Silk Road Report

OECD Guidelines on Business & Human Rights

December 2016

Justice For Iran
عدالت برای ایران

Silk Road Report

OECD Guidelines on Business & Human Rights

Justice for Iran

December 2016

Email: info@justiceforiran.org

Website: www.justiceforiran.org

Copyright © Justice for Iran 2016

Reproduction of any or all parts of this document is permissible only with proper citation.

Table of Contents

ABOUT THE SILK ROAD PROJECT **3**

ABOUT THE REPORT **4**

I. OECD INSTRUMENTS **5**

II. DUE DILIGENCE IN THE OECD GUIDELINES **6**

III. OECD COMPLAINT PROCEDURE **8**

IV. CASE STUDIES **11**

About Silk Road Project

The Silk Road was an ancient network of trade routes that were for centuries central to cultural interaction through regions of the Asian continent connecting the East and West, from China to the Mediterranean Sea. Trade on the Silk Road played a significant role in the development of the civilizations of China, the Subcontinent, Persia, Europe, the Horn of Africa and Arabia, opening long-distance political and economic relations between the civilizations.

The Silk Road project aims to promote accountability and protect human rights in the context of Iran's rapid return to the world markets after the 2015 Nuclear Deal.[1] Through publishing reports on business and human rights in Iran, this project intends to increase awareness among advocates of human rights, particularly lawyers and civil society activists, and accountability in business and corporate relations. It also aims to hold accountable corporates which are involved or complicit in human right violations, using legal and other available mechanisms.

[1] The Joint Comprehensive Plan of Action (JCPOA) known commonly as the Iran deal or Iran nuclear deal, is an international agreement on the nuclear program of Iran reached in Vienna on 14 July 2015 between Iran, the P5+1 (the five permanent members of the United Nations Security Council—China, France, Russia, United Kingdom, United States—plus Germany), and the European Union. Under the agreement, Iran will receive relief from U.S., European Union, and United Nations Security Council nuclear-related economic sanctions.

About the Report

This is our second report from the Silk Road Report series which aim to shed light on the underlying concepts and instruments as well as mechanisms that can be applied to specific cases of recent contracts and agreements between multinational corporations and Iranian companies, some of which are closely linked to or partially owned by human rights violators. In this report, we will briefly explore OECD guidelines in relation to business and human rights. In particular, we will focus on the OECD Guidelines for Multinational Enterprises and explain the principles reflected therein, placing greater emphasis on complicity and due diligence. We will also explain the OECD Complaint Procedure through a number of case studies.

I. OECD Instruments

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organisation founded in 1960 to stimulate economic progress and world trade. The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The adhering governments are those of all OECD members, as well as 11 Non-OECD adhering countries: Argentina, Brazil, Colombia, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

OECD has produced a number of guidelines in the field of business and human rights. The OECD Recommendations on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (Common Approaches)[2] require its members and adhering states to take into account the relevant adverse project-related human rights impacts. It instructs members to 'encourage protection and respect for human rights, particularly in situations where the potential impacts from projects or existing operations pose risks to human rights.' This applies to all types of officially supported export credits for exports of capital goods and/or services, except exports of military equipment or agricultural commodities, with a repayment term of two years or more.

[2] Revised text for the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, as adopted by the OECD Council on Wednesday 6 April 2016, can be accessed here: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282016%293&doclanguage=en>

OECD Guidelines for Multinational Enterprises (as last revised in 2011)[3] are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsibility.

The OECD Guidelines set out principles and standards for responsible business conduct. They are recommendations from governments to multinational enterprises operating in or from countries that are signatory to the Declaration on International Investment and Multinational Enterprises including the Guidelines. They provide guidance for responsible business conduct in areas such as: labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights. While they are not legally binding, OECD and signatory governments are required to ensure that they are implemented and observed. What distinguishes the OECD Guidelines from other corporate responsibility instruments[4] and mechanisms is the fact that they are government-backed standards and that they have a dispute resolution mechanism for resolving conflicts regarding alleged corporate misconduct.

II. Due Diligence in the OECD Guidelines

In our Autumn Report, we examined the concept of due diligence in the UN Guiding Principles. The OECD Guidelines, too, refer to due diligence on several occasions, as shown below:

[3] Revised text of OECD Guidelines for Multinational Enterprises (as last revised in 2011) can be accessed here: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
[4] For example, the UN Sustainable Development Goals: http://www.un.org/sustainabledevelopment/sustainable-development-goals/

