Norm localization in action

A qualitative analysis of two specific instances filed at different National Contact Points

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Abbreviations

BIAC: Business and Industry Advisory Committee

BMF: Bruno Manser Fund

DRC: Democratic Republic of Congo

EU: European Union

FDI: Foreign Direct Investment

GDP: Gross Domestic Product

ILO: International Labour Organization

MNE: Multinational Enterprise

NCP: National Contact Point

NGO: Non-Governmental Organization

NTB: Non-Tariff Barriers

OECD: Organization for Economic Development and Cooperation

OTRI: Overall Trade Restrictiveness Index

P-A: Principal-Agent

RfR: Request for Review

TCS: Trade Commissioner Service

The Guidelines: the OECD Guidelines for Multinational Enterprises

TUAC: Trade Union Advisory Committee

WTO: World Trade Organization

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1 Introduction

1.1 Background

In 1976 the Organization for Economic Development and Cooperation (OECD) established its Guidelines for Multinational Enterprises ("the Guidelines"). These Guidelines were developed to protect individuals from corporate abuse. To this day, it is the most elaborate set of government-backed recommendations aimed at supporting responsible business conduct. While the guidelines consist of recommendations which are not legally binding on corporations,[1] they are binding on signatory governments. Thus far, 46 countries have adhered to the Guidelines: all 34 members of the OECD, and 12 non-members.[2]

Part of the requirements of adherents to the Guidelines is that they establish National Contact Points (NCPs). NCPs are tasked with "furthering the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines in specific instances".[3] NCPs are the agencies where those who feel their rights have been infringed upon by a corporation can file a complaint (a so-called 'specific instance'). After a specific instance is filed, the NCP conducts an initial assessment to evaluate if the complaint merits further consideration. This should be based on the six admissibility criteria established in the Guidelines' Procedural Guidance, namely on who files the complaint and why; if the alleged violation of the Guidelines is material and substantiated; if there seems to be a link between the activities of the company that is implicated and the alleged violation; whether there are other relevant laws and procedures that are applicable; how similar issues have been, or are being treated in other domestic or international settings; and whether the handling of the complaint would contribute to the purposes and effectiveness of the Guidelines. If the NCP finds that it does, it can offer its good offices to facilitate talks between the parties to help resolve the issues. It may result in an agreement between the parties on some or all the issues raised in a complaint, or it may result in no agreement at all. After this stage finishes and talks are over, the NCP issues a final statement in which it details the complaint, the steps taken and the result. NCPs are, however, non-judicial grievance mechanisms, which means that a company's participation in the process is voluntary. Furthermore, in cases where a final statement is made by the NCP, these are not legally binding. In fact, none of the Guidelines impose mandatory obligations upon corporations, they only do so on states. NCPs also have no possibilities to enforce outcomes (OECD Guidelines for

[1] As corporations are not subjects under international law

[2] These non-members are: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia, and Ukraine.

[3] https://mneguidelines.oecd.org/about/

Multinational Enterprises, 2011). They do have the possibility to include in their final statement, especially in cases where no agreement has been reached, a determination which indicates whether or not the company is in violation of the Guidelines, as well as a request for the application of consequences to companies that refused to participate in the process. These tools are, however, not regularly employed.

While governments have some degree of freedom in how exactly they set up their NCP, the OECD requires "functional equivalence" between the different NCPs. This means that NCPs all need to act in a comparable manner. The four core principles of visibility, accessibility, transparency and accountability form the basis of this functional equivalence. As long as these criteria are met, adhering countries are free to set up their NCPs in the way that they see fit. In practice, this means that there are significant differences between NCPs in terms of how they operate as well as how effective they are. The four core criteria are not simple dichotomous variables, but they are a matter of degree, and this has implications for the manner in which they are operationalized. As is often the case with international norms that have to be translated to the domestic realm, the ambiguity of the Guidelines has led to a reinterpretation of the norm. As Eimer, Lütz and Schüren (2016) argue, domestic actor constellations determine how international norms are put into practice on the national level, leading to NCPs that differ in the way they handle specific instances, as well as differences in outcome. As a result, the effectiveness of the Guidelines and its attached system of NCPs is widely debated (OECD Watch, 2018; Ruggie & Nelson, 2015; Cernic, 2008; Tully, 2001). It is "piecemeal and inconsistent" (Schuler, 2008), "NCPs are invisible or unresponsive to potential complainants" (Ruggie & Nelson, 2015), while others claim that "the update of the MNE Guidelines has demonstrated the effectiveness of soft law implementation of international norms through a multi-stakeholder approach" (Santner, 2011). Research by OECD Watch[4] on cases that were concluded in 2017 has shown that out of the 18 cases that were concluded in that year, only one of them (5%) resulted in a concrete improvement in the situation of the complainants, including in the form of monetary compensation. A total of five cases (27%) resulted in some form of remedy, such as an acknowledgement of wrongdoing or an agreement to improve corporate policies. In 73% of all cases concluded in 2017, there was no form of remedy whatsoever in the outcome of the case. For the period 2000-2015 the picture was even grimmer: only 14% of all cases concluded in that period resulted in some sort of remedy (OECD Watch, 2018).

There are, however, important differences in the performance of different NCPs . This is a problem that has been pointed out by OECD Watch for years and which they argue is mostly due to

[4] OECD Watch is a global network of NGOs that is dedicated to the furthering of sustainable business. It is one of the key stakeholders of the OECD in relation to the Guidelines.

different organizational structures and procedural guidance in relation to the handling of specific instances by NCPs (OECD Watch 2021a, 2021b). It is argued by OECD Watch that the failure of the NCPs to reach functional equivalence is due to the fact that the Guidelines do not, in fact, provide enough guidance for states to establish NCPs that function adequately (OECD Watch, 2021b). Norm localization is likely to be one of the reasons for this. However, what has not yet been researched in the context of the Guidelines, is what the underlying reasons are that determine the way the norm is implemented in specific cases. States make choices that shape the way a norm is interpreted, no matter the wording of the norm (or Guidelines). In this research an attempt is made to find out the exact reasons certain choices are made and how these choices lead to particular outcomes.

1.2 Research question and theoretical framework

The question thus is how it is possible that National Contact Points that, according to the Guidelines establishing them, should be functionally equivalent can result in such a radically different process and outcome. Therefore, in this thesis, the following research question will be answered:

What explains the differences in the processes and outcomes of the national contact points of the Netherlands and Canada?

