<sup>172</sup> See generally Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (2005) 30–1.

<sup>173</sup> For a recounting of those goals, see *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003). These are analysed in Backer, ‘Multinational Corporations, Transnational Law’, above n 2, 374–88.

<sup>174</sup> On the general relationship of law to the state apparatus through which it might be effected, see Larry Catá Backer, ‘Symposium: Reifying Law: Understanding Law beyond the State’ (2008) 26 *Penn State International Law Review* 521. The relationship to the early English common law is unmistakable as ‘a body of general rules ... enforced by the ordinary royal courts, and characterized by the development of its own principles in actual legal controversies, by the procedure of trial by jury, and the doctrine of the supremacy of law’: Arthur Hogue, *Origins of the Common Law* (1966) 190.

<sup>175</sup> In the international law context this privileged conventional law because of hard law’s perceived binding effect. See, eg, Sandeep Gopalan, ‘The Creation of International Commercial Law: Sovereignty Felled?’ (2004) 5 *San Diego International Law Journal* 267, 306.

such power as democratic representative of some polity).<sup>176</sup> These were notions shared by those close to the drafting and defence of the *UN Norms* formula for governance.<sup>177</sup> But those days are over — at least for the moment,<sup>178</sup> and certainly in the context of transnational economic regulation,<sup>179</sup> ‘[p]rivate law now lives a life of its own outside the nation-state. It is invoked, as we have observed, to justify momentous legal changes and to precipitate institutional developments’.<sup>180</sup>

Thus, positive law no longer retains a monopoly as the only legitimate form of governance. It is in this sense that NCP efforts speak to the ‘death’ (of sorts) of the ‘state’ and the ‘rise’ (through consent-contract) of a transnational political system neither *centred* on the state nor on positive law.<sup>181</sup> The governance framework of the *MNE Guidelines* reminds us quite forcefully that this is a world that increasingly embraces governmentality beyond government.<sup>182</sup> This section provides a brief unpacking of these necessarily preliminary, but potentially complex, interactions between the MNE governance framework and the legal systems against which they operate. It suggests the tensions and possibilities that might arise when and while bureaucracy cedes control to a different regime that is based instead on ‘a contrasting trajectory and logic of regulative ordering in

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<sup>176</sup> See, eg, Pierrick Le Goff, ‘Global Law: A Legal Phenomenon Emerging from the Process of Globalization’ (2007) 14 *Indiana Journal of Global Legal Studies* 119, 121–30. Therefore, adherents of positive law solutions to transnational governance speak to soft law’s deficiencies as grounded in ‘legitimacy, transparency, determinacy, and coherence’: Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521, 1524.

<sup>177</sup> See David Weissbrodt and Muria Kruger, ‘Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (2003) 97 *American Journal of International Law* 901, 901, in which the authors suggest that:

Throughout the past half century, states and international organizations have continued to expand the codification of international human rights law protecting the rights of individuals against governmental violations. ...With power should come responsibility, and international human rights law needs to focus adequately on these extremely potent international nonstate actors.

<sup>178</sup> See, eg, Teubner, above n 70.

<sup>179</sup> See, eg, Paul Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 511–29; Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

<sup>180</sup> Daniela Caruso, ‘Private Law and State-Making in the Age of Globalization’ (2006) 39 *New York University Journal of International Law and Politics* 1, 60.

<sup>181</sup> For examination of the relationship with traditional theories of public law, especially the theories of Hans Kelson, see, eg, François Ewald, ‘The Law of Law’ in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (1987) 36, 39–41; Niklas Luhmann, ‘Law as a Social System’ (1989) 83 *Northwestern University Law Review* 136.

<sup>182</sup> See, eg, Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (1991) 87; Wendy Larner and William Walters, ‘Introduction: Global Governmentality’ in Wendy Larner and William Walters (eds), *Global Governmentality: Governing International Spaces* (2004) 1; Michael Reed, ‘From the “Cage” to the “Gaze”? The Dynamics of Organizational Control in Late Modernity’ in Glenn Morgan and Lars Engwall (eds), *Regulation and Organizations: International Perspectives* (1999) 17.

which [the key features are] intensive, but remote and dispersed, scanning of organisational behaviour and its “normalizing” effects’.<sup>183</sup>

Of course, none of this is to suggest that the particular provisions of the *MNE Guidelines* considered and applied by the UK NCP in these two cases were particularly sound or well advised. The thrust of this analysis is institutional. A discussion of the legitimacy and effectiveness of particular *MNE Guidelines*, while useful and interesting, is beyond the scope of this case note. The issues considered in this case note centre on the consequences of efforts to interpret and apply the *MNE Guidelines* within the emerging institutional NCP system rather than on the soundness of such provisions as soft, hard, rational or ludicrous governance.

#### A *The Construction of an Interlinked System of International and Municipal Hard and Soft Law*

The two cases highlight four central issues of any supranational enterprise regulatory scheme: first, the conceptual difficulties of direct imposition of international law on non-state actors; second, the imposition of soft as well as hard law norms in equal measure; third, the deputisation of civil society actors as a critical element in the enforcement of soft law principles; and fourth, the quasi-judicial role of the NCPs, unsupported by traditional rule of law limits.<sup>184</sup> In each of these issues, the cases suggest the ways in which, while loudly proclaiming the ineffectiveness of *MNE Guidelines* proceedings *in law*, each has been made more effective *in fact*.<sup>185</sup> The cases also suggest some support for the critique of the effectiveness of hard law regimes in regulating this sector of human activity.<sup>186</sup>

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<sup>183</sup> Reed, above n 182, 43.

<sup>184</sup> See Matthias Goldmann, ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’ (2008) 9 *German Law Journal* 1865, in which he states that:

The proceedings before National Contact Points established under the OECD Guidelines for Multinational Enterprises are a fine example of such quasi-judicial settlements. The sanction consists in the issuance and publication of a statement by a National Contact Point. For enterprises with a reputation to lose this outlook might amount to a substantial threat. Again, who may trigger the procedure becomes a matter of great significance: at 1889.

He also notes that:

These statements are not subject to hard enforcement and therefore cannot be considered binding law. Nevertheless, they are rendered within an elaborate non-binding legal framework and use legal discourse to resolve a dispute. One could have doubts about the international character of these statements because they are rendered by national administrations. However, in doing so, the National Contact Points act purely on the basis of binding and non-binding international law: at 1892.

<sup>185</sup> This is not an isolated pattern by any means: see Erika de Wet, ‘Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work’ (2008) 9 *German Law Journal* 1429.

<sup>186</sup> In the related operational endeavours centred on the *UN Global Compact*, Ruggie articulated the following critique of the critique of soft law:

First, legal compliance is inherently problematic at the global level due to the absence of centralized enforcement mechanisms. ... Second, no less of an authority than Amartya Sen warns against viewing human rights primarily as what he calls ‘proto legal commands’ or ‘laws in waiting’. ... Third, individual legal liability

While the *MNE Guidelines* describe a soft relationship between international law norms, the entities subject to the *MNE Guidelines* and the state,<sup>187</sup> the UK NCP in each of the cases presumed that DAS Air and Afrimex had direct obligations under international law, the breach of which ran contrary to their obligations under the *MNE Guidelines*.<sup>188</sup> Of course, this presumption would be untenable under traditional notions of international law,<sup>189</sup> and is problematic even under the more ambiguous provisions of the *MNE Guidelines*. For example, in *DAS Air* the UK NCP considered that contravention of the *Chicago Convention* was sufficient to indicate breach of specified paragraphs of the *MNE Guidelines*.<sup>190</sup> Moreover, the UK NCP directed Afrimex that it must be mindful of its business practices and its effects, which could cause indirect violations of the arms embargo in the DRC conflict zone.<sup>191</sup> This suggests a direct relationship between the private actor and international law, a relationship that has raised powerful objections by states.<sup>192</sup>

The NCPs in both cases were able to do what the UN establishment was unable to accomplish through the *UN Norms* structure, precisely because the method used was soft rather than hard law. Because neither are technically law, both could serve as the basis for behavioural regulation *in effect*, while avoiding challenges to the *forms* of public sovereign power. The technical monopoly power of the state over law was not affected by regulatory systems that do not bind in law and could thus have an equivalent effect, at least as far as the entity subject to NCP proceedings is concerned. Thus, soft law increases in power: it is formally non-existent, yet can become a powerful and effective force of substantive behavioural regulation. The *MNE Guidelines* represent the

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regimes alone in any case cannot solve the structural problem of inadequate protection and fulfillment of human rights ...

