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Human Rights Risks for Mining and Manufacturing: Lessons from 10 Years of the OECD Guidelines for Multinational Enterprises, Part II

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I. Introduction

In 2011, following the adoption of the United Nations Guiding Principles, the OECD Guidelines for Multinational Enterprises (the “Guidelines”)—the only existing intergovernmental guidance to businesses—introduced a new chapter on Human Rights. In December 2022, we released a first-of-its-kind report on the Guidelines, focusing in particular on complaints alleging human rights violations under Chapter IV. The report (Analysis of OECD Guidelines: Ch. IV Human Rights Cases; or “Analysis”), including a summary of the Guidelines, is available [here](#).

Since 2011, more human rights complaints under the Guidelines have been filed against companies in the manufacturing and mining sectors than any other sectors.

In this Part II of a series of articles (see previous article [here](#)), we discuss the trends we identified from the human rights cases in the manufacturing and mining sectors brought under Chapter IV of the OECD Guidelines, drawing on data we gathered in preparing our Analysis. In brief, the data reveals that these sectors are commonly subject to complaints. In subsequent articles, we will address the increased risks that arise from recently proposed changes to the Guidelines and suggest actions that companies may consider to mitigate potential impacts from those amendments, as well as increasingly abundant national and international regulations.

On February 10, 2023, the OECD closed its most recent public consultation on proposed amendments to the Guidelines. The changes will be the first revision to the Guidelines since 2011 when the human rights chapter was enacted. The changes in the 2023 OECD Guidelines Consultation Draft (the “Consultation Draft”) were based on a 2021-2022 stock-taking exercise and include updates to all sections of the Guidelines, including the enforcement mechanism of the Guidelines: the National Contact Point (“NCP”) system. The OECD plans to release its update to the Guidelines in June of this year.

Among the proposed changes to the Guidelines, some of the potentially most impactful to the manufacturing and mining sectors are apparent expansions of protections for organizations that monitor

and report on potentially-harmful business practices, as well as proposed extensions to multinational enterprises' duties of remediation. As the EU and U.S. work toward implementing human rights due diligence,¹ the OECD Guidelines provide civil society, businesses, and others with an alternative means of pursuing companies, and provide companies with a reference point for how such cases may be handled in other contexts.

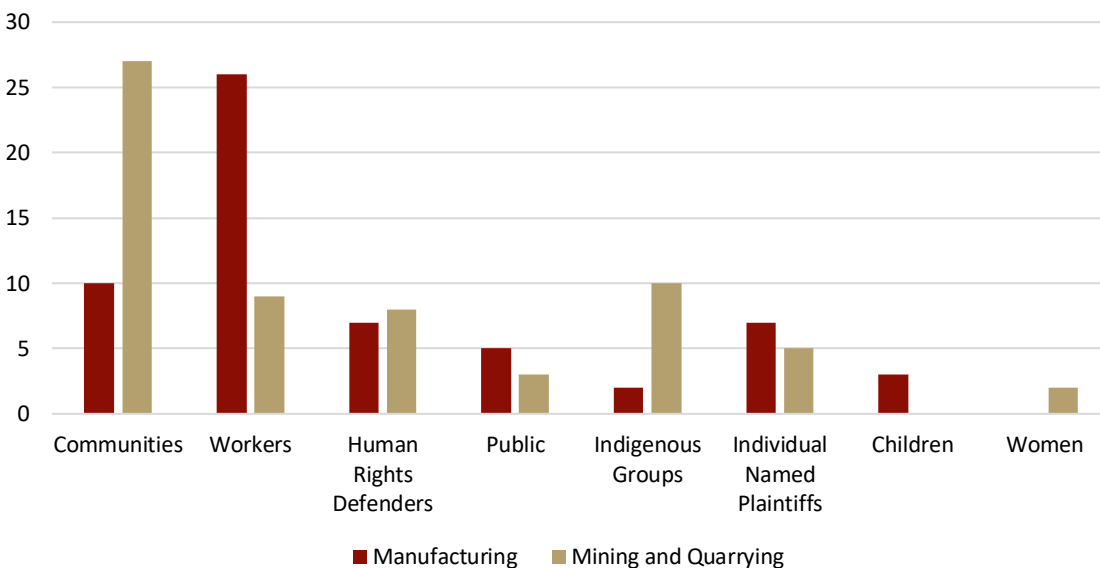
II. Manufacturing and Mining Are Already at High Risk