This question is embedded in the theoretical debate about norm localization. Norm localization holds that international norms are reconstructed by domestic actors when they are implemented at the national level (Acharya, 2004). As of yet, not much is known about the level at which this reconstruction takes place (Eimer et al., 2016). In this research, the implementation of the Guidelines will therefore be analyzed at two different levels: that of the government and the bureaucrats. Two theoretical perspectives will be used to find an answer to this research question. Firstly, on the level of the government, an explanation for this difference in effectiveness may be found in the Neo-mercantilist literature. Neo-mercantilism suggests that “a nation will pursue economic policies that reflect domestic economic needs and external political ambitions without much concern for the effects of these policies on other countries or on the international economic system as a whole” (Gilpin, 1975). In short, a neo-mercantilist government will put its own economic interests above that of the larger community. While the Guidelines are meant to level the playing field, i.e. remove the competitive advantage that arises when choosing to do business with states that do not uphold the same standards in relation to corporate governance as the home state, the degree of freedom states have in the implementation of the Guidelines allows for government interventions that may nevertheless undermine them. Conversely, governments that are less neo-mercantilist may go even

further than strictly necessary, for example by conducting in-country fact-finding or by issuing determinations, if they find this to be in their interest.

On the level of the bureaucrats, the notion of bureaucratic entrepreneurship may explain the phenomenon at hand. Bureaucratic entrepreneurship holds that unelected bureaucrats may influence the development and implementation of public policies (Teske & Schneider, 1994). In light of the current research, this means that they can possibly play a significant role the manner in which a case is pursued – if at all, and the outcome of a case, thus explaining the difference between the process and outcome of cases. This role can go both ways and may be dependent on the structure of the respective NCP: an NCP that has greater independence from government may leave more room for entrepreneurial behavior than an NCP that is less independent and, as a result, cases dealt with by independent NCPs may be handled more innovatively, leading to different results. Teske and Schneider (1994) and Sørensen (2007) acknowledge the importance of the social context in the likelihood of entrepreneurial activity. This means that the ideas of bureaucratic entrepreneurship and neo-mercantilism may even impact each other: a neo-mercantilist state may establish a less independent NCP, which may hinder the possibilities for bureaucratic entrepreneurship. The possible influence the two perspectives may have on each other will therefore also be taken into account in the present research.

1.3 Method

These differences will be examined by examining two cases filed at different national contact points: first, the case of *former employees vs. Heineken*. This was the only case that was concluded in 2017 that had a positive outcome. It involves the unlawful dismissal of workers in a subsidiary of the brewery in the Democratic Republic of Congo, and resulted in a compensation for the workers of over 1 million dollars. Secondly, the case of *Bruno Manser Fund vs. Sakto Group* will be analyzed. This case had a radically different trajectory than the *Heineken* case, with the NCP issuing and then retracting both the initial assessment as well as the final statement several times, and the Canadian government intervening by issuing cease and desist letters to NGOs abroad that published about the case. Finally, the NCP rejected the case, but to this day, the conflict is far from over. The cases are selected based on the most-similar different outcome method of case selection. They are chosen because they were conducted in states that are similar in many respects, therefore one would expect that the cases would be handled in a similar manner. The processes and outcomes of these cases were, however, very different. Through process tracing, an attempt is made to discover whether neo-mercantilism and bureaucratic entrepreneurship are able to account for the differences in process and outcome.

1.4 Scientific and societal relevance

This research is scientifically relevant, as it will provide insight into the possible influence of neo-mercantilist policies on non-judicial grievance mechanisms aimed to protect individuals that would normally not fall under the protection of the respective state. It will show the role neo-mercantilist policies can have in such endeavors and may offer clues as to how multilateral instruments such as the OECD Guidelines can be designed to be more effective. Knowing the role bureaucratic entrepreneurs may have in influencing these policies will contribute to closing the knowledge gap that currently exists. Moreover, it will deepen knowledge on the theoretical debate about norm localization.

This is also societally particularly relevant, given the contemporary political climate where protectionist measures by states are on the rise and a trade war may be looming (BBC, 2018), and where working together for the "greater good" is increasingly under attack, as evidenced by Trump's threats to pull the US from NATO (Barnes & Cooper, 2019) and his reintroduction of the Mexico City policy (the "global gag rule"), banning foreign NGOs from receiving US aid if they provide any abortion services (Ford, 2018). Furthermore, knowing what does and does not work in the OECD's complaint mechanism is necessary, especially for local NGOs that lack resources and thus are helped by an efficient mechanism. This increases the chances of remedy for victims of corporate misconduct. Moreover, as the Guidelines may be updated in the coming year(s), the OECD and its stakeholders may benefit from the outcomes of this research.

1.5 Structure of the thesis

This thesis will be structured as follows: In chapter two, literature on norm localization, principal-agent theory, bureaucratic entrepreneurship and neo-mercantilism will be discussed. These are the theoretical constructs that will be used as tools to help explain the differences between NCPs. In the next chapter, the methods that will be used will be elaborated upon, constructs will be operationalized and hypotheses discussed. Chapter four will deal with the empirical reality. First, an overview of the case filed at the Dutch NCP will be given. This case will then be discussed based upon the relevant theories. The same process is then repeated for the case filed at the Canadian NCP. In chapter five, conclusions will be drawn and the research question will be answered, followed by a discussion on the research, its conclusions and limitations.

2 Theoretical framework

This section will elaborate on the theoretical insights that will be used to make sense of the empirical research that will be discussed in chapter four. First, norm localization will be discussed. Since international norms are rarely directly incorporated into domestic laws, it is worth seeing how and under what conditions this happens. Next, principal-agent (P-A) theory will be elaborated on. The two final theoretical perspectives that will be utilized – neo-mercantilism and bureauctratic entrepreneurship – will be discussed in relation to P-A and regarding their applicability to the cases.

2.1 Norm localization

The OECD Guidelines are one of many internationally established norms that have to be implemented on the national level. Generally, norms that are implemented domestically are not exact copies of the intended international norm. One of the characteristics of soft law instruments such as the Guidelines is that they deliberately make use of vague language that leave states room for maneuver in implementing the norms (Abbot & Snidal, 2000). Van Kersbergen and Verbeek (2007) argue that norms may be kept vague in terms of what behavior is considered appropriate in relation to the norm, because actors are more likely to adopt vague norms. If a norm is vague, it allows actors to stick to their own interpretation of it, consequently making it more difficult to establish what type of behavior constitutes a breach of the norm. Furthermore, if a norm is vague, consensus on it will be reached sooner, so as to maximize the number of actors agreeing to it.