John Ruggie, 'Voluntary Principles on Security and Human Rights, Remarks at Annual Plenary' (Speech delivered at Voluntary Principles on Security and Human Rights Annual Plenary, Washington DC, US, 7 May 2007) [18]–[20].

<sup>187</sup> See Schuler, above n 49, 1777, in which he notes:

For future enhancement it is necessary that the implementation of the basic prerequisites for the institutional set up prescribed by the OECD, viz (namely) visibility, accessibility, transparency and accountability, is enhanced. In particular transparency needs to be implemented more vigorously. This leads to the first proposition of this study. Effective governance is achieved through cooperation. In the future, adhering governments need to enhance cooperation with the OECD and secure effective implementation of the basic prescriptions.

<sup>188</sup> See UK NCP, *DAS Air* (21 July 2008) [53]: 'The NCP notes that [*UN Resolution 1592*] is directed towards states but considers this resolution highlights the requirement for business to undertake heightened awareness when trading or investing in natural resources in this region'. The distinction the NCP attempts to make is, substantially, one without a difference.

<sup>189</sup> Johns, above n 1, 912–14.

<sup>190</sup> UK NCP, *DAS Air* (21 July 2008) [35].

<sup>191</sup> UK NCP, *Afrimex* (28 August 2008) [71]–[74]. For that purpose, Afrimex was to rely on a number of studies and statements put out by government agencies with an interest in the management of the conflict.

<sup>192</sup> This fits nicely into public conceptions of legal hierarchy, opening a space for effective regulation while remaining respectful of the forms of government. '[C]ontractual rulemaking as well as intra-organizational rule production is still seen either as non-law or as delegated lawmaking that must be recognized by the official legal order': Gunther Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law and Society Review* 763, 768.

contemporary way in which soft law systems can create hard international law.<sup>193</sup> The *MNE Guidelines* thus clearly provide a formula for creating consensus, which eventually will be translated into legislation acceptable to all stakeholders that have contributed to its terms and whose values are reflected therein. Again, there is irony here.

Critical in that development, of course, is the work of the NCPs, the royal courts of this developing common law. This is well understood by the civil society actors that have become a decisive element in pushing this framework forward in its institutionalisation.<sup>194</sup> Indeed, civil society actors have played an increasingly large role in managing the development of soft law in the public and private sectors across a large variety of subject areas.<sup>195</sup> The *MNE Guidelines* are not unique in this respect. Other soft law systems have turned to civil society actors as an essential stakeholder in the governance structure adopted.<sup>196</sup> In this case, the civil society actors, RAID and Global Witness, used these actions to help construct international values and norms through an interpretive elaboration of the *MNE Guidelines*. They meant to continue to transform moral and ethical consensus into formal, binding rules, first within bureaucratized systems of soft law and then, ultimately, into instruments of law in form as well as fact.<sup>197</sup> The cases, then, suggest their power in their form: an institutionalisation of dispute resolution in which elements of civil society undertake the traditional enforcement role of the state.<sup>198</sup> The state provides the judge, but not the law. Civil society provides the enforcement mechanism. Economic enterprises serve as both objects and subjects of a law that is derived from both the obligations of states and the presumed rules produced by international actors.<sup>199</sup>

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<sup>193</sup> Consider the developing common understanding of the relationship between soft and hard law beyond the state. 'As with the drafting of almost all human rights treaties, the United Nations begins with declarations, principles, or other soft-law instruments. Such steps are necessary to develop the consensus required for treaty drafting': Weissbrodt and Kruger, above n 177, 914. The same steps are also required for the development of supranational hard law standards for corporate regulation.

<sup>194</sup> RAID and The Corner House, for example, proposed a number of modifications to the NCP complaint process that would effectively move it toward greater institutionalisation as a quasi-judicial organ: RAID and The Corner House, *UK National Contact Point's Promotion and Implementation of the OECD Guidelines*, above n 59, 21–4.

<sup>195</sup> In the related operational endeavours centred on the elaboration of the UN's 'protect, respect and remedy' policy framework, Ruggie articulated the following critique of the critique of soft law: for a discussion of this, see, eg, L David Brown et al, 'Globalisation, NGOs and Multisectoral Relations' in Joseph Nye Jr and John Donahue (eds), *Governance in Globalizing World* (2000) 271, 283–5: 'Increasingly during the past decade, transnational civil society alliances have been central to campaigns to formulate and enforce global public policies in response to critical problems'.

<sup>196</sup> See, eg, Faina Milman-Sivan, 'Representativity, Civil Society, and the EU Social Dialogue: Lessons from the International Labour Organization' (2009) 16 *Indiana Journal of Global Legal Studies* 311.

<sup>197</sup> It is in this sense that one can see an application of the notion of norms as patterns of rationally governed behaviour maintained in groups by acts of conformity. See, eg, Steven Hetcher, *Norms in a Wired World* (2004) 17. The form of that conformity is the object of law. The imposition of effective patterns of governance, irrespective of form, is the object of transnational actors who do not need the legitimating forms of the state to effect binding patterns of governance.

<sup>198</sup> Cf Bunn, above n 6, 1265.

<sup>199</sup> As one commentator noted recently:

international private governance is not just an abstract possibility, it is an increasingly important reality. One could also say that we are facing the emergence

But the cases raise a larger and more potent issue with respect to the division of power between states and private entities — the governance role of private economic actors within territories in which state power is weak or illegitimate.<sup>200</sup> In that context, the NCPs in both cases implied that the OECD principles imposed on private actions the obligations to behave like a state and in lieu of the state. One can now begin to imagine a world in which economic and political activity do not march in lock step over the same terrain.<sup>201</sup> In effect, for purposes of the cases, in lawless areas like the DRC-Goma, both DAS Air and Afrimex were meant to operate as the state for purposes of ordering their conduct and the conduct of those they might influence. The relationship between DAS Air and Afrimex (especially Afrimex) and those entities they controlled becomes not purely commercial, but also regulatory in character.<sup>202</sup>

MNCs have always been powerful players in the international society and have since long been accepted as partners in the conclusion of ‘internationalised’ contracts with states. In such cases, many have argued, they are endowed with a kind of derived [international legal personality].<sup>203</sup>

But the same could be said as well for the elements of civil society that were permitted, in effect, to take the role traditionally undertaken by the state as enforcer of positive law. In each of these cases, it was an organisation of civil society, not a state, which effectively sought to enforce international and municipal law (to a lesser extent, certainly). This represents a potentially significant extension of the traditional notion of civil society actors as individuals organised to influence lawmakers within the framework of state organisation,<sup>204</sup> or as surrogate regulators.<sup>205</sup> In both cases, the host states were absent; a legitimating substitute was required.<sup>206</sup> Civil society elements

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of new forms of polity, closely associated with the creation of new public arenas and populated by a variety of new political constituencies.

Franco Furger, ‘Global Markets, New Games, New Rules: The Challenge of International Private Governance’ in Richard Appelbaum, William L F Felstiner and Volkmar Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (2001) 201, 226. The *MNE Guidelines* structure is undeniably an important element in that global matrix of new regulatory systems.

<sup>200</sup> See the excellent discussion in Naomi Cahn and Anthony Gambino, ‘Towards a Typology of Corporate Responsibility in Different Governance Contexts: To Do in the Absence of Responsible Country Governance?’ (2008) 39 *Georgetown Journal of International Law*, 655.

<sup>201</sup> See Jean-Philippe Robé, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’ in Gunther Teubner (ed), *Global Law without a State* (1997) 46.

<sup>202</sup> See UK NCP, *Afrimex* (28 August 2008) [65]–[66]. Consider in this regard especially the nature of the relationship required by the NCP between Afrimex and its unrelated suppliers, which was grounded in an understanding of the political situation and an obligation to contribute directly to the management of that political situation, to the extent of their powers.

<sup>203</sup> Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004) 347, 354.

<sup>204</sup> See, eg, Michael Walzer, ‘The Civil Society Argument’ in Chantal Mouffe (ed), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (1992) 89.

<sup>205</sup> See, eg, Neil Gunningham and Peter Brabosky, *Smart Regulation: Designing Environmental Policy* (1998) 262.

<sup>206</sup> This was recently emphasised in a different context in Alhaji B M Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ (2003) 16 *Georgetown International Environmental Law Review* 21, 74.

substituted for their enforcement arms, and the substantive role of public power was invested in the entities, the violations of which effectively constituted the basis for breach of obligation under the *MNE Guidelines*.<sup>207</sup> This raises issues of accountability in its own right — ones that the *MNE Guidelines* do not yet address. The *MNE Guidelines* provide a basis, in soft law, to substitute private for public power in places where the apparatus of state is effectively absent. *Afrimex* and *DAS Air* both take small steps to effect that reality.