In our 2022 Analysis, we examined all of the complaints brought under Chapter IV—Human Rights—of the Guidelines since its inception. Of the 207 complaints, 44 (21.3%) implicated one or more entity in the “Manufacturing” sector and 40 (19.3%) implicated one or more entity in the “Mining and Quarrying” sector. These were the two sectors most frequently targeted by complainants, far ahead of the next most common sector: “Finance” (28 of 207, or 13.5% of cases). From our analysis, we highlight three key takeaways for the manufacturing and mining sectors:

A. *The Subjects and Location of Harm vary significantly between Manufacturing and Mining.*

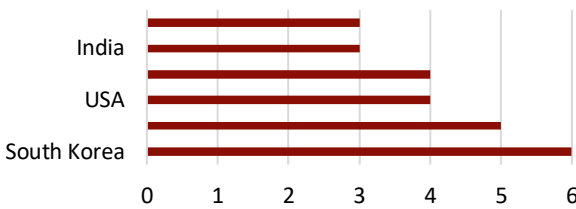
Most human rights complaints filed in manufacturing cases also included allegations under the Employment and Industrial Relations chapter of the Guidelines (55% of manufacturing complaints), with workers being the most commonly cited adversely affected parties (“affected people”). In human rights mining cases, the majority of complaints also included allegations arising under the Environment chapter of the Guidelines (63% of mining complaints), with communities most often cited as affected people. We note that Chapter VII of the Guidelines – Combating Bribery, Bribe Solicitation, and Extortion – was cited in just 8% of human rights mining complaints, which may be surprising given that the OECD Foreign Bribery Report found extractives (such as mining and quarry) to be among the sectors most likely to have defendants sanctioned for foreign bribery.²

Affected People in Human Rights-Related Complaints

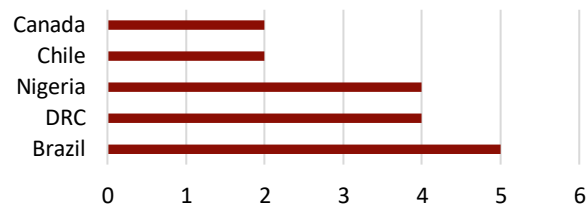


The top countries in which harm was alleged to have taken place (“Host Countries”) diverged for manufacturing and mining. For manufacturing, South Korea, Bangladesh, the United States, India, and Bahrain took the top spots. Of these, only the United States and South Korea are signatories to the OECD Guidelines, indicating that complainants are consistently leveraging the Guidelines against enterprises for their activities worldwide, and not only where the regulations might be expected to apply. For mining, Brazil, the Democratic Republic of the Congo, Nigeria, Chile, and Canada were the most common host countries. Unlike in manufacturing, the majority of these countries are signatories to the OECD Guidelines, with the exception of the DRC and Nigeria.

Most Common Host Countries - Manufacturing



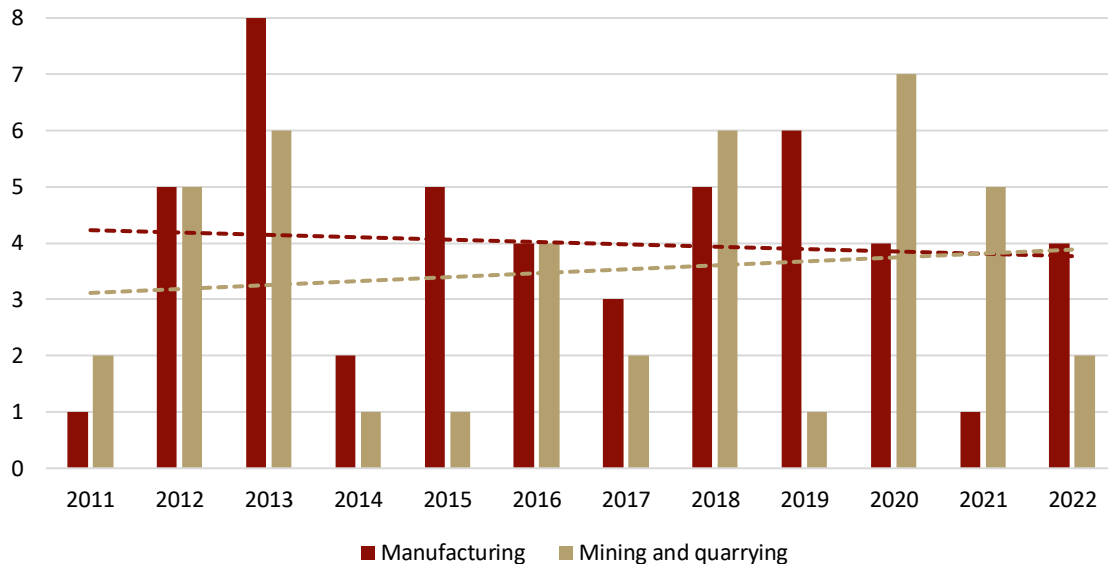
Most Common Host Countries - Mining and Quarrying