The domestic application of an international norm happens through a process Acharya (2004) calls “norm localization”. The implementation of the norm is the result of contestation between the new international norm and the normative and social orders that were already in place locally. To what extent this process is successful depends on local beliefs and practices. Emphasis is placed on the role local actors have as agents for norm reconstitution. While these actors have several adaptive processes at their disposal to make an international norm more fitting for the local normative order, such as framing and grafting[5], norm localization goes further than merely the reinterpretation of a norm. In short, Acharya (2004) defines norm localization as “the active construction (through discourse, framing, grafting, and cultural selection) of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices”.

The exact level at which norm localization takes place is part of ongoing debate. Acharya (2004) found that credible local actors are fundamental in the prospects of norm localization:

[5] Grafting is a tactic used by norm entrepreneurs to embed a new norm in the existing framework by associating it with an already existing norm.

especially when a local actor is seen as an upholder of local values and identity and has sufficient discursive influence, norm localization seems more likely. Others argue that these so-called norm-entrepreneurs can also be found at the international level: Risse & Sikkink (1999) for instance argue that norm localization happens on the level of external stakeholders and that transnational advocacy networks are the driving force behind norm localization. However, as Aharoni (2014) states, nation-states still play an important role in norm localization, as they bear responsibility for the implementation of international norms, and they have the institutional capacity to do so.

Norm localization may result in different outcomes. Eimer et al. (2016) have identified four possible implementation outcomes of international norms at the domestic level, termed modes of localization. First, *Adoption* entails the implementation of the international norm in the domestic realm without any significant change to it. This is, however, a rare occurrence. Second, *Accentuation*, which means that a norm becomes reinterpreted, but in which case the spirit of the norm remains intact. Emphasis is placed on certain aspects of the norm to better fit the domestic environment. Third, *Addition*, meaning that aspects are added to the original international norm in its domestic implementation; and, fourth, *subversion* where the international norm is implemented in a manner contrary to the spirit of its original purpose. In this case, the new norm borders on non-compliance at the international level.

2.2 The principal-agent framework

This research is in essence about the effects of the principal-agent relationship on non-judicial grievance mechanisms. It explores how agents behave in this relationship, and how principals aim to constrain (or not) this behavior. Thatcher and Sweet (2002) state that the principal-agent theory is often used in research on delegation. Hawkins, Lake, Nielson and Tierney (2006) define delegation as "a conditional grant of authority from a *principal* to an *agent* that empowers the latter to act on behalf of the former". Other key components of the P-A relationship are that the actors in it are only defined by their relationship to the other, and that this relationship is limited in time and scope and can be ended by the principal (Ibid.)

Delegation is common practice in (international) politics. It makes sense, since without delegation it would be impossible to govern. Inherent to any principal-agent relationship, are so-called agency losses. These are costs that arise purely from the fact that a principal has to contract or supervise an agent, but also costs that arise from agents' engaging in undesired independent behavior (Hawkins et al., 2006). Kiewiet and McCubbins (1991, p.5) attribute agency losses to the fact that there almost always is an discrepancy between the interests of principals and agents.

Another the problem in the principal-agent relationship is that of information asymmetry. Waterman and Meier (1998) have described this problem by using the example of the physician and the patient: while we assume that both parties are rational utility-maximizers, their goals differ: the patient, who is the principal in this relationship, wants to be healthy but for as low cost as possible; but the physician – the agent in this scenario – wants to maximize his income. The information asymmetry exists because the physician knows more about the health of the patient than the patient himself does, and so may provide medical services that the patient in fact has no need for. This example also lays bare one of the reasons why principals delegate in the first place: the agent may have informational and expertise advantages over the principal (Waterman & Meier, 1998). Principals have a need to control their agents, bureaucratic or otherwise. They have multiple strategies to do so. Firstly, principals can design institutions in a manner that leaves agents with little room for maneuver, and incorporate certain structures that facilitate control. Second, they can monitor the actions of their agents, and third, they can apply sanctions or rewards to incentivize specific behavior from the agents (Waterman & Meier, 1998).

2.3 Bureaucratic entrepreneurship

As Müller (2011, p. 155) states: "no government can achieve its goals, limited as they may be, without many helping hands". Bureaucrats are fundamental in helping states reach their goals. If norms are purposely left vague to maximize the number of actors adopting it, and if a principal-agent relationship leaves room for agents to pursue their own interest, one might expect that bureaucrats are in an optimal position to become norm entrepreneurs. Reseach has shown that indeed some bureaucrats are able to push forward their own ideas: they become bureaucratic entrepreneurs. Teske and Schneider (1994) define bureaucratic entrepreneurs as "actors who help propel dynamic policy change in their community". They create or exploit opportunities for bureaucratic innovation.

There is ongoing debate about which factors lead to entrepreneurial activity, with a distinction being made between contextual influences and dispositional traits. Contextual accounts contend that certain characteristics of a position in a social structure influence entrepreneurial activities, independent of the characteristics of the person involved. Dispositional accounts, on the other hand, argue the opposite: personal traits of an individual lead to entrepreneurial behavior, no matter the context it is in (Sørensen, 2007). The difficulty with the distinction is, however, that the two are not easily separated: there may be certain dispositional traits that determine the type of context a person will choose to work in. Conversely, a company may be reluctant to hire an individual that has an inclination against following established procedures (Sørensen, 2007). Teske and

Schneider (1994) too acknowledge that different factors play a role in the emergence of entrepreneurial activity in bureaucrats. They argue that public sector bureaucrats usually pursue a combination of goals when engaging in entrepreneurial behavior: the advancement of their careers, higher salaries, more autonomy and greater prestige, but also a desire for public service, to achieve certain policy goals and to solve problems.

Bureaucratic entrepreneurs face opportunities and constraints (Teske & Schneider, 2004). Opportunities include the potential to develop technical expertise, to gain power and autonomy, and to use these traits when the opportunity arises. The importance of opportunity identification for entrepreneurial activity is acknowledged by Klein et al. (2010) and (Sørensen, 2007). Furthermore, Teske and Schneider (2004) found that bureaucratic entrepreneurs can improve their performance by building a strong team that is united by a strong sense of shared mission. Constraints, on the other hand, can be economic, political and financial. Financial constraints include the possibility for budget cuts, which may hamper the entrepreneur's ability to develop and implement policies. Political constraints consist of limits imposed by politicians and interest groups. Economic conditions may further limit the options of entrepreneurs (Teske & Schneider, 2004).

2.4 Neo-mercantilism

Neo-mercantilism has its roots in economics. It originates from eighteenth-century mercantilism, which was largely concerned with a trade and balance-of-payment surplus. Mercantilism was the dominant practical and theoretical framework in the period from the Middle Ages to the nineteenth century. According to Heckscher (1936), the most important characteristic of mercantilism at the time – a feature that was also a leading consideration in economic policy decisions – was protection. Protection in this sense did not only mean interference with foreign trade; it went much further than that and included a shift in the mindset of the man on the street. Later, it involved the spreading of mercantilist thought to less advanced states.