Thus, the NCPs would, through an interpretive application of the *OECD Risk Awareness Tool*,<sup>208</sup> serve as both regulator and participant in the markets in a territory in which the state is, to some degree, absent.<sup>209</sup> Indeed, it has been suggested that the *OECD Risk Awareness Tool* went a long way to satisfying the civil society community, especially with respect to what might be understood as sovereign activities of certain multinational corporations.<sup>210</sup> But it applies to all economic activity in such a context where, effectively, multinational corporations become a self-regulating subsidiary unit of public internal law. Thus, in both cases, the UK NCP stressed the special nature of the public law obligations of enterprises operating where government seems to be weak or absent.<sup>211</sup> This is derived from the imposition of an obligation on enterprises to observe their legal obligations, including other relevant international and human rights instruments.<sup>212</sup> Multinational enterprises have been asserting this authority

<sup>207</sup> For a description of initiatives targeting accountability of civil society actors, see Michael Szporluk, 'A Framework for Understanding Accountability of International NGOs and Global Good Governance' (2009) 16 *Indiana Journal of Global Legal Studies* 339. Indeed, civil society actors can as easily be seen as a threat to states as they might appear to be useful in disciplining economic actors within soft law regimes: see, eg, James McGann, 'Pushback against NGOs in Egypt' (2008) 10 *International Journal of Not-for-Profit Law* 29.

<sup>208</sup> OECD, *OECD Risk Awareness Tool*, above n 161, 9. The Tool's explanatory materials describe the relationship between people, states and entities in weak governance zones:

The Tool is based on the premise that a durable exit from poverty will need to be driven by the leadership and the people of the countries concerned — only they can formulate and implement the necessary reforms. Companies play important supporting roles and this Tool seeks to raise awareness of these roles and to help companies play them more effectively.

However characterised, the role envisioned is regulatory rather than participatory. The entity is in effect presumed to be required to substitute its apparatus for that of the (missing) state.

<sup>209</sup> See UK NCP, *Afrimex* (28 August 2008) [68]–[69]. On the merger of economic and social roles of these corporations, see also Michael Addo, 'Human Rights and Transnational Corporations: An Introduction' in Michael Addo (ed), *Human Rights Standards and the Responsibilities of Transnational Corporations* (1999) 3, 9.

<sup>210</sup> Thus, it has been noted by White and MacLeod, above n 42, 978, that:

While some are pushing for a general review of the Guidelines, the 2006 Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones represents important progress, as it applies to states which are 'unable or unwilling to assume their obligations' under international law and refers to the 'positive contributions' that corporations can make to 'social progress' among other things in such zones. Such a tool appears to bring PMCs firmly within the remit of the OECD.

<sup>211</sup> UK NCP, *DAS Air* (21 July 2008) [43]. 'Heightened care is required by companies when investing and trading in weak governance zones'.

<sup>212</sup> UK NCP, *Afrimex* (28 August 2008) [68]; UK NCP, *DAS Air* (21 July 2008) [54].

on their own for a number of years.<sup>213</sup> What is novel here is the incorporation of this idea within the soft law, quasi-legal framework of the *MNE Guidelines*. We move from private, contract-based, non-state systems to a hybrid public–private governance framework, which is another step toward the formal recognition of entities as proper subjects of international law.

Lastly, from a more global perspective, these cases can be understood not merely as efforts to develop systems of transnational regulation of multinational corporations, but also as efforts to coordinate international efforts to manage violent engagement in certain conflict zones.<sup>214</sup> The idea of control of war-production material as a means of reducing the size and scope of conflict is not new. It hardly needs mentioning that, at least from the middle of the last century, the reorganisation of the supranational governance of Europe was grounded on the notion that coordinated management of the factors of production of war-making was essential to manage (and ultimately avoid) armed conflict.<sup>215</sup> It was a logical leap from the success of the framework for peace in Europe to the attempted internationalisation of that framework within a network of related norm-sets, affecting and coordinating the regulation of all factors of production for organised political violence.

The result is a move towards more comprehensive regulation of the rules for warfare and violence among state and non-state actors. In that context, the *MNE Guidelines* play a role that is made explicit in *Afrimex* and *DAS Air*. Indeed, neither case can be understood completely without reference to the conflict to which the applicants in each case alleged the MNEs had contributed.<sup>216</sup> Both cases focused on the conflict in the Eastern DRC, both as an internal matter and

<sup>213</sup> For a discussion of one version of these private self-referencing regulatory systems grounded in the regulatory power inherent in the supply chain, see Backer, ‘Economic Globalization’, above n 48.

<sup>214</sup> The development of comprehensive systems for the management of violence, including war and insurrection, is well beyond the scope of this case note. For a taste of the emerging and rich literature, see, eg, Lindsay Moir, *The Law of Internal Armed Conflict* (2002); Winston Nagan and Marcio Santos, ‘From an African Perspective: The Training of Lawyers for a New and Challenging Reality’ (2008) 17 *Transnational Law and Contemporary Problems* 413, 449–62; John Norton Moore, ‘A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, “Wars of National Liberation”, Mixed Civil–International Wars, and Terrorism’ (1982) 31 *American University Law Review* 841. It is important to note, though, that these efforts are not produced in isolation but are increasingly coordinated with the management of all of the factors of production of violence, including the participation of economic actors in the financing and supplying of goods required for the maintenance of conflicts. These cases represent efforts to coordinate the control of the factors of production of war, that is, economic activity. Others have looked to the management of the conduct of war as well. See, eg, Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy, and Practice* (2005).

<sup>215</sup> These notions, of course, in part, guided the framework organisation of the European Coal and Steel Community in the 1950s. This was the essence of the *Schuman Plan* of 1950:

The coal-steel pool, Schuman said, would immediately provide a common basis for economic development, ‘the first step in the federation of Europe ... . [It would] make it plain that any war between France and Germany becomes, not merely unthinkable, but materially impossible’.

William Diebold, *The Schuman Plan: A Study in Economic Cooperation, 1950–1959* (1959) 1. Diebold also notes that: ‘France was proposing partnership with the hereditary enemy; what is more, the partnership was to rest on the creation of a common interest in basic industries, the sinews of war and the mainsprings of the economy of peace’: at 2.

<sup>216</sup> UK NCP, *DAS Air* (21 July 2008) [13]; UK NCP, *Afrimex* (28 August 2008) [30].

in terms of a foreign invasion.<sup>217</sup> Both sought to apply, as the actual rules of multinational behaviour, the obligations, declarations and other actions of the political sector that intend to manage away conflict by directly targeting the economic entities.<sup>218</sup> The situation provided an important opportunity to explicitly network the complex of rules and actions designed, now more explicitly, to work together in applying international law and policy to conflict situations.<sup>219</sup> For civil society actors in these cases, the *MNE Guidelines* provided a means of extending the scope of that regulatory environment to non-state actors that were indirectly involved by the invocation and strengthening of the mechanisms of soft law control.<sup>220</sup> And that is perhaps the greatest insight that can be drawn from these cases in the context of international law: both *Afrimex* and *DAS Air* suggest the way in which international soft and hard law, national law, and transnational custom and customary normative frameworks (institutionalised or not) are converging within a dynamic matrix where each, developing separately, come together to coordinate and resolve issues that arise beyond the state.<sup>221</sup> The *MNE Guidelines* enterprise thus fits in nicely with what Gunther Teubner describes as ‘polycentric’ globalisation.<sup>222</sup>

<sup>217</sup> UK NCP, *DAS Air* (21 July 2008) [18]; UK NCP, *Afrimex* (28 August 2008) [9], [12].

<sup>218</sup> See, eg, UK NCP, *DAS Air* (21 July 2008) [53]–[54]; UK NCP, *Afrimex* (28 August 2008) [69]–[76]. Indeed, in both cases the NCPs explicitly declared the use of the *MNE Guidelines* as a mechanism for an attempt at a seamless coordination of UK national policy and the UK’s international obligations or policies. What is policy in the public sector becomes (soft) law in the private: see UK NCP, *DAS Air* (21 July 2008) [51]: ‘The UK Government expects all UK business to follow international conventions including the Convention of International Civil Aviation’; UK NCP, *Afrimex* (28 August 2008) [75]: ‘The UK Government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuse, such as that which prevails in Eastern DRC’.