B. Proposed Amendments May Result in an Increased Number of Complaints.

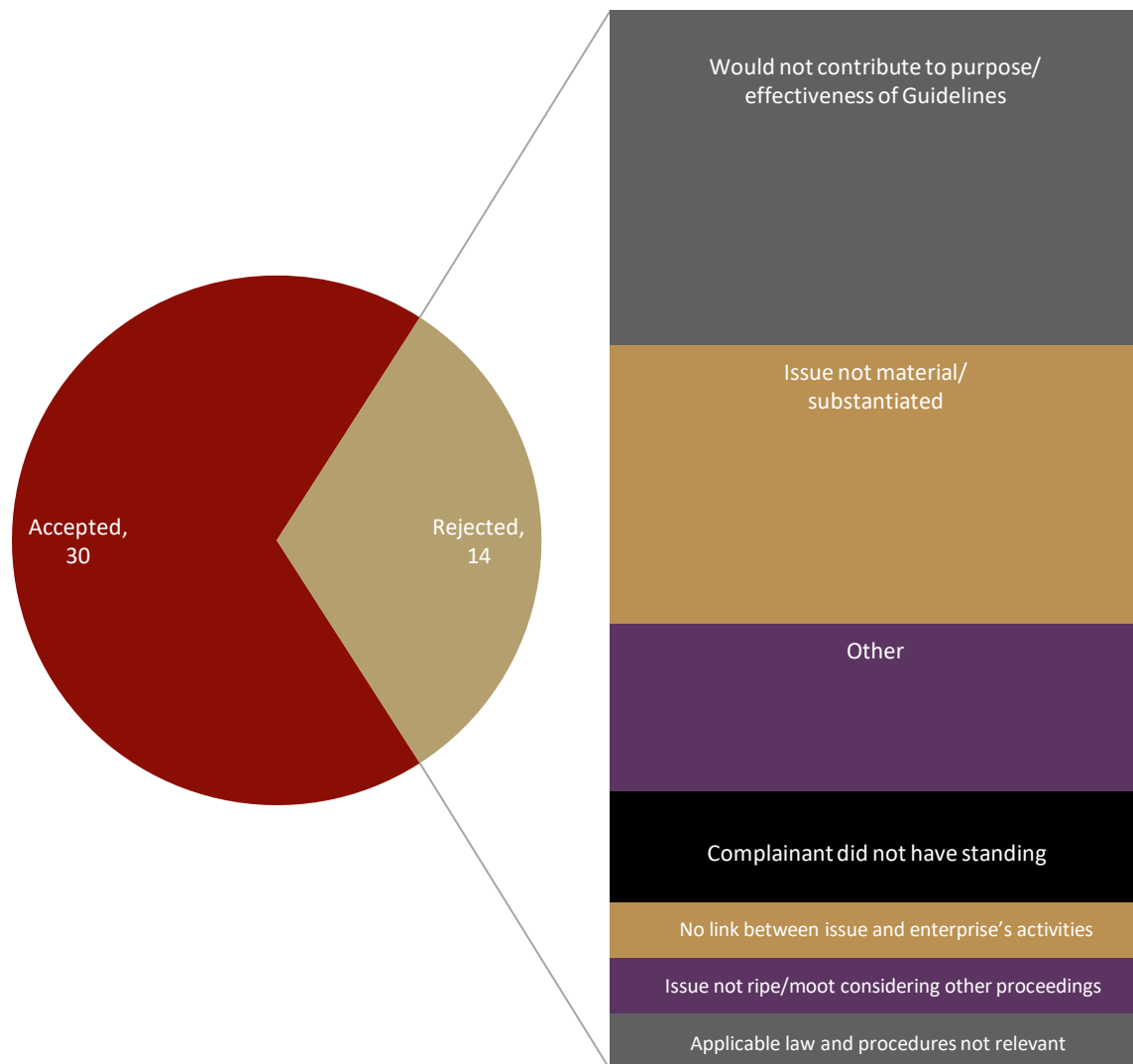
The number of human rights manufacturing complaints filed with an NCP trended downward between 2011 and 2022, peaking at eight complaints in 2013, and reaching a low of one complaint filed in 2021.³ The number of human rights mining complaints filed with an NCP trended upward between 2011 and 2022, peaking at seven complaints in 2020.