One of the most important features of Mercantilism at the time, was the importance of "a skillful politician' to achieve the desired results (Heckscher, 1936). The politician was such an important force in Mercantilist thought, because one of the basic assumptions of Mercantilism was the lack of a belief in the existence of a "pre-established harmony" (Ibid.). Pre-established harmony in this sense was derived from philosophical thought, and involved the idea that the existence of an economic free market would naturally lead to an ordered society. Since no such order exists in Mercantilist thought, the politician is allowed – and even expected to interfere, without much regard for ethical considerations.

The period of mercantilism was followed by a period of laissez-faire economics, in which state intervention was strongly opposed. Laissez-faire is one of the guiding principles of modern capitalism, and forms the basis of what later came to be known as (neo-) liberalism. It was a critique on mercantilism based on Adam Smith, who based his ideas on, among others, David Hume. They saw trade as positive-sum: everyone would benefit from trade, because an "invisible hand" will cause trade to be beneficial for society as a whole. This is also referred to as "enlightened self-interest" (Buzan, 1984). The (neo-) liberal system was dominant from the nineteenth century onwards, but recently states can be seen to move back to more protectionist measures. This protectionism differs in some ways from mercantilism, and is generally referred to as neo-mercantilism. According to neo-mercantilism, states will put their own interests above that of the larger international community. It predicts a shift from multilateral free trade to regional economic alliances that advance their interests in opposition to other nation states. International trade is again seen as a zero-sum game, and nationalism and protectionism[6] are the strategic goals to be pursued, as opposed to the sustainment of the liberal international order. The balance of trade and the balance of power are increasingly seen as analogous. The exact policies of neo-mercantilism may take different forms: "the desire for a balance-of-payments surplus; the export of unemployment, inflation, or both; the imposition of import and/or export controls; the expansion of world market shares; and the stimulation of advanced technology" (Giplin, 1975). In an article describing the rise of neo-mercantilist policies in Brazil after the financial crisis, Kröger (2012) describes neo-mercantilist policies including the saving of corporations and the coordination of mergers by politicians and institutions, which resulted in exacerbated class-based inequalities and an increase of power in actors that are well-connected in the political economy.

Neo-mercantilism thus brings the state back in. This has implications for the global political economy. Neo-mercantilist thought translates to protectionist policies. Drezner (2005) argues that states will actively influence the extent of policy convergence among them so as to increase the benefits while keeping the economic and political cost as low as possible. He uses a game-theoretic model to demonstrate that states will make a cost-benefit analysis of certain proposed policies or regulations, and that so-called policy harmonization will only take place if the benefits for the state outweigh the costs.

While most states have some form of protectionist economic policies in place in certain sectors, ranging from tariffs to non-tariff barriers such as health and safety restrictions, Neo-mercantilism may nevertheless be a useful theoretical perspective for the present study, because it

[6] https://carnegieendowment.org/2017/08/17/trump-s-national-security-strategy-new-brand-of-mercantilism-pub-72816

may offer an explanation for the difference in process and outcome of cases handled by different NCPs. Since neo-mercantilism holds that states protect their economic interests, it follows that states would also intervene if those interests are threatened via international norms, even when they themselves have chosen to adhere to them. Especially in the case of NCPs, which are domestic applications of international norms, and in which states have a great degree of freedom in how to structure them. This is where norm localization takes place. It would make sense for states to put into place practices that would allow them to have some form of control over what gets done and how, for example by making sure that the NCP is strongly dependent on the state, and that no other body (for example an oversight committee) has the power to interfere. The following chapters will elaborate on neo-mercantilism as a tool to understand our cases further.

3 Research design

In this chapter, first, the research design and the selected cases will be elaborated on. Next, hypotheses will be developed and operationalized based on the theories that were introduced in the previous chapter, followed by an explanation of the method of data collection. Finally, some limitations of the research design will be discussed.

3.1 Method

3.1.1 Design

This research seeks to explain the difference in process and outcome of complaints handled by different NCPs. In order to gain enough insight into the phenomenon, the method of process tracing will be employed. Process tracing is defined by Beach and Pedersen (2016) by its ambition to uncover causal mechanisms. Process tracing can be used to uncover the causal mechanisms that exist between dependent variable and independent variable(s). There are three variants of process tracing that can be distinguished: two of them are theory centric, namely theory-testing process-tracing and theory-building process tracing. The third is a case-centric method, namely explaining-outcome process tracing. It is a method that is termed abductive, since it switches between induction and deduction. The aim is to build a minimally sufficient explanation for the phenomenon at hand. This method is particularly useful in this context, since it starts from empirical events – different processes and outcomes of complaints handled by non-judicial grievance mechanisms that should be functionally equivalent. Theories, then, are used as a tool to attempt to explain a causal mechanism.

3.1.2 Case selection

While Beach and Pedersen (2016) define an explaining- outcome process-tracing as a single-case study, the present research has opted for a different approach. Cases are selected based on the most-similar different outcome criteria. This method of case selection is defined as “Cases (two or more) [that] are similar on specified variables other than X_1 and/or Y” by Gerring (2006, p. 90). The expectation is that this approach will enable us to delve deeper into the causal mechanism than would be possible by using a single case . It allows us to get into the nitty grits of specific X_1/Y relationships to determine which factors are the ones that lead to the difference between the cases.

Thus, for a Most-similar different outcome design, (at least) two cases have to be examined (Gerring, 2006, p. 131). The cases that will be considered are the Dutch and Canadian states. These

two states are chosen because they are similar in many respects: both are liberal democracies with social-democratic economies and a roughly comparable GDP per capita.[7] They are both ranked by the World Bank has high income countries and are both members of the WTO. Furthermore, both countries are part of the group of states that have founded the OECD in 1961, they have been members since then and, as such, have also ratified the Guidelines for Multinational Enterprises. Both have also complied with these international norms by setting up National Contact Points.

As with any method, there are some drawbacks to the most-similar different-outcome design. Gerring discusses in this regard the problem with continuous variables and the need for them to be coded dichotomously (Gerring, 2006, p. 133). This is not as great of a problem, Gerring argues, in relation to the control variables that are "held constant" across the cases – the X_2 variables. In the present study, the control variables are the ones described in the paragraph above. With regard to the X_1 and Y variables, it is also quite unproblematic, if the actual scores on these dimensions differ enough. I would argue that in the present thesis, the scores on the relevant dimensions, namely independence of the NCP and outcome of the process differ enough so as to render the problem meaningless, since these are the factors that are most different in the present cases. The problem may exist in relation to the level of protectionism, because it is a discrete variable. It would not be a problem if the scores for our two cases differ greatly. Should they be (fairly) similar, it would only be a problem insofar that it proves that level of protectionism may not have anything to do with independence of the NCP, in which case this hypothesis will be rejected. In any case, we will have learned something useful.