<sup>219</sup> As the UK NCP stated, the UN *Resolution 1592* (30 March 2005) rec 10 urges ‘all states neighbouring the Democratic Republic of Congo to impede any kind of support to the illegal exploitation of Congolese natural resources, particularly by preventing the flow of such resources through their respective territories’. The NCP further noted that this Resolution is directed towards states but considered that it highlighted the requirement for businesses to undertake heightened awareness when trading or investing in natural resources within this region: UK NCP, *DAS Air* (21 July 2008) [53].

<sup>220</sup> Thus, for example, Global Witness (*About Us*, above n 27):

exposes the corrupt exploitation of natural resources and international trade systems, to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was the first organisation that sought to break the links between the exploitation of natural resources, and conflict and corruption.

<sup>221</sup> It has been suggested that companies are now more likely to have to

take into account so-called soft law arising from the growing international web of multi-stakeholder initiatives and public and private codes and norms. Although these norms are technically voluntary, they have significant bite in practice, as a result of the absence of a centralized command-and-control system of international law.

John F Sherman III and Chip Pitts, *Human Rights Corporate Accountability Guide: From Law to Norms to Values* (Working Paper No 51, Corporate Social Responsibility Initiative, December 2008) 3.

<sup>222</sup> Teubner, ‘Societal Constitutionalism’, above n 70, 13, describes a crucial effect of the type of globalisation advanced by the civil society actors and corporate stakeholders with the *MNE Guidelines* system as ‘a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors of themselves’.

Taken together, the cases provide a potentially rich window on the way in which a matrix of hard law, soft law, governance norms, rules applicable to states, municipal law and policy can be re-crafted as the framework basis of behaviour through the *MNE Guidelines*, and applied to judge the conformity of the behaviour of economic actors with that framework. From a lawyer's perspective, this is a result far removed from the institutional context in which law is traditionally framed, understood and applied to multinational enterprises.<sup>223</sup> Law exists in *Afrimex* and *DAS Air* on a different plane, beyond the more formally confining frameworks of positive law and its institutions, so that 'corporate responsibility ... exists independently of States' duties. Therefore, there is no need for the slippery distinction between 'primary' State and 'secondary' corporate obligations'.<sup>224</sup> Rules, declarations, commands to states, and other instruments suggest that in this context behavioural rules bind, and thus serve as a law of, the *MNE Guidelines* community, because they can, and not because they have been approved under the usual procedures for the production of positive law by institutions legitimately vested with the power to effect them.

There is law here only to the extent of a contract of sorts — the contract between the participants in the OECD governance community to abide by the rules that that community has crafted in conformity with the procedures for their implementation and enforcement. But that enforcement is soft also.<sup>225</sup> However, this may be what makes the rules effective.<sup>226</sup> And effectiveness is not a product of the traditional dynamic between prince and subject inherent in positive law,<sup>227</sup>

<sup>223</sup> As Ruggie, *Protect, Respect and Remedy*, above n 33, [13]–[16] noted:

At the same time, the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization. A parent company and its subsidiaries continue to be construed as distinct legal entities. ... Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. ... And what is the result? ... [T]he worst cases of corporate-related human rights harm ... occurred, predictably, where governance challenges were greatest ...

<sup>224</sup> *Ibid* [55].

<sup>225</sup> See, eg, UK NCP, *DAS Air* (21 July 2008) [53]: 'The NCP urges UK companies to use their influence over contracting parties, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain'.

<sup>226</sup> As a study by Schuler, above n 49, 1755, suggests:

The analyzed governance mechanism constitutes an exercise of public authority. The fact that the OECD Guidelines for MNEs and their implementation mechanism are soft law instruments does not contradict this supposition because the Guidelines' mechanisms generate considerable reputational effects on actors outside the OECD. Moreover, the Guidelines regulate a subject matter of high public interest which would call for regulation in domestic or international public law in the absence of the OECD Guidelines for MNEs. This study proposes that effective governance is achieved through multi-level cooperation and through decentralized soft mediation-based implementation.

<sup>227</sup> This dynamic looks to law as

the body of authoritative norms or models or patterns of decision applied by the judicial organs of a politically organized society in the determination of controversies so as to maintain legal order ... [or] in terms of the authority which promulgates it and puts coercion behind it.

but rather in the utility of the mechanisms for naturalising approved behaviours within corporate culture.<sup>228</sup>

In effect, in order to overcome the limitations of a territorially-based positive law, the MNE system ignores it, creates its own normative framework and then seeks to apply it. For those who conflate the rule of law, democratic accountability and lawmaking with positive law, this is not reassuring as a principled basis of law system construction.<sup>229</sup> The great difficulty of the *MNE Guidelines* is precisely its proclivity for imposing norms as the ‘law’ of behaviour without the benefit of a political imprimatur of any kind. The ensuing tensions with municipal law are touched on next.

## B Corporate Law Challenges

As important as the effects of the cases are on the construction of complex transnational governance systems, the cases also evidence potentially important engagements with traditional notions of corporate law and regulation. These are explored briefly here. There were two potentially significant issues that might affect the way in which corporate law principles are understood and applied under municipal law. These approaches are important if only because they either challenge the supremacy of municipal law as the source of corporate law norms or they will serve as a strong incentive to harmonise these corporate law principles.<sup>230</sup> The first deals with the law respecting the separate corporate existence of separately constituted entity. The second concerns an understanding of enterprise liability.

### 1 *Respect for the Separate Legal Personality of Separately Constituted Entities*

Within Anglo-American corporate law, the protection of the separate legal personality of economic entities operating in corporate form has been strongly defended.<sup>231</sup> Most states have developed rules for the protection of that autonomy, both from people who seek to impose responsibility on shareholders, and also from people who seek to impose responsibility on corporations for the acts of their stakeholders (principally shareholders).<sup>232</sup> Most states also have

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Roscoe Pound, *The Ideal Element in Law* (2002) 4. On the nature of that relationship in the US and its critique from theory, see Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006).

<sup>228</sup> See UK NCP, *Afrimex* (28 August 2008) [66]: ‘To ensure this policy is effective, it needs to be integrated into Afrimex’s way of working; to create this policy without a subsequent change in behaviour would merely create a worthless piece of paper’.

<sup>229</sup> On the dynamics, see generally Tamanaha, above n 227; Marlene Wind, ‘The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?’ in Joseph Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (2003) 103.

<sup>230</sup> The fear that such soft regulatory systems might serve as a basis to displace municipal law, to the benefit of multinational corporations, has been raised elsewhere: see, eg, Alan C Neal, ‘Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?’ (2008) 29 *Comparative Labor Law and Policy Journal* 459, 471–2.

<sup>231</sup> The germinal English case is *Salomon v A Salomon & Co Ltd* [1897] AC 22. For a discussion of the notion from an American perspective, see Larry Catá Backer, ‘The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality’ (2006) 41 *Tulsa Law Review* 541.

<sup>232</sup> For a foundational discussion, see Maurice Wormser, *The Disregard of the Corporate Fiction and Allied Corporate Problems* (1927) 42–86.

quite complicated rules for determining when those rules can be avoided, by ‘piercing the veil’ of autonomy of these separate legal actors.<sup>233</sup> At the same time, when it serves their interests, states have been more willing to try to seek to extend their authority over elements of corporate activity stretching across borders.<sup>234</sup> Most importantly, it is well understood that issues related to veil-piercing, enterprise liability and the legal regulation of separately constituted juridical persons are, in the absence of binding supranational law to the contrary, generally matters of municipal law, going to the core of sovereign authority.<sup>235</sup> This has been a point of great frustration among academic critiques, civil society actors and developing (usually host) states, all of whom have generally been seeking means around these restrictions of positive law.<sup>236</sup>

Yet, despite the nod to municipal law in the *MNE Guidelines*, in both cases the UK NCP did not consider either the law of corporate autonomy or the rules by which that autonomy could be disregarded under either the law of the home or host states. These proceedings evidence the increasing embrace of notions of ‘governance’ rather than ‘law’ for the construction and imposition of obligations on economic actors. The formal constraints of law are deemed far too confining for the work to be done. Management requires a more flexible approach, it seems.<sup>237</sup> As such, the NCP panels made that determination on the basis of construction of their own standards, grounded in something that appeared to mimic English and American equity practice, but subject to its own internal logic. The consideration of the relationship between Afrimex, Société Kotecha and SOCOMI is telling. Because the ‘law’ of the *MNE Guidelines* forms part of

<sup>233</sup> See, eg, Nicole Rosenkrantz, ‘The Parent Trap: To Hold Parent Corporations Directly Liable for Their Negligence’ (1996) 37 *Boston College Law Review* 1061, 1086–7; Stephen M Bainbridge, ‘Abolishing Veil Piercing’ (2001) 26 *Journal of Corporation Law* 479, 506–14; Henry Hansmann and Reinier Kraakman, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) 100 *Yale Law Journal* 1879, 1919–20. To similar effect in Australia, see Ian Ramsay and David Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* 250.