Complaints Filed by Year

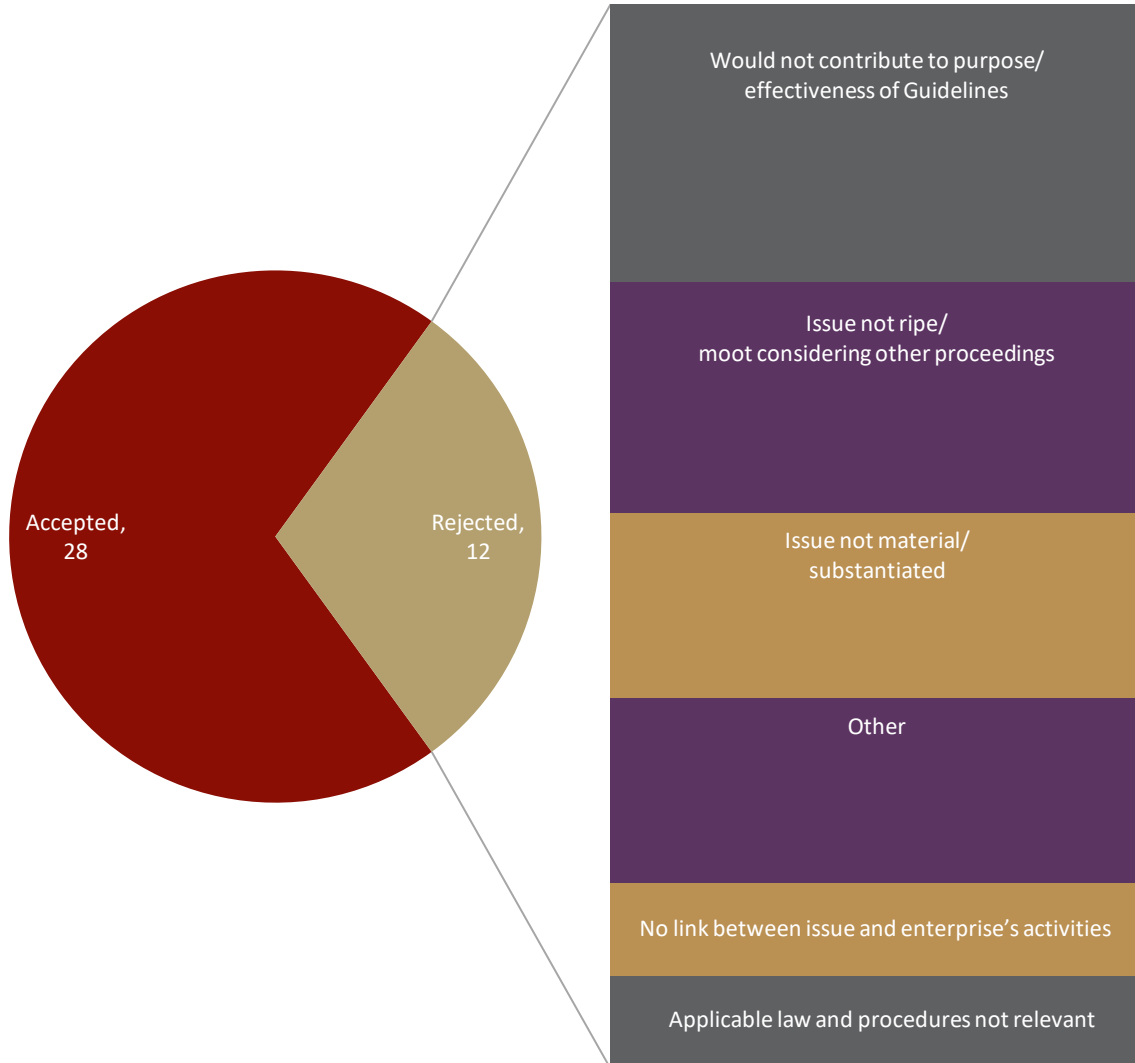


In both manufacturing and mining sector cases, approximately 30% of all complaints filed were rejected by the respective NCP, which aligns with the rate of rejection across all human rights complaints that we examined in our December 2022 report, where the average across all sectors stood at 33%. The most common reason for rejecting a complaint in the manufacturing and mining sectors was that consideration of the specific instance would not contribute to the purpose and effectiveness of the OECD Guidelines (six instances for each sector).⁴ As discussed below, proposed changes to the Environmental and the Employment and Industrial Relations chapters of the Guidelines stand to expand the scope of these sections, which may reduce the number of rejections for manufacturing and mining sector cases.