3.2 Operationalization and Hypotheses

Dependent variables

The present research question actually comprises two questions: the first question concerns what explains the difference in process of the two NCPs. To measure the dependent variable in this question, the process, the level of (in)dependency of the NCP from the state will be taken as a proxy. There are many other possibilities as to why the process might differ, but the most salient difference between the NCPs of Canada and the Netherlands was that in relative dependence of the NCP. Therefore, in this research we will first try to establish what causes this difference in (in)dependence from the state. An NCP's dependency from the state will be measured on five different variables.

[7] In 2019, GDP per capita of Canada and the Netherlands were 46.326,67 USD and 52.295,04 USD, respectively (World bank https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2020&locations=NL-CA&start=2014)

First, the structure of the NCP will be analysed to see if members are independent from state or if they come from different departments within government. Second, it will be assessed if the NCP has some sort of oversight committee. Third, whether or not the NCP allows NGOs or other parties to publish on the complaint (in compliance with relevant confidentiality agreements). Fourth, does the government attach consequences on corporations that refuse to participate in the process, for example by withholding trade support? And fifth and finally does the NCP make a finding on the complaint in relation to whether or not the Guidelines have been violated if a corporation refuses to participate or in cases where no agreement has been reached. These variables have been chosen based on assessments by the OECD, peer reviews by NCPs and recommendations from social partners and NGOs.[8]

The second sub question asks how the difference in outcome can be explained. There are multiple possible outcomes to the process. The complaint can be rejected in the initial assessment phase or in any of the other phases, it can be concluded without an agreement, withdrawn or it can be blocked. For the purpose of this thesis, the different outcomes have been dichotomized into positive or negative. Positive is a case that has been concluded with an agreement, negative are all other possible outcomes. It is often said that remedy is the reason. Therefore, only cases in which some form of remedy is reached will – in the present study – be seen as positive. Moreover, based on our method of case selection, as discussed in the previous paragraph, it is most useful if cases are on either end of the continuum of possible outcomes.

Independent variables

Neo-mercantilism

Because a state that is more neo-mercantilist prioritizes its economic interests over other interests, it is likely to want to hold more control over issues that may have economic impact, such as in cases where individuals feel that multinational corporations, often drivers of economic growth, have violated their rights. Protectionist rade policies nowadays can take many different forms. To adequately measure trade restrictiveness of Canada and the Netherlands (the EU), the Overall Trade Restrictiveness Index (OTRI) by Kee, Nicita and Olarreaga (2008, 2009) will be used. The benefits of this method in relation to other methods, is that it measures both the uniform tariff equivalent of the country tariff as well as non-tariff barriers (NTB). This is important, because, as Kee et al. (2009), argue, NTBs on average account for more than 70 percent to global protectionism. It is a rising star in

[8] Sources, among others:

terms of protectionist measures. NTBs include, among others, health and safety regulations and anti—dumping laws.

During the initial inspection of the cases, it was found that the government of Canada had interfered a great deal in the case that BMF filed against Sakto Group. Based on this finding and on our previous discussion on trade barriers, the following hypotheses are deduced:

H1: Canada scores has a higher OTRI score than the EU

H2: The NCP from a state with higher import tariffs will be less independent from state than an NCP from a state that has lower import tariffs.

H3: A specific instance filed at an NCP that is more independent from government is more likely to have a positive outcome than a specific instance filed at an NCP that is less independent from government

To confirm this hypothesis, first, it must be found when a state can be seen as more neo-mercantilist. One of the key characteristics of neo-mercantilism is the focus on a strategy of economic power maximization. Thus, to determine to what extent neo-mercantilist thought played a role in Canada and the Netherlands' handling of the cases, their respective scores on Kee et al.'s OTRI scale will be analyzed. Once it is established to what extent the two countries follow protectionist policies, the independence of respective NCPs from the state will be considered. Independence of NCPs will be measured by looking at the structure of the NCP. Five characteristics will be considered: are members independent of government or are they civil servants? Does the NCP has an oversight committee? Does the NCP allow NGOs to campaign about a complaint? Does the NCP issue a determination on whether or not the corporation has violated one or more of the Guidelines? Does the NCP recommend consequences for corporations that refuse to participate in the process and do states apply these recommendations? These questions will be analyzed based on different sources, such as information provided on the website of the respective NCPs, assessments by NGOs, as well as by analyzing what happened during the proceedings of the two cases. This is necessary because, as will be shown, what is communicated on an NCPs website does not always translate to practice. The distincition is important in order to fully grasp the level of independence of an NCP.

Bureaucratic entrepreneurship

Bureaucrats have room for manoeuvre within a normative framework. This is due not only to the fact that norms are often intentionally vague, but also due to the room that exists because of a principal – agent relationship. As agents, the bureaucrats have certain strategies at their disposal to exhibit

entrepreneurial behaviour. They are, however, constrained by the principals, for example because these principals have put in place control mechanisms or have otherwise shaped the institution in ways that prevent bureaucrats from engaging in entrepreneurial behaviour. It is expected that this is also true in the context of National Contact Points, even though the Guidelines clearly state that one of the main goals of NCPs is to further the effectiveness of the Guidelines (Guidelines, p. 68). With regard to bureaucratic entrepreneurship, the following hypothesis is formulated:

H4: Entrepreneurial activity will be greater in NCPs that are more independent from government

H5: Specific instances that show more entrepreneurial behaviour from bureaucrats are more likely to have a positive outcome

To measure independence from government, the analysis from H1 will be used. Entrepreneurial activity by bureaucrats will be measured by carefully considering the cases to discover possibilities for entrepreneurial behaviour. Entrepreneurial behaviour was previously defined as actors that create or exploit opportunities for bureaucratic innovation. In the context of the current research, it will be operationalized as moments in which the bureaucrats could have gone further than strictly necessary according to their mandate. More concretely, there are three specific actions an NCP might have taken. Firstly, the NCP facilitates the terms and process that complainants and/or corporations request. Second, the NCP makes (and publishes) a determination in which it finds whether or not the corporation was in breach of the Guidelines. Third, the NCP will follow-up on agreements or recommendations made in relation to a complaint. It will allow us to find out whether bureaucratic entrepreneurship is able to make a difference when an agent is constrained by the principal in the context of NCPs and possibly other non-judicial grievance mechanisms.