<sup>234</sup> See, eg, Raymond Vernon, ‘Codes on Transnationals: Ingredients for an Effective International Regime’ in Arghyrios Fatouros (ed), *Transnational Corporations: The International Legal Framework* (1994) 69, 72; Marc Galanter, ‘Law’s Elusive Promise: Learning from Bhopal’ in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (2002) 172

<sup>235</sup> Ruggie, *Protect, Respect and Remedy*, above n 33, [13]–[16].

<sup>236</sup> For references to some of the literature, see above nn 6–7. The main points have changed very little over the last several decades and are nicely summarised in Muchlinski, *Multinational Enterprises and the Law*, above n 1, 125–76, 385–427, 537–74.

<sup>237</sup> These notions are being developed more formally, in one context, through the literature on elaborating a *UN Global Compact* governance system, especially in the context of fleshing out the notion of ‘respect[ing] rights’: see Ruggie, *Protect, Respect and Remedy*, above n 33, [23]. See especially at [54]:

In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. ... Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations — as part of what is sometimes called a company’s social license to operate.

Its principles, though, find direct expression in the approach of the NCPs to the governance principles to be applied to economic entities under the *MNE Guidelines*. But Ruggie has demarcated respect for human rights as ‘the baseline responsibility of all companies in all situations’. John Ruggie, *Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/11/13 (22 April 2009) [61]. Beyond that, there is philanthropy and volunteerism: at [62].

the arrangements between the relevant stakeholders, municipal law appears less relevant, or even waived, by the parties to the contract.<sup>238</sup>

The *MNE Guidelines* are currently read as making ‘hard law’ municipal corporate law provisions irrelevant to their determination. On one level that makes sense: the *MNE Guidelines* are without legal effect and are self-referential with respect to the obligations they impose on its community of actors. On the other hand, each corporation incorporates national and international hard and soft law by reference.<sup>239</sup> It is difficult to understand that incorporation is so selective as to permit NCPs to choose from among them. But that is precisely what the UK NCP does in *Afrimex*, at least, for example, when it first determines the associated status of the three entities and then imposes collective liability on them for actions in a foreign jurisdiction (whose own law of corporate aggregation is disregarded as well).<sup>240</sup> The result, then, can be enforced only unofficially — or through transnational mechanisms. It is unlikely to be enforced in states such as the US, where such determinations might be deemed inconsistent with state corporate law, absent modification of municipal law.<sup>241</sup> The difficulty, here, in a sense, is that NCPs decide corporate liability, and the scope of obligation under contract, not with reference to the complex national rules of either host or home state, but on the basis of a framework for inter-corporate liability devised by the NCPs.<sup>242</sup>

For states less receptive to the ideals of the *MNE Guidelines* mission thus expressed, the tension between such freewheeling application and its own law may not be resolved in favour of the analytical framework adopted by an NCP. Yet, the soft law nature of the *MNE Guidelines*, and their characterisation as contract, rather than law, as conventionally understood,<sup>243</sup> might ameliorate any tension between the *MNE Guidelines* and the national corporate law regime.<sup>244</sup>

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<sup>238</sup> Backer, ‘Multinational Corporations, Transnational Law’, above n 2, 364–5.

<sup>239</sup> *MNE Guidelines*, above n 11, 5–6.

<sup>240</sup> See UK NCP, *Afrimex* (28 August 2008) [38]–[40], [50]–[51].

<sup>241</sup> See, eg, Alissa Mickels, ‘Note: Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the US and Europe’ (2009) 32 *Hastings International and Comparative Law Review* 271, 282–94.

<sup>242</sup> That framework substitutes notions of spheres of influence and positive obligations flowing therefrom, obligations essentially regulatory in character, from the connection. See, eg, UK NCP, *Afrimex* (28 August 2008) [48]–[51], where the NCP applies *MNE Guidelines* above n 11, s II.10 (‘encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines’). This approach is certainly inconsistent with the more narrow scope of legal obligation under many corporate law systems.

<sup>243</sup> See Backer, ‘Multinational Corporations as Objects’, above n 5, 517: ‘Contract serves as the means by which the “law” of [a non-state] system is memorialized and made binding. While states memorialize their norms through law, contract serves a similar purpose for regulating the behavior among non-state parties’.

<sup>244</sup> Speaking of the use of private law to affect the objectives of the *UN Norms*, above n 3, it has been suggested by Backer, ‘Multinational Corporations, Transnational Law’, above n 2, 378 (emphasis in original), that contract might serve to ameliorate the strictures of national law:

From the perspective of civil law societies, there could be nothing potentially more innocuous — after all, there is no question of the superiority of *statute* to *contract*. Yet, by imposing changes to the customs and practices of the largest global amalgamations of economic power and by changing behaviour through private law, the implementation of the *Norms* can be far more effective as a means of implementing international legal norms than the traditional method so dependent on state action.

First, most statutes permit a certain flexibility in the ordering of corporate affairs and obligations, subject to public policy limitations, the core principles underlying corporate organisation and the privileged place of shareholder and shareholder interests in the corporate enterprise.<sup>245</sup> Second, those obligations under the *MNE Guidelines* might be limited only to the extent necessary under express prohibitions of law or to those cases where such compliance is otherwise beyond the power of the board of directors to make. In this case, a board of directors might undertake extended obligations under contract with suppliers and other parties, but only to the extent that such agreements do not breach a board of directors' duty to the corporation (and its shareholders).<sup>246</sup> Indeed, in the event of such conflict, the *MNE Guidelines*, and any supplemental interpretation by NCPs, would have to defer to applicable national law.<sup>247</sup>

More likely, the result serves another purpose: to employ the soft context of regulation to normalise the behaviour advocated within corporate culture, especially in non-binding international human rights instruments and reflected in the *MNE Guidelines*.<sup>248</sup> Again, the idea is that formal positive law is inadequate

<sup>245</sup> For an article comparing the number and scope of mandatory versus default rules in the US and the EU, see William Carney, 'The Political Economy of the Competition for Corporate Charters' (1997) 26 *Journal of Legal Studies* 303, 321 (especially). In American legal idiom, the template of policy and principle at the limits of municipal law was nicely captured in *Dodge v Ford Motor Co*, 170 NW 668, 684 (1919): 'A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of the means to attain that end'.

<sup>246</sup> These notions are being developed more formally, in one context, through the literature on elaborating both the *UN Global Compact* and the emerging 'protect, respect and remedy' governance system, especially in the context of fleshing out the notion of 'respect[ing] rights': see Ruggie, *Protect, Respect and Remedy*, above n 33, [23], [54] (especially). In a sense, that would require disciplining corporate social and human rights responsibilities within the traditional discourse of profit maximisation over the long term. See, eg, *Kamin v American Express Co*, 383 NYS 2d 807 (1976); aff'd 387 NYS 2d 993 (1976). On limits to corporate action that sacrifice corporate profits for larger ideals, see Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest?' (2005) 80 *New York University Law Review* 733, 840–58. Sovereign wealth funds that take a strong activist position have adopted this position, clothing corporate social responsibility and an extra legal obligation to observe human rights and other norms, not necessarily legally mandated, in long-term economic rationales: see discussion in Larry Catá Backer, 'Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance through Private Global Investment' (2009) 40(4) *Georgetown Journal of International Law* (forthcoming).

<sup>247</sup> 'Commentary on the OECD Guidelines for Multinational Enterprises' in *MNE Guidelines*, above n 11, 39: 'The *Guidelines* are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operation of these enterprises'.

<sup>248</sup> See Weissbrodt and Kruger, above n 177, 915, stating that this reflects a variation in the pattern developed for the *UN Norms*:

In the recognition that human rights obligations will be most effective if internalized as a matter of company policy and practice, the Norms ... call upon businesses to adopt their substance as the minimum standards for the companies' own codes of conduct or internal rules of operation and to adopt mechanisms for creating accountability within the company.