Complaints Accepted vs. Rejected - Manufacturing



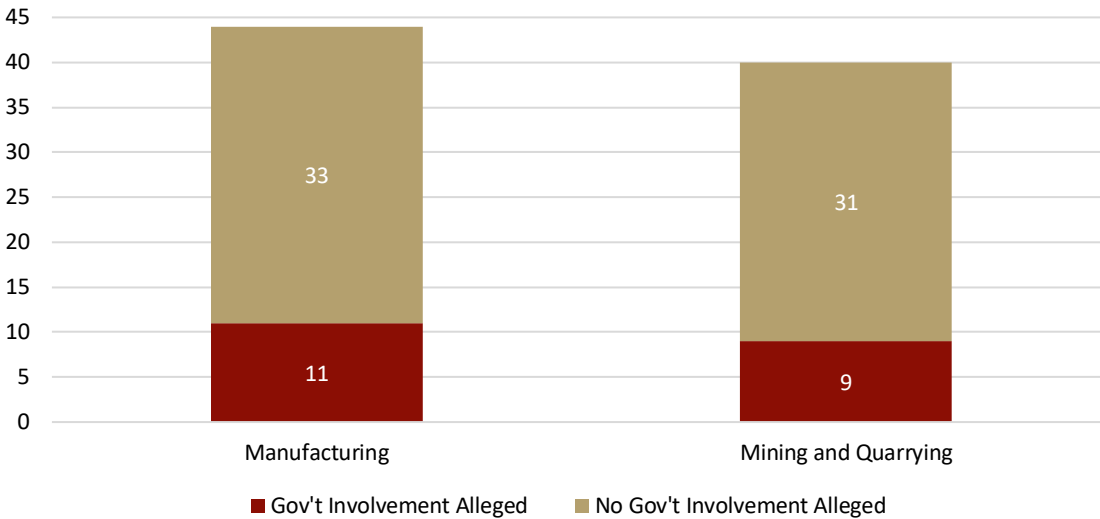
Complaints Accepted vs. Rejected - Mining



C. Government Approval does not Shield a Company from Enforcement.

Manufacturing and mining human rights complaints alleged government involvement in 25% and 23% of cases, respectively. Government involvement may comprise municipal, state, or federal governments. The particulars of government involvement vary from case to case, and, include, for example, improperly securing land rights from indigenous groups for development purposes, or colluding with an enterprise to subvert employee rights.

Complaints Alleging Government Involvement in Misconduct



III. Proposed Changes to the OECD Guidelines

The Consultation Draft includes proposed changes throughout, addressing everything from grammatical errors, to definitions, to substantive modifications. Below, based on the findings of our 2022 Analysis, as well as our professional expertise, we highlight a selection of impactful proposed changes with significant implications for actors in the manufacturing and mining sectors.

Chapter II, paragraph A.10 is a proposed new paragraph stating that an enterprise should: “Refrain from applying undue pressure or reprisals against any persons or groups who monitor or report practices of the enterprise or entities with which it has a business relationship that contravene the law, or are inconsistent with the Guidelines, or the enterprise’s policies, including, but not limited to, submitters of Specific Instances, members of the press, whistleblowers, and human rights defenders, and those working on environmental matters referred to as environmental defenders”.⁵ Given the prevalence of Employment and Industrial Relations allegations in manufacturing cases, and that workers were most commonly cited as affected parties, as well as the historically high amount of scrutiny on the manufacturing sector, this change could have significant impacts on business operations, and potentially expose manufacturing operations to increased scrutiny. Similarly, the explicit attention to “environmental defenders” could expose entities in the mining sector to enhanced scrutiny, given the prevalence of environmental allegations in those complaints.