Enterprises should conduct **risk-based due diligence** for their own operations – as well as throughout their **supply chains** and **other business relationships** – to identify, prevent and mitigate actual and potential impacts for matters covered by the Guidelines. This provision applies to all enterprises in all situations, though it should be noted that the extent and depth of due diligence may differ from one situation to the next.
Enterprises should **avoid causing or contributing to adverse impacts**[5] throughout the enterprise or in the supply chain or other business relationships. Enterprises should **address impacts when they occur** and seek to **prevent or mitigate adverse impacts** even where the enterprise itself has not contributed to the impact.
Enterprises are encouraged to **communicate information on their internal audit, risk management and legal compliance systems**. Because due diligence is an integral part of risk management, enterprises should disclose due diligence processes and findings.
Enterprises should **avoid causing or contributing to negative human rights impacts**. Even if they do not contribute to those impacts, enterprises should seek to prevent or mitigate any adverse impacts that they are linked to through their supply chains or other business relationships.
Enterprises should conduct **human rights due diligence.**
Enterprises should **mitigate the foreseeable environmental, health and safety-related impacts** associated with their processes, goods and services over their full life cycle.

Two points are worth noting here: Firstly, in the minerals sector, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas is the international standard for companies along the whole

[5] For a detailed discussion on adverse impacts of businesses on human rights see: INEF, 'Assessing Business-Related Impacts on Human Rights. Indicators and Benchmarks in Standards and Practice, INEF-Report 110', 2016; available at: http://inef.uni-due.de/cms/index.php?article_id=4&clang=1&pub=1735

supply chain. Secondly, EU and national laws mandate due diligence in specific sectors, such as the EU Anti-Money Laundering Directive and the EU Timber Regulation. For example, the EU Anti-Money Laundering Directive expects Member States to ensure that entities take "appropriate" steps to identify and assess money laundering and terrorist financing risks, taking into account risk factors. Those steps— and entities' risk management and mitigation policies, controls and procedures—are expected to be "proportionate to the nature and size" of the entity.

III. OECD Complaint Procedure

The OECD Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.

The 'Specific Instance' procedure – as the Guidelines' complaint process is officially called – is focused on resolving disputes – primarily through mediation and conciliation, but also through other means – and can be used by anyone who can demonstrate an 'interest' (broadly defined) in the alleged violation. NGOs from around the world have used the complaint process to address adverse social and environmental impacts caused by corporate misconduct. NGOs have also used the complaint process to raise awareness about the fact that enterprises are expected to uphold internationally recognised standards, contribute to sustainable development and, at a very minimum, 'do no harm' wherever they operate. OECD Watch has produced numerous publications in this field and maintains an online database of all

Guidelines cases filed by NGOs which are extremely helpful for other NGOs and activists.

Three phases of the complaint process [6]	
Phase 1 **(Initial Assessment)**	It starts when a complaint is submitted to an NCP. At this stage the NCP must conduct an initial assessment to determine if the case merits further examination.
Phase 2 **(Mediation)**	It starts when the NCP decides the case merits further examination. At this stage the NCP will try to bring the complainants and the company together to resolve the case through a process focused on mediation and conciliation.
Phase 3 **(Final Statement)**	It involves the NCP issuing a final statement about the complaint and mediation process. It should outline the alleged breaches and how the NCP dealt with the case. Final statements may include recommendations on the implementation of the Guidelines, as well as the NCP's determination as to whether a breach of the Guidelines has occurred.

It must be noted that if mediation fails, NCPs can issue a statement which will be publicly available. This can then be used to put pressure on the company. However, even if a desirable and successful outcome may be realistically difficult to achieve, the complaint process can still have strategic benefits. The complaint can help raise public awareness of the issue and consequently, put pressure on the company to change its behaviour. Additionally, the complaint process can alert government officials to the alleged violations. Increasingly, investors and financial institutions monitor the social and environmental performance of the companies in which they invest. An OECD Guidelines case may result in a decision to divest a company if it is unwilling to change irresponsible behaviour and is thus putting the financial

[6] Source: OECD Watch, Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises, available at: <https://www.oecdwatch.org/publications-en/Publication_3962>.

institution at risk of being linked to abuses through their investments.

It is also worth mentioning that in terms of transparency and confidentiality three different stages should be distinguished:

> (a) At the time of filing and during the initial assessment: The general rule for this stage is transparency. It is permissible for complainants to publicly announce the filing of the complaint and to communicate about the content of the complaint while the NCP is conducting the initial assessment. Some NCPs make the outcome of the initial assessment public on their website.
>
> (b) While the case is pending: During this phase the general rule is transparency of process, but confidentiality of content. Complainants therefore should not publicly disclose information, correspondence, documentation or opinions learned or exchanged during the process. It is acceptable for complainants to communicate publicly about purely procedural aspects in complaint processes, such as whether or not the company responds to the allegations; whether meetings between the parties are being organised or have taken place; and if mediation has begun or ended.
>
> (c) After the case has been concluded: The general rule for this phase is transparency. At the conclusion of a case, the Procedural Guidance instructs NCPs to make the results of the process available in a public report or statement. Complainants are free to communicate about the outcome and process of the case, bearing in mind the need to

respect the confidentiality of sensitive information exchanged during the process.[7]

Two further important points are worth noting here. First, NCPs should inform other government agencies of their statements and reports when they are known to be relevant to a specific agency's policies and programmes. Second, in the case of a multinational company, the OECD complaint can be submitted to more than one NCP. For instance, in the case of POSCO, the complaint was filed in South Korea, Norway, and The Netherlands.