See also Patrick Delaney, 'Transnational Corruption: Regulation across Borders' (2007) 47 *Virginia Journal of International Law* 413, 437: 'Corporations and their constituents ... are not purely rational actors. They are capable of socialization through norm-creation. It is by focusing on this mechanism that corporate [behaviour] can best be further altered'.

to the task of modifying behaviour. Social engineering of the type contemplated requires a more subtle hand. The *MNE Guidelines* are meant to constitute at least a part of that hand. Baade writes that, internalised as the normal behaviours and expectations on companies, behavioural norms serve as an enforcer of behaviour that is more effective, perhaps, than any commanded by a legislator with limited power to enforce against unwilling entities. Baade notes that:

The legal foundations of the ‘legitimizing’ effect of international declarations regarding the conduct of MNEs are most readily apparent where these declarations, or instruments adopted in reference thereto, affirmatively recommend the transformation of their contents into enforceable rules of domestic law.<sup>249</sup>

And there might be a further benefit: behaviour thus naturalised within the community of multinational corporations might serve either as a basis for deriving the contours of customary international law or the basis for articulating a less controversial set of binding international laws. Indeed, it might be possible to consider the NCP cases as important markers in the production of a stream of semi-public pronouncements that could lead to the discovery (or evolution) of what, as customary international law, might then be imposed on host and home states. This is an ‘alternative mechanism for global legislation’, so that ‘custom may serve as a pathfinder for later established more specific treaty rules’.<sup>250</sup> These cases promote the substance of the project inherent in the *UN Norms* by institutionalising soft power mechanisms that affect a governance regime different from that of home or host state law.

## 2 *Enterprise Liability*

One of the more rigorously enforced legal protections of state law is rules for avoiding liability between separately constituted parts of a large economic enterprise operating through a large number of subsidiaries.<sup>251</sup> But states have also tentatively sought to find limits to the protection of the rules of separate corporate legal personality beyond traditional veil-piercing standards. That search has focused on determining circumstances through which the aggregate parts of a multi-corporate enterprise can be held collectively liable for the acts of any of its respective parts.<sup>252</sup> There are inherent tensions between corporate structures, which take advantage of the benefits of asset protection under the

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<sup>249</sup> Baade, ‘Legal Effects of Codes of Conduct for MNEs’, above n 6, 26.

<sup>250</sup> George Norman and Joel Trachtman, ‘The Customary International Law Game’ (2005) 99 *American Journal of International Law* 541, 569.

<sup>251</sup> See above nn 231–236 and accompanying text. On the importance of proof of excessive control and intent to accomplish some unjust, fraudulent or inequitable conduct, see also Phillip Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2001) 24 *Hastings International and Comparative Law Review* 297, 304–6.

<sup>252</sup> See, eg, Muchlinski, *Multinational Enterprises and the Law*, above n 1, 138; Melvin Eisenberg, ‘Corporate Groups’ in Michael Gillooly (ed), *The Law relating to Corporate Groups* (1993) 1.

rules of limited liability and separate legal personality of corporations, and the business organisation of the aggregate entity.<sup>253</sup>

The supplier chain governance rules, especially as applied against Afrimex,<sup>254</sup> suggest the emergence of a new set of enterprise liability norms in which regulatory responsibility becomes the foundation for regulation of the legal relationships between unrelated companies. The touchstone is control — no longer excessive control, but now a necessary level of control imposed through the *MNE Guidelines* themselves. Indeed, though the notion of supply chain is contested,<sup>255</sup> the UK NCP assumed that SOCOMI was part of Afrimex's supply chain,<sup>256</sup> as were the *comptoirs* used by Afrimex.<sup>257</sup> That determination had consequences. First, it gave rise to a set of obligations with respect to the control of the supplier relationship and the conduct of the downstream supplier.<sup>258</sup> Second, the levels of control imposed through the *MNE Guidelines* then suggest a degree of intertwining sufficient to trigger application of equitable considerations of joint effort and thus, potentially joint liability, under a broad reading of traditional municipal veil-piercing rules.<sup>259</sup> It is true enough that this sort of regulatory enterprise model is already fairly well advanced as a system in the construction of contract-based private regulatory systems of multinational enterprises.<sup>260</sup> But that sort of private regulatory system takes on something of a different character when it emanates from the state. The difference, of course, is that the enterprise liability contemplated in cases like *Afrimex* is also coupled with the transformation of the corporation into a quasi-state actor, an entity with publicly-imposed regulatory obligations, which failing to assert correctly can

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<sup>253</sup> In Australia, 'where the group has centralized senior management and a divisional business unit structure, there is an inevitable tension between the business organizational structure and the corporate structure': Robert Austin, 'Corporate Groups' in Charles Rickett and Ross Grantham (eds), *Corporate Personality in the 20<sup>th</sup> Century* (1998) 71, 75.

<sup>254</sup> See above nn 144–151.

<sup>255</sup> Compare the definition in John Blackstone Jr and James Cox III, *American Production and Inventory Control Society Dictionary* (12<sup>th</sup> ed, 2008) ('the global network enabling products and services to be supplied from raw materials to end customers through an engineered flow of information, physical distribution, and cash') to the definition in John Mentzer et al, 'Defining Supply Chain Management' (2001) 22 *Journal of Business Logistics* 1, 4 ('set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances and/or information from a source to a customer').

<sup>256</sup> UK NCP, *Afrimex* (28 August 2008) [34]–[39].

<sup>257</sup> *Ibid* [16].

<sup>258</sup> See the *MNE Guidelines*, above n 11, s II.10: 'Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*'. The 'Commentary on the OECD Guidelines for Multinational Enterprises' in the *MNE Guidelines*, above n 11, 41, however, notes that '[e]stablished or direct business relationships are the major object of this recommendation rather than all individual or *ad hoc* contracts or transactions that are based solely on open market operations or client relationships'.

<sup>259</sup> 'Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise': *MNE Guidelines*, above n 11, 9.

<sup>260</sup> See discussion in Backer, 'Economic Globalization', above n 48; Backer, 'Multinational Corporations as Objects', above n 5.

lead to consequences.<sup>261</sup> And the result is made inevitable by the construction of hard law systems that impose joint liability where control is excessive combined with soft law systems that mandate the assertion of such ‘excessive’ control in the context of supplier relations, especially in areas where governance systems are weak.

From the perspective of international law, the formalities remain clear — states remain sovereign and corporations serve in a subordinate capacity as agents, whose powers may increase as the ability of the state to project power diminishes. In any case, the corporation must ‘think like a state’ in devising its commercial relationships with other actors. That was, in essence, the perspective of the UK NCP Panel in *Afrimex*.<sup>262</sup> But the consequences for the municipal regulatory control of corporations — and especially core state policy in response to the fundamental character of entities as profit- or wealth-maximising private actors — can be significant.<sup>263</sup> Not that the results are ‘bad’ or unwarranted, but the failure of states to address these developments might be perceived as awkward at best.

### C Toward Procedural Autonomy

One of the more interesting aspects of the cases has been the freedom with which the NCPs have fashioned their own procedural and evidentiary rules.<sup>264</sup> These tend to deepen both the institutional legitimacy of the process and its separation (autonomy) from the municipal and international law systems which are referenced in its substantive rules.<sup>265</sup> A fully developed and autonomous

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<sup>261</sup> See UK NCP, *Afrimex* (28 August 2008) [54]:

Afrimex questioned whether they could contribute to the abolition of child and forced labour considering that they were several steps removed from the mine in the supply chain. ... If sufficient due diligence is applied to the supply chain, then the NCP considers that Afrimex can make a contribution.

The NCP cross-referenced the work, not of the English courts, but of Special Representative Ruggie for an appropriate understanding of due diligence applied as a matter of the internal governance regime under the *MNE Guidelines*. See also UK NCP, *Afrimex* (28 August 2008) [41].

<sup>262</sup> See findings of the UK NCP, above nn 154–163.

<sup>263</sup> See, eg, Yoshiro Miwa, ‘Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant’ (1999) 84 *Cornell Law Review* 1227, 1250–3. Thus, critics of the movement for greater corporate social responsibility within legal frameworks have suggested that the result of the current project ‘represents at least as much a perversion of the corporation’s function as it does an abdication of responsibility by the state’: Delissa A Ridgway and Mariya A Talib, ‘Globalization and Development — Free Trade, Foreign Aid, Investment and the Rule of Law’ (2003) 33 *California Western International Law Journal* 325, 332.

<sup>264</sup> See UK NCP, *Afrimex* (28 August 2008) [5].