3.3 Data collection

A combination of primary and secondary sources will be used to research the cases. The primary sources consist of the Guidelines for Multinational Enterprises and documents produced by the National Contact Points including but not limited to initial assessments and final statements. Other primary sources include datasets from international organizations – both governmental and non-governmental – namely the OECD, OECD Watch and the World Bank and WTO.

3.4 Limitations

Cases are not (nor are they ever) completely the same: some specific characteristics may not have been accounted for that may nevertheless influence the process. Furthermore, the Netherlands is part of the EU and this may have certain implications. For example while the EU may impose protectionist measures, the Netherlands may hide behind these policies and pursue a liberal agenda. Its membership to the EU also provides it with significant benefits of scale and thus economic power. However, it is still a valid case to include, since it is considered as one of the main successes of the Guidelines and its grievance mechanism.

4 Empirical findings

This chapter will delve deeper in the Dutch and Canadian NCPs inner workings based on two cases that have been brought before them. First, some background about the cases and why the specific instances have been filed will be given. After that, the cases will be viewed through the lens of all three theoretical perspectives. Based on these cases, not only will we gain more insight into the theoretical perspectives themselves and under what conditions they are – to some extent – useful, we will also gain valuable insight into the NCPs, thereby making it possible to see what works well in terms of the goals of the Guidelines – and what does not.

4.1 The Dutch NCP

4.1.1 Background

Heineken is the second largest beer company in the world, with a global revenue of € 23.770 million in 2020. It owns, markets and sells over 300 brands in 190 countries. With almost 85.000 employees globally, the brand is not uncontroversial. In recent years, Heineken has been called out on, among other things, corruption[9] and sexual violence against 'promotional girls' in Africa and Asia.[10] This has caused sustainable Dutch bank ASN Bank to remove Heineken from its sustainable investment funds[11], and The Global Fund, an NGO that works with governments, civil society and the private sector to eradicate aids, tuberculosis and malaria has cut ties with Heineken for Heineken's failure to properly address these issues. [12]Even as recently as May 2021, Heineken is ordered to pay $ 125.000,- in compensation for moral damages caused to workers that were working under slave-like working conditions in one of its subsidiaries in Brazil.[13]

On December 14 2015, a group of workers from the company of Bralima, a Congolese subsidiary of Heineken, filed a complaint at the Dutch NCP. The complaint was based on the fact that in the period of 1999 – 2003, Bralima had dismissed 168 of its workers from its Bukavu facilities. During this period, a civil conflict in the DRC was ongoing, and the workers allege that the company used this situation to their benefit by seeking permission for the mass dismissals from the rebel

[9] https://www.ftm.nl/artikelen/fraude-nigeria-heineken?share=yX5jzzVt5Bs4WQbqJJHJkQ7UfopoVj8dBnb5WEYetnn1VgNHm4qy0AsaeKCwag%3D%3D
[10] https://eenvandaag.avrotros.nl/item/promotiemeisjes-heineken-nog-steeds-slachtoffer-seksuele-intimidatie/
[11] https://nos.nl/artikel/2233222-asn-bank-gooit-heineken-uit-fonds-vanwege-promotiemeisjes
[12] https://www.theglobalfund.org/en/news/2018-03-29-global-fund-suspends-partnership-with-heineken/
[13] http://www.rel-uita.org/brazil/ambev-and-heineken-accused-of-imposing-slave-like-working-conditions/

movement of RDC-Goma instead of the competent labour authority. The dismissed workers were subsequently replaced by temporary workers. Bralima is accused of massive and abusive retrenchment of its workers, and of miscalculating and non-payment of the final settlement for some of the workers. According to the complainants, at the time of the dismissals, the Dutch headquarters worked closely with Bralima and therefore could or should have had knowledge of the situation. Furthermore, Heineken was in a position to use its influence to prevent further damage to the employees but failed to do so.

The group of workers attempted for years to hold Heineken to account for what they deemed unjust dismissals. While some individual claims had been honoured, Heineken and Bralima are said to work actively to prevent collective claims from being brought. They even went so far as to advise the former workers not to waste their time, claiming that all judicial avenues for these former workers have been closed (Van Beemen, 2018, p.156). Three former employees represented the group of 168 former workers as they filed the specific instance. In it, they alleged that Heineken violated the OECD Guidelines (version 2000) in a number of ways, namely by its failure to respect the law of RDC (Chapter 1, Concepts and Principles), by resorting to day-labourers who were paid low wages, massive dismissals without economic reasons, dismissals of older workers exposing them to poverty because of their age and the lack of pensions, and bad payment of redundancy schemes in violation of Chapter II, General Policies paragraph 1. Furthermore, Heineken is said to have violated Chapter II Paragraph 2 by failing to respect the human rights of its employees when they unlawfully dismissed them, denied them the right to a decent life by dismissing them, which resulted in a lack of income to support their families, violated the right to life for a worker who died because the company failed to provide him with transport needed for medical reasons, as well as the right to life for workers that were dismissed while they were hospitalized and who later died, as well as the right to life for workers who were laid off while being sick and subsequently died because the medicine that was to be provided by the company was no longer supplied. The complainants also accuse Heineken of a violation of paragraph 5, 6, 9, 10 and 11 of Chapter II, namely that the company should (5) Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues; (6) Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups; (9) Refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies; (10) Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and

mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation; and (11) Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur (OECD Guidelines, 2000). Moreover, Chapter IV Employment and Industrial Relations, paragraph 6 states that enterprises should "In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective layoffs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful cooperation to mitigate the effects of such decisions". The complainants argue that Bralima and Heineken had failed to do so by "practicing a policy of intimidation, of surprise and of lies in respecting the right of priority to employment of the dismissed workers, by the unilateral ending of labour contracts by Conventions de separation à amiable not negotiated, by the corruption policy etc.". Finally, the complainants contend that Bralima and Heineken violated Chapter VI Combating Bribery, paragraph 6, which states that enterprises "should not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management". Since Bralima and Heineken have paid taxes to rebel movement RCD-Goma, have paid the administration costs to RCD-Goma for authorizing the dismissals of the workers as well as for other documentation it is argued that Bralima and Heineken have illegally contributed to a political organization. Moreover, Bralima and Heineken have never publicly disclosed the financial contributions made to the rebel movement during this period (Ministry of Foreign Affairs of the Netherlands, 2016). In short, "The complainants stated that Bralima took advantage of a period of economic and political turmoil in the DRC to dismiss a large number of employees in a brief period of time, without providing basic guarantees required by Congolese and international law, and that the employees thus dismissed were replaced by temporary workers."[14] They request remedy in the form of monetary compensation for the amount of € 200 million.