IV. Case Studies

Case Study: Failing To Prevent Human Rights Abuses
In 2012 a complaint was filed against POSCO for its failure to seek to prevent human rights abuses related to its proposed mine and steel plant in Odisha, India. Complainants also called on Dutch and Norwegian pension funds to seek to prevent abuses directly linked to their operations through their investment in POSCO. The Dutch NCP issued a statement confirming that the Guidelines are applicable to financial institutions and to investors, including minority shareholders. After a series of meetings between the Dutch pension fund ABP and the Dutch complainants an agreement was reached on the steps to be taken by the pension fund to exercise its leverage over POSCO to ensure operations are in line with international standards. Further agreement was reached on a terms of reference for a local independent review and assessment mission.[8]

[7] For further information see: OECD Watch, Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises, available at: <https://www.oecdwatch.org/publications-en/Publication_3962>.
[8] See a detailed analysis of the case here: https://www.academia.edu/12913545/POSCO_s_Odisha_project_OECD_National_Contact_Point_complaints_and_a_decade_of_resistance

Case Study: Failing To Conduct Human Rights Due Diligence

A June 2011 complaint to the Dutch NCP called on Nidera to implement a company-wide human rights policy that includes due diligence procedures consistent with the UN's "Protect, Respect and Remedy" Framework. The complaint was filed by NGOs following high-profile government investigations that exposed the company's abusive treatment of temporary workers in its corn detasseling operations in Argentina. After a constructive dialogue, Nidera strengthened its human rights policy, formalised due diligence procedures for temporary rural workers and allowed the NGOs to monitor its Argentine corn seed operations through field visits.[9]

Case Study: Failing To Stop The Use Of Child Labourers

In 2010, seven cotton dealers from France, Germany, Switzerland and the UK were accused of knowingly profiting from forced child labour in the Uzbek cotton industry. Although the efficiency of the procedures conducted by the NCPs differed fundamentally, cases were concluded with joint agreements / final statements whereby the companies acknowledged responsibility for their supply chains and promised to take steps to improve the human rights situation in Uzbekistan.

While Otto Stadtlander maintained that it does not receive cotton directly from Uzbek sellers, the company still agreed in discussions led by the German NCP to take steps to avoid forced child labour and to report back after one year. ECOM Agroindustrial agreed in the Swiss NCP-led discussions to allow the European Centre for Constitutional and Human Rights (ECCHR) to regularly evaluate steps taken by the company. Louis Dreyfus agreed to further dialogue with ECCHR if consultations between the cotton traders and the Uzbek government fail to produce results. The ICT Cotton and Cargill Cotton cases handled by the UK NCP included an agreement to a follow-up after one year to evaluate their progress. The French NCP, which handled the case against Devcot, S.A., could not establish if Devcot had breached the Guidelines but held trade in goods produced from forced child labour to be a flagrant violation of the Guidelines.

Although the complainants note the commitment of the cotton traders to end

[9] See the final statement by the Dutch NCP here:
http://www.oecd.org/investment/mne/Netherlands_final_statement_nidera_03-02-2012.pdf

forced labour in the Uzbek cotton supply industry decreased after the complaints had been concluded, the complaints have triggered positive responses from a number of investment banks, which now monitor the Uzbek forced labour situation with updates from the complaints.[10]

Case Study: DAS Air and Afrimex in DRC

Two important decisions taken by the UK NCP relating to allegations against companies operating in the Democratic Republic of the Congo (DRC).

In July 2008, the UK NCP found DAS Air, a UK-based air cargo company, in breach of the human rights and supply chain provisions of the Guidelines for its part in transporting minerals from rebel-held areas of the eastern DRC. Rights & Accountability in Development, which had filed the complaint, welcomed the NCP's decision as a major breakthrough. This was the first time a British company had been found to have breached the Guidelines for its conduct during the Congolese conflict.[11]

A month later, in August 2009, the UK NCP, in response to a complaint by Global Witness, concluded that Afrimex, a minerals trading company, had also contributed to fuelling conflict in the DRC, and that it failed to respect human rights and take adequate steps towards abolishing child and forced labour in its supply chain.[12]

These cases have been cited as setting an important precedent. According to British NGOs and the Trades Union Congress (TUC), the DAS Air and Afrimex decisions, which emphasize the responsibilities of companies involved in trade and services in conflict zones, “have demolished the artificial barriers ("supply chain" and "investment nexus") that OECD governments had erected to try to shield their companies from scrutiny and censure.”