<sup>265</sup> For a discussion of the advantages of transnational litigation as a regulatory process in the global order, see Robert Wai, ‘Transnational Private Law and Private Ordering in a Contested Global Society’ (2005) 46 *Harvard International Law Journal* 471, 478–81; J G Merrills, *International Dispute Settlement* (1998) 295.

system of dispute resolution contributes greatly to the autonomy of rule systems,<sup>266</sup> as Wai explains:

To the extent that states discharge their responsibility by taking the difficult political decisions which are needed to formulate new legal principles, they strengthen the process of adjudication by providing courts and tribunals with a legitimate basis for their decisions.<sup>267</sup>

Indeed, to the extent that the NCPs develop a uniform set of procedural rules applicable in every *MNE Guidelines* proceeding, the system does more than deepen its autonomy from the states from which authority, in part, was ceded; it produces a certain framework for the development of substantive outcomes.<sup>268</sup>

The two cases illustrate the development of this autonomy, especially via the freedom with which the NCPs developed distinctive rules for burdens of proof, sufficiency of evidence, applicability of the rules and addressing moot issues. Both the *Afrimex* and *DAS Air* panels considered the effects of instances of rule violation that occurred before the adoption of the *MNE Guidelines* in the current form. Both reached the same conclusion, reasonable in the context of English jurisprudence, that only those actions occurring after the adoption of the rules would be subject to consideration.<sup>269</sup> But the panels did not disregard prior conduct completely. Instead, they determined that such conduct was pertinent in considering the behaviour of the entities.<sup>270</sup> The distinction, thus, made little difference in the proceedings. For all practical effects, prior conduct was dispositive in both cases, though it could not form part of the complaints. This procedural rule might well be in accord with the rules recognisable in English courts. But the panels did not pause to consider that issue. Instead, they made their determination on the basis of their consideration of the objectives, principles and context of the *MNE Guidelines* themselves — without reference to the law of the state in which they sat. The fig leaf over this determination, of course, was that the proceedings had no formal legal effect. However, they had substantive effects that in some respects mimicked proceedings before a state tribunal. In that context, assertion of a power to determine the effects of evidentiary facts is strong evidence of the autonomy of the rule system grounded in the *MNE Guidelines*.

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<sup>266</sup> Harmonised rules across systems tend to serve integrative functions as well. For an important recent effort, see, eg, *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2004). This is particularly important when attempting to fashion internal coherence within a regulatory community that stretches across the territorial borders of states. The ALI/UNIDROIT project, for example, focused on the international community of merchants and their commercial transactions, already bound to some extent by an increasingly uniform system of substantive law.

<sup>267</sup> Merrills, above n 265, 310.

<sup>268</sup> In a sense, this represents the exposition, on a transnational stage, of the process legalism Robert Kagan speaks of in the American context: Robert Kagan, *Adversarial Legalism: The American Way of Law* (2001) 3. Adversarial legalism is to be understood as ‘policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation’. Like the American adversarial legalism, NCP elaboration of the *MNE Guidelines* ‘is best viewed not merely as a method of solving legal disputes but as a mode of governance, embedded in the political culture and political structure’ of the transnational economic community: at 5.

<sup>269</sup> UK NCP, *DAS Air* (21 July 2008) [15], [39], [45].

<sup>270</sup> UK NCP, *Afrimex* (28 August 2008) [7], [29].

The NCP panels asserted a similar autonomy in constructing rules of burdens of proof without reference to those either of the establishing institution (the OECD) or the home or host state. Thus, for example, in *Afrimex*, the NCP panel suggested that Afrimex had the burden of proving that its minerals were not sourced from mines that used child or forced labour, rather than the complainant, Global Witness, bearing the burden of proving that they were sourced from such operations.<sup>271</sup> There was no basis for this determination other than the flexible principles inherent in the *MNE Guidelines* framework. In *DAS Air*, where the UK NCP Panel determined that the failure of DAS Air to respond — which occurred principally because the company was being liquidated — would not affect the evidentiary determinations or, better, might be read against DAS Air, and that determination was made without reference to procedural rules outside of those constructed by the Panel.<sup>272</sup>

This is not meant as a criticism of the procedural choices of the panels, but rather as a suggestion that the freedom of those panels to choose their procedural rules suggests the autonomy of the normative systems within which these entities were judged. It was clear that procedural autonomy was on the minds of the panels. This is tidily illustrated by those instances in which the Panel was quite sensitive to the applicability of the host state process rules in arriving at their own determinations. For example, in *DAS Air*, the Panel gave greater weight to evidence offered by RAID produced by the (Ugandan) Porter Commission because it ‘gathered extensive documentation. It worked only with sworn evidence given in public. The Commission adhered to the Evidence Act in its proceedings’.<sup>273</sup> But an international imprimatur was also considered important.<sup>274</sup> On the other hand, in the *Afrimex* complaint, the UK NCP was satisfied to judge the credibility of evidence produced by a Belgian NGO on the basis of receipt of assurances from the Belgian NCP ‘who confirmed the credibility of the organisation and its work’.<sup>275</sup> Contrast this to the same panel’s consideration of the issue of mootness.<sup>276</sup> This was striking in *DAS Air*, in which the UK NCP determined to give no regard to the liquidation of the entity when proceeding with the complaint.<sup>277</sup>

## V CONCLUSION

The idea of state intervention in transnational private activity, and the understanding that private economic activity is invariably laced with public

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<sup>271</sup> Ibid [57].

<sup>272</sup> UK NCP, *DAS Air* (21 July 2008) [25]: The UK NCP determined that the failure to answer would be read against DAS Air, because there had been ‘sufficient time for it to rebut RAID’s allegations’ before the commencement of proceedings in liquidation.

<sup>273</sup> Ibid [36].

<sup>274</sup> Ibid: ‘The International Court of Justice (ICJ) has acknowledged the evidentiary value of the Porter Commission. ... The ICJ had tested the evidence collected by the Porter Commission and considered it stood up to scrutiny’.

<sup>275</sup> UK NCP, *Afrimex* (28 August 2008) [37].

<sup>276</sup> ‘Mootness’ refers to a case that may no longer be timely. However, at least in American constitutional law, courts will hear otherwise moot cases on occasion where the facts are ‘capable of repetition, yet evading review’: *Southern Pacific Terminal Co v ICC*, 219 US 498, 515 (1911).

<sup>277</sup> UK NCP, *DAS Air* (21 July 2008) [15]–[16].

policy ramifications and burdens, has been growing.<sup>278</sup> As the global economic crisis deepened post-2005, state actors have joined academics in embracing these notions, even if only tentatively. Indeed, in early 2009, the ministers of the G7 declared an intention to work toward ‘setting up a set of common principles [founded] on integrity, transparency and propriety in global financial and business transactions’.<sup>279</sup> Indeed, the *OECD Risk Awareness Tool* reflects these assumptions.<sup>280</sup> Consistently with this approach, Richard Meeran writes that: ‘If a proper balance is to be achieved, the law must continue to develop to reflect the reality of [transnational corporation] operations and adapt to counter [transnational corporation] methods of avoiding legal responsibility’.<sup>281</sup>

That adaptation, within the OECD governance framework, is bound up in the concepts of obey and observe.<sup>282</sup> This incorporates an approach similar to that of the *UN Global Compact’s* ‘protect, respect and remedy’ framework, and the articulation of a corporate ‘social license to operate’<sup>283</sup> that mirrors the understanding of the *MNE Guidelines* applied in *DAS Air* and *Afrimex*. More broadly still, these developments suggest, as I have written elsewhere, that the state today has an absolute duty to intervene in markets directly, and coercively, because the effects of market collapse are not only social and economic, as they

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<sup>278</sup> For a discussion, see Paul Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 518–30.

<sup>279</sup> OECD, ‘OECD’s Gurría Welcomes G7 Move to Establish Set of Ethical Principles on Global Business’ (Press Release, 16 February 2009).

<sup>280</sup> See OECD, *Risk Awareness Tool*, above n 161, 9: ‘Support for an OECD initiative in this area has come from the G8 — the 2005 G8 Gleneagles Summit Communiqué calls for “developing OECD guidance for companies working in zones of weak governance”’.

The ‘heightened risks’ encountered in weak governance zones (*eg* in relation to corruption, human rights abuses and violations of international law) create a need for ‘heightened care’ in ensuring that the company complies with law and observes relevant international instruments: at 12.

<sup>281</sup> Richard Meeran, ‘The Unveiling of Transnational Corporations: A Direct Approach’ in Michael Addo (ed), *Human Rights Standards and the Responsibilities of Transnational Corporations* (1999) 161, 161.