Chapter II, paragraph A.14 is a proposed new paragraph stating that enterprises should: “Provide for or cooperate through legitimate processes in the remediation of adverse impacts where an enterprise has caused or contributed to these impacts”.⁶ As drafted, this paragraph appears to suggest that remediation is appropriate for any adverse impact, even where a respondent is not directly responsible for harm, which is consistent with the United Nations Guiding Principles on Business and Human Rights. In the case of mining and quarrying in particular, the change may require companies to allocate increased resources towards participation in efforts to remediate medium and long-term environmental or health impacts, among others, that may result from resource extraction.

Chapter V, paragraph 1.(a) and (b) in the current Guidelines states that enterprises should “[r]espect the right of workers employed by the multinational enterprise” to participate in trade unions. The Consultation Draft removes the phrase “employed by the multinational enterprise” and adds that enterprises should act “in line with due diligence expectations described in Chapter II [General Policies] and Chapter IV [Human Rights]”.⁷ This modification appears to expand the scope of these paragraphs to cover workers who are not employed by the respondent company. Given that a high percentage of human rights complaints for the manufacturing sector already include allegations under Chapter V, this more expansive language may require companies to invest further into their due diligence with respect to workers’ right to organize.

Chapter VI of the Guidelines, which addresses Environment, is where the majority of potential updates are made in the Consultation Draft. While a full assessment of the changes is beyond the scope of this article,⁸ one addition bears particular emphasis. *Paragraph 3* is a proposed new paragraph stating that enterprises should: “Assess and seek to address potential or actual adverse impacts to workers, communities, or consumers resulting from their environmental management activities, including in support of a just transition”.⁹ Given that many human rights mining cases included allegations under Chapter VI, this, and other proposed additions in Chapter VI, are likely to have significant implications for companies in the sector.

Procedures, I.C.4(c) in the Consultation Draft adds a new provision stating: “If allowed by applicable law and the NCP’s case-handling procedures, the NCP may, at its own discretion, set out its views in its final statement on whether the enterprise observed the Guidelines” even where a party is unwilling to participate.¹⁰ This change would mean that, although participation in the NCP process is voluntary, refusal to participate would not preclude an NCP from publishing an unfavorable decision. As such, corporate entities may face a greater incentive to participate in the process, securing the assistance of well-informed counsel, or risk complainants attempting to leverage uncontested negative decisions based on the OECD Guidelines in other fora.

IV. How to Prepare for Business and Human Rights Regulation and Dispute Settlement

As shown above, the manufacturing and mining sectors are already major targets of unconventional sources of liability, such as the OECD Guidelines. The proposed amendments to the Guidelines—among other developments—demonstrate the ongoing trend toward increasing the scope of regulation for multinational corporations, both at home and abroad. In our next article in this series, we will suggest how entities in these sectors may begin to prepare for these changes, and address obligations that are already taking effect.



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- ¹ See J. Drimmer, N. Bonucci, T. Giunta, R. Parras, "Don't be Afraid of Mandatory Human Rights Due Diligence in the EU ... It's Already Here," Paul Hastings (April 3, 2023): <https://www.paulhastings.com/insights/international-regulatory-enforcement/dont-be-afraid-of-mandatory-human-rights-due-diligence-in-the-eu-its-already>; J. Drimmer, S. Flicker, Q. Dang, A. Giumarelli, T. Hutchison, "New Emphasis on Human Rights and Human Rights Due Diligence in U.S. Export Controls," Paul Hastings (April 7, 2023): <https://www.paulhastings.com/insights/client-alerts/new-emphasis-on-human-rights-and-human-rights-due-diligence-in-u-s-export>.
 - ² OECD, "OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials", p. 22 (Dec. 2, 2014): <https://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.
 - ³ Note that our analysis focuses on cases filed between 2011 and 2021.
 - ⁴ NCPs may list more than one reason for rejecting a given complaint.
 - ⁵ OECD Centre for Responsible Business Conduct, "OECD Guidelines Consultation Draft", p. 10 (Jan. 13, 2023): <https://mneguidelines.oecd.org/consultation-draft-public-consultation-targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.pdf>.
 - ⁶ OECD Guidelines Consultation Draft, p. 11.
 - ⁷ OECD Guidelines Consultation Draft, p. 24.
 - ⁸ While we do not treat the proposed modifications to Chapter VI in full here, we note that they broadly provide increased guidance for companies, and in some respects expand the expectations levied upon enterprises.
 - ⁹ OECD Guidelines Consultation Draft, p. 29.
 - ¹⁰ OECD Guidelines Consultation Draft, p. 59.

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