[14] Ministry of foreign affairs, 2017

In April 2016, Heineken organized a meeting between a delegation of the complainants and the Bralima management in Bukavu, Congo (without interference of the NCP). Both parties agreed that this meeting did not lead to new insights. In accepting the complaint in its initial assessment, the Dutch NCP held that dealing with the complaint would contribute to the purpose and effectiveness of the Guidelines - one of the key goals of the Guidelines. The parties requested the NCP for an external mediator. In December 2016 several discussions and confidence-building meetings were held between the mediator and the individual parties. The mediator also visited the brewery in Bukavu. In January 2017 several meetings were held between the parties. The meetings were – at the request of the parties – hosted on neutral territory: the Dutch embassy in Kampala, Uganda agreed to host them. Bralima and Heineken propose an external expert in Congolese labour law, which is approved by the NCP and the representatives of the workers after the NCP had spoken to this expert over the phone. In March 2017, the expert, Bralima and Heineken visit Bukavu to meet with the Representatives and approximately 150 former employees. In june, another meeting between Heineken/Bralima and the Representatives takes place, this time in the Dutch embassy in Paris. The NCP was also present to monitor the process. Finally, in July 2017, Heineken again visits Bukavu to meet with Bralima, the Representatives and some 140 former employees. In August 2017 the NCP publishes its final statement. Although the parties agreed that the substance of the agreement remain confidential, Olivier van Beemen, a Dutch news reporter did publish that Heineken paid an amount of $ 1.3 million (€ 1.1 million) to the former employees (Van Beemen, 2017). In 2021, the case has been evaluated by the NCP (Ministry of Foreign Affairs, 2021).

4.1.2 The Dutch case and the role of Neo-Mercantilism

4.1.2.1 Economic policy in the Netherlands

On the OTRI scale, the Netherlands is

4.1.2.2 (In)Dependence of the NCP

The Dutch NCP consists of four independent members outside of government. Complaints are handled solely by these independent experts. On the website of the Dutch NCP, all four members are introduced including a piece on their background. Members were previously or currently active in either the area of business or labour representation or from civil society organizations. They are supported by a secretariat and four advisory members from the international divisions of the Ministry of economic affairs and climate, the ministry of social affairs and employment, the ministry of foreign affairs, and the ministry of Infrastructure and water management.

The NCP has an advisory body consisting of Dutch representatives of the OECD Guidelines' three key stakeholders: VNO-NCW, which represents business, FNV, a union that represents workers, and OECD Watch, an NGO that represents societal organizations. The Dutch NCP meets with these parties (called 'NCP+') four times a year to discuss the Guidelines and the NCP's engagement with them. Besides these three key stakeholders, the NCP holds biannual meetings with the three key stakeholders and other relevant parties, such as other industry organizations, the social economic council, and others. It is located at the Ministry of Foreign Affairs.

In relation to rules on confidentiality, the NCP works on the premise of transparency about procedures, but confidentiality about substance. They state that there are three exceptions to the confidentiality requirement, which are the initial assessment and the final statement, and any information of which the party that has provided it has permitted to be made public. Furthermore, the Dutch NCP states that, even in situations where agreement on confidentiality are not an issue, any public appearances or public statements made by either of the parties involved could have an influence on the success of the proceedings, and parties should be aware of this. This does not mean, however, that publications on a case by definition constitute a breach of confidentiality. In the present case, considerable attention was directed to it in the media, and this did not result in a perceived breach of confidentiality. OECD Watch even argues that the media attention in this case has helped the NCP and may have contributed to the case (OECD Watch, 2017). This was also confirmed by Obbe Siderius, legal director at Heineken, who stated that the publicity surrounding the case was an important reason for Heineken to provide remedy to the workers (Van Beemen, 2018, p. 159).

The Dutch NCP does not report in its rules of procedure on whether or not they make a finding on whether or not a corporation has violated the Guidelines. However, it is a well-known fact, even among corporations, that companies that refuse to participate in the process will be subject to an investigation by the NCP, and that the NCP will publish a finding In the present case, no finding was published, since the parties agreed that the content of the agreement should remain confidential. There are cases in which the NCP did make a finding:

In May 2018, the Dutch government has agreed to impose trade- and investment related consequences on businesses that refuse to participate in the NCP process.

4.1.3 Bureaucratic entrepreneurship and the Dutch case

Facilitation of terms and process by NCP

In the case of the former employees from Bralima filed against Bralima and Heineken, the NCP can be seen to facilitate both parties in a number of ways. Firstly, by providing an independent mediator to facilitate dialogue, and to host meetings between the parties and the mediator at locations most convenient for the parties: in the Dutch embassies in Uganda and France. The NCP was present during these visits to monitor the process. Furthermore, the NCP helped cover travel expenses for the complainants. When Heineken wanted to engage an expert in Congolese labour law, the NCP actively engaged with it.

The NCP publishes a determination on the case

Since the parties wished to keep the content of their final agreement confidential, the NCP did not publish a determination on the case.

The NCP will follow-up on agreements or recommendations made in relation to a complaint

The NCP made several recommendations in its final statement: it advises Heineken and Bralima to be transparant about changes that could have great impact on its workers, and to deal with complaints from (former) employees in an early stage. Furthermore, it recommends Heineken to monitor and evaluate complaints and to actively monitor, evaluate and improve its code of conduct and to communicate those widely (Ministry of Foreign Affairs, 2017). In April 2021, the NCP published an evaluation on the Final Statement and its contents (Ministry of Foreign Affairs, 2021). It finds that the monetary compensation that was agreed upon had been paid in full. The evaluation is based on written information provided by both parties, and both parties had the opportunity to respond to a draft version of the evaluation. The NCP concludes that Heineken has made important progress in relation to their responsible business conduct and that the NCP process, despite its difficulty, was considered a success by all those involved.

4.2 The Canadian NCP

4.2.1 Background of the case

Bruno Manser Fund, a Swiss NGO filed a complaint at the Canadian NCP against the Sakto Group on 2 January 2016. They argue, based on research conducted by them, that the Sakto Group may be laundering money that they have earned through the illegal logging of rainforests in the Sarawak region of Malaysia, an area which Bruno Manser fund actively aims to protect. They claim that the owners of the Sakto Group, purposely attempt to conceal their ownership and their relationship to … Taib, in order to invest these illicit earnings in real estate globally. Breaches of the Guidelines consist, according to the complainants, of failure to disclose information on ownership and financial information. On 25 October 2016, the Canadian NCP publishes a draft initial assessment in which it

describes Sakto's reaction to the complaint. The position of Sakto Group is fourfold: first, they claim that the OECD Guidelines do not apply to them. Second, they claim that Sakto Group is not a multinational company, Third, they claim that the guidelines concerning disclosure are not applicable to privately owned companies, and fourth that Bruno Manser Fund has breached the confidentiality requirement of the NCP process by publishing statements on Sakto's alleged breach of the Guidelines. In its draft initial assessment, the NCP further elaborates on the issues and Sakto group's assertion that the OECD Guidelines are not applicable to the company. They establish that Sakto Group constitutes a multinational enterprise and thus that Guidelines apply to them. They further conclude that all provisions in the Guidelines apply to all multinational enterprises, irrespective of whether they are privately or publicly owned. The NCP considers the issues to be material to the Guidelines and "considers the disclosure issue to be substantiated". Concerning the question whether the consideration of the specific instance would contribute to the purpose and effectiveness of the Guidelines, the NCP states:

"The purpose of the NCP is to promote the Guidelines and contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. It is the view of the NCP that consideration of the issues raised in the RfR[15] could contribute to a more fulsome discussion and examination of the expectations surrounding the disclosure of information by firms, including privately owned ones."

The NCP offers its good offices to the parties in order to start a dialogue. This draft initial assessment was then sent to the parties to comment on. Next, in March 2017, without any consultation with the Bruno Manser Fund, the NCP published a draft final statement in which it rejects the case, claiming that offering its good offices "would not contribute to the purposes and effectiveness of the Guidelines". No explanation for this complete reversal of opinion had been given, nor was the initial assessment included in the final statement. This event caused Bruno Manser Fund to issue two press releases: the first one on 3 April 2017, in which it condemns the NCPs "bowing to corporate pressure", the second one on 5 April 2017 in which it announces its request to the NCP to close the case within 30 days and to include a statement in which it condemns the company's non-compliance with the OECD's disclosure standards. Next, in July 2017, the NCP again publishes a final statement in which it does outline the reasons for deciding to close the case: On the part of the Bruno Manser Fund, the NCP argues that process was "ultimately derailed" because the confidentiality requirement was breached when BMF published their press release on the NCPs decision to reject the case. However, as has since been argued by OECD Watch, BMF only issued the press releases when it

[15] By RfR is meant "request for review".

became clear that the NCP planned to reject the case, meaning that the NCP had already decided to reject the case prior to BMF publishing about it, and therefore that BMF's actions could not have been a cause for the NCPs decision to reject the case. On the part of Sakto Group, the NCP cites Sakto's involving of a member of parliament during the confidential NCP assessment process, Sakto's aggressive challenge of the NCPs jurisdiction and Sakto's legal counsel making submissions to Canada's deputy minister of justice.

Bruno Manser Fund and OECD Watch, who both actively published about the case and the actions of the NCP, receive a cease and desist letter from the Canadian Department of Justice, in which it requests OECD Watch and the Bruno Manser Fund to remove from its website the original initial assessment, as well as to refrain from publishing in any other form on the draft initial assessment. Finally, on 11 May 2018, the NCP again issues a revised final statement. In this statement, the NCP claims that the first draft of the initial assessment of October 2016 was shared with the parties based on confidentiality and that it does not "reflect the opinion or contain conclusions of the NCP" and that this new final statement supersedes it (NCP Canada, 2018). Furthermore, the NCP states that the Bruno Manser Fund has breached the confidentiality procedures of the NCP when they released the draft initial assessment in April 2017. It concludes that facilitating dialogue between the parties would not contribute to the purposes and effectiveness of the Guidelines and closes the case.

4.2.2 The Canadian case and the role of Neo-Mercantilism

4.2.2.1 Economic policy in Canada

4.2.2.2 (in)Dependence of the NCP

Canada's NCP was established in 1991. The Canadian NCP consists of seven government departments: Environment and Climate Change Canada (ECCC), Labour Program of the Department of Employment and Social Development Canada (ESDC), Finance, Indigenous and Northern Affairs Canada (INAC), Innovation, Science and Economic Development Canada (ISEDC), and Natural Resources Canada (NRCan).[16] The exact members of the NCP are unknown, since it is not individuals who are members, but departments. It is therefore unknown what the backgrounds of the members are. Moreover, the NCP meets biannually (although extra meetings can be held upon request of the members). While this interdepartmental structure has been criticized because of its lack of independence and its perceived lack of impartiality, Canada argues that this structure enables them to benefit from required resources and expertise present in the government. The NCP has a

[16] https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms_of_ref-mandat.aspx?lang=eng#instit

secretariat that consists of two full-time members. It is located in the department of Global Affairs in the Trade Planning, Coordination and Responsible Business Conduct division of the Trade Commissioner Service (TCS). This has led to criticism from stakeholders, as the main function of the TCS is to help Canadian business thrive in foreign markets, therefore leading to a perception of a lack of impartiality. This reality is not to be taken lightly, especially when taking in consideration what transpired in the case of BMF versus Sakto Group, in which the corporation was able to influence Canada's Minister of Justice to such an extent that he(?) intervened on Sakto's behalf in the NCP proceedings, ultimately leading to the NCPs rejection of the case.

The NCP does not have a formal advisory body. It does have social partners related to two of the key stakeholders to the OECD, namely the Business and Industry Adviory Committee (BIAC), which represents the interests of business, the Trade Union Advisory Committee (TUAC), which represents workers. The Canadian social partners are the Canadian Chamber of Commerce (CCC), who represent business and the Canadian Labour Congress (CLC) and the Confédération des syndicats nationaux (CSN), both labour organizations, with the latter representing workers from sectors in Québec. NGOs are not included as stakeholders in the Canadian NCP. In its 2018 report to the OECD, the NCP stated that they meet with their social partners quarterly and, if needed, on an ad-hoc basis. However, on their website they have published only five reports on stakeholder engagement since 2011, and in its 2016 report it is mentioned that the report was on the NCPs fifth stakeholder session. When OECD Watch reported on Canada's stakeholder advisory body and found that it does not include NGOs and is not consulted at least 2 times in the past year, two factors that would result in a positive assessment by OECD Watch, Canada's NCP responded that it will make reporting on their engagement with their stakeholders more accessible, a statement that implies that the engagement *does* take place.[i]

On its website, the NCP published its procedural guidance.[ii] Section 13 deals with confidentiality and transparency. In it, it is stated that "Confidentiality of the proceedings will be maintained during the entire NCP process". Facts and arguments that any of the parties bring forward in the process are part of this confidentiality requirement, as are the NCP initial assessment or draft versions of the Final Statement. In fact, publication of these documents may even