[10] See the report of The European Center for Constitutional and Human Rights ‘Forced Labour of Children and Adults in Uzbekistan’: https://business-humanrights.org/sites/default/files/media/documents/130507_oecd_complaints_evaluation_en.pdf

[11] http://www.oecdwatch.org/news-en/government-condemns-british-aviation-company-for-fueling-congo2019s-war

[12] http://www.oecdwatch.org/cases/Case_114

Case Study: Involvement In Building And Maintenance Of Guantanamo Bay Incarceration Facilities

In a 2005 complaint filed with Norway NCP, the complainant, ForUM, alleged that Aker Kværner ASA, through its wholly owned subsidiary Kværner Process Services Inc. (KPSI), had breached the Guidelines' human rights provision at Guantanamo Bay, Cuba.

Since 2001, KPSI's activities were expanded to include the building and maintenance of facilities for the incarceration of captives taken during military operations in, among other places, Afghanistan and Cuba. The complainants contend that Aker Kværner and KPSI were contributing to a prison system that abuses international law and core human rights.

The NCP met jointly with the complainants and company in September and October 2005 and issued a statement the following November reprimanding the company and noting, "the activities that the company has carried out can be said, at least partly, to have affected the inmates of the prison".

The NCP clarified that this complaint did not raise the question of whether Aker Kværner had directly violated human rights laws, as "human rights conventions apply to states only, and companies cannot therefore be held responsible for violations of human rights." The NCP added, however, that companies can, through their own actions or omissions, be complicit in or profit from violations of human rights by states (OECD Guidelines, Chapter II, Recommendation No. 2). The NCP thus considered whether the company had failed to "respect the human rights of those affected by (its) activities consistent with the host government's international obligations and commitments."

The NCP examined a series of international reports expressing serious concern about the operation of the detention facilities at Guantanamo Bay. The NCP recognized that such criticism was directed at the detention camp and not the Marine base, but found that Aker Kværner and its subsidiary KPSI had occasionally carried out maintenance work on shared operational and supply functions both the based and the prison. Thus, since the operation of the prison depends on the maintenance of joint infrastructure (the type of work carried out by KPSI), the NCP concluded that KPSI's activities "at least in part can be considered to have affected the inmates."

The NCP acknowledged that the nature and extent of Aker Kværner's activities were unclear, because the company refused to provide specific information about its activities at Guantanamo despite the NCP's repeated requests. The NCP observed that Aker Kværner could have provided extensive documentation without compromising its confidentiality obligations towards US authorities. The NCP added that Aker Kværner had not submitted documentation of the company's internal ethical assessments in relation to its activities at Guantanamo Bay, including any board discussions of these issues. This led the NCP to conclude that the company had not drawn up ethical guidelines for its activities. Moreover, Aker Kværner did not use the Guidelines as a basis for its assessments.

The NCP emphasized the importance of continuous assessments by Norwegian companies of their activities in relation to human rights in general, adding that the provision of goods or services in situations like Guantanamo Bay require "particular vigilance." The NCP further concluded that Aker Kværner should have undertaken a thorough and documented assessment of the ethical issues in connection with its tender for the renewal of the contract in 2005. The NCP therefore urged the company to draw up ethical guidelines and to apply them in all countries in which it operates in order to come in compliance with Chapter II, Recommendation No. 2.

Aker Kværner has ceased its operations at Guantanamo Bay. The official reason given was the company lost its contract with the US Department of Defence.[13]

[13] http://www.oecdwatch.org/cases/Case_81; http://www.accessfacility.org/oecd-ncp-norway-forum-environment-and-development-vs-aker-kv%C3%A6rner-asa

About The Silk Road Project

The Silk Road was an ancient network of trade routes that were for centuries central to cultural interaction through regions of the Asian continent connecting the East and West, from China to the Mediterranean Sea. Trade on the Silk Road played a significant role in the development of the civilizations of China, the Subcontinent, Persia, Europe, the Horn of Africa and Arabia, opening long-distance political and economic relations between the civilizations.

The Silk Road project aims to promote accountability and protect human rights in the context of Iran's rapid return to the world markets after the 2015 Nuclear Deal.1 Through publishing reports on business and human rights in Iran, this project intends to increase awareness among advocates of human rights, particularly lawyers and civil society activists, and accountability in business and corporate relations. It also aims to hold accountable corporates which are involved or complicit in human right violations, using legal and other available mechanisms.

Justice for Iran
April 2017
Email: info@justiceforiran.org
Website: www.justiceforiran.org

Copyright © Justice for Iran 2017