<sup>282</sup> Thus, for example, the *OECD Risk Awareness Tool*, above n 161, 15, speaks of the expectation that companies ‘comply with their legal obligations and ... observe other relevant international instruments covering such areas as human rights, the fight against corruption, labour management (including observance of core labour standards) and environmental protection’.

<sup>283</sup> See also Ruggie, *Business and Human Rights*, above n 237, [46]:

The social license to operate is based in prevailing social norms that can be as important to the success of a business as legal norms. ... But one of them has acquired near-universal recognition by all stakeholders, namely the corporate responsibility to respect human rights, or, put simply, not to infringe on the rights of others.

But this framework has been careful to distinguish between responsibility for law (directed to states) and the obligation to conform conduct to law, however broadly understood (as positive law, principle, consensus obligation or the like), which is directed to corporations and other non-state actors: at [46]–[53]. In that context, Ruggie noted: ‘Confusion has also existed because the first generation of advocacy in business and human rights, culminating in the Draft Norms ... so co-mingled the respective responsibilities of States and companies that it was difficult if not impossible to disentangle the two’: at [58].

always have been, but now also political.<sup>284</sup> Because collapse of the financial sector would lead to political instability, even where the state is not interested in protecting particular economic and social actors, it must do so for self-preservation.

The soft law initiatives of the OECD and, importantly, its growing body of interpretive reviews of complaints through its NCPs, will likely be influential in developing attempts to renew efforts at better governance of multinational corporations and other economic activity globally.<sup>285</sup> However, the efforts will be uneven.<sup>286</sup> The OECD will examine its own regulatory posture, taking advantage of the insights and opportunities presented by the global economic downturn and 'will be looking at existing legal instruments, guidelines and conventions in the coming months to see if they need to be improved or extended'.<sup>287</sup>

Notwithstanding these limits, the output of quasi-judicial and interpretive statements, like those of the UK NCP in the matters of *DAS Air* and *Afrimex*, will continue to contribute, incrementally, to the institutionalisation of transnational systems of multinational regulation; systems that will have legal effect whether or not this is law as classically understood. These cases continue an effective process of operationalising soft law to produce the effects of hard law beyond the state, without directly challenging state authority.<sup>288</sup> The OECD system is progressing through this form of institutionalising quasi-judicial organs in

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<sup>284</sup> Larry Catá Backer, '(Un?)Intended Regulatory Consequences of the Financial Crisis: Multinational Corporations and Sovereign Wealth Funds', *Law at the End of the Day* (Blog, 5 October 2008) <<http://lcbackerblog.blogspot.com/2008/10/predictions-for-unintended-regulatory.html>>.

<sup>285</sup> OECD, 'OECD's Gurría Welcomes G7', above n 279:

The mandate from finance ministers is based on a proposal for a 'global standard' of principles by Italian Economy and Finance Minister Giulio Tremonti. As the initial building blocks for the core principles, Mr Tremonti pointed to instruments, signed by OECD governments and by a number of non-member countries, covering bribery, corporate governance, responsible business conduct, money laundering and taxes.

<sup>286</sup> See, eg, Schuler, above n 49, 1776, noting the wide differences in the activities of NCPs.

<sup>287</sup> OECD, 'OECD's Gurría Welcomes G7', above n 279. Gurría said: 'We have to review some of the instruments in the light of the crisis. How can we increase their compatibility and coherence? What needs to be improved for more stringent implementation? How can we establish a strong unified monitoring mechanism?'. For a general discussion of proposals for modifying the substance and procedures under the *MNE Guidelines*, see, eg, Černič, above n 49, 96–8.

<sup>288</sup> Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783, 789, described this process in the context of the realisation of international soft law frameworks of human rights:

Although the six treaty bodies in existence today are not judicial institutions, they have had to interpret and apply their respective conventions in reviewing and commenting on the periodic reports the states parties must submit to them, and in dealing with the individual complaints that some treaty bodies are authorized to receive. This practice has produced a substantial body of international human rights law. While one can debate the question of the nature of this law and whether or not it is law at all, the fact remains that the normative findings of the treaty bodies have legal significance, as evidenced by references to them in international and domestic judicial decisions.

parallel with other soft law operationalising endeavours, principally those under the umbrella of the *UN Global Compact*.<sup>289</sup>

RAID applauded the *DAS Air* case for its transnational elements.<sup>290</sup> But that case, along with *Afrimex*, will have significantly broader and deeper implications. This approach will change in favour of more direct regulation. In the past, the political sector deferred to the economic and social sectors because of a market-based ideology that restricted political power to its territorial limits and insisted on global regimes of lightly-fettered, free movement of capital.<sup>291</sup> No longer. Whether it comes in the form of harmonised transnational standards to be implemented by national governments or by the adoption of a new international convention for that purpose, it is clear that attempts will be made to move from voluntary to more coercive legal regimes. Indeed, for some elements of civil society, that day is already here.<sup>292</sup>

In the process, more than a regulatory framework for the governance of multinational enterprises will be affected. As *Afrimex* and *DAS Air* demonstrate, all of the fundamentals of national corporate law — from piercing the corporate veil to notions of enterprise liability to that great issue of the direct relationship between international law and private economic actors (without the shield of the state standing between entity and obligation) — will be part of the regulatory reform conversation. In the process, state corporate law will likely be internationalised in the way in which, in federal states like the US, it has slowly been moving from states to the national government as a consequence of regulatory responses to crisis.<sup>293</sup> Yet neither state nor international public institution will be able to effectively impose a singular system of control derived exclusively from positive law. Consequently, the further elaboration of an *MNE Guidelines* governance framework, or its institutionalisation beyond the OECD structure, will not necessarily render the OECD and its behavioural modification governance project obsolete. Rather, the intensification of this movement toward

<sup>289</sup> See Ruggie, *Protect, Respect and Remedy*, above n 33, 1, presenting ‘a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors’.

<sup>290</sup> Patricia Feeney, RAID’s Executive Director, said:

This is a major breakthrough and sets an important precedent. ... For the first time a foreign company has been held to account by its own government for its part in fueling a war that has cost the lives of an estimated 5.4 million people — the highest civilian death toll since World War II.

As quoted in ‘British NCP Finds DAS Air Breached Guidelines’, *OECD Watch* (21 July 2008) <<http://oecdwatch.org/news-en/government-condemns-british-aviation-company-for-fueling-congo2019s-war/>>.

<sup>291</sup> See Backer, ‘Multinational Corporations, Transnational Law’, above n 2.

<sup>292</sup> For the suggestion that the *MNE Guidelines* ‘have entered the sphere of application of Customary law’, see Yann Queinnec, *The OECD Guidelines for Multinational Enterprises: An Evolving Legal Status* (Association Sherpa Report, June 2007) 8, who notes, that the *MNE Guidelines* ‘restate or else are the extension of heterogeneous existing fundamental notions of international law, relating to customary law, general legal principles or practice’. The two cases considered here are good evidence of the value of this insight. They also suggest that this heterogeneous collection is being formed into its own internally consistent set of rules for governing the global community of multinational corporations and their related entities — precisely the objective of the *UN Norms*, now realised through the device of ostensibly non-binding regulatory regimes.

<sup>293</sup> See Larry Catá Backer, ‘The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer and Accountant Behavior’ (2002) 76 *St John’s Law Review* 897.

governance ought to place the OECD project at the centre of future developments in the regulation of multinational corporations. Harm Schepel recognised this phenomenon when he wrote that: ‘Standards bodies link the global marketplace to national politics, link scientific knowledge to industrial practice, and link social custom to law. They should at least be taken seriously as sites of modern governance’.<sup>294</sup>

The decisions in *Afrimex* and *DAS Air* suggest the continued importance of the OECD’s behaviour control projects in global efforts to regulate corporate conduct. Nearly two decades ago, Hans Baade suggested that voluntary codes, like the *MNE Guidelines*, are not instant international law, but they are capable of rising to that level through state practice. This is because the voluntary nature of the framework does not guarantee codes will be enforced or that their substantive content will be transformed into domestic law and, in any case, such codes acquire ‘legal effects as agreed-on data and criteria of international public policy and legal terminology’.<sup>295</sup> The decisions of *Afrimex* and *DAS Air* evidence one of the ways in which the international community might be moving from insight to application.

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<sup>294</sup> Schepel, above n 172, 35.

<sup>295</sup> Hans Baade, ‘The Legal Effects of Codes of Conduct for MNEs’ in Arghyrios Fatouros, *Transnational Corporations: The International Legal Framework* (1994) 212, 240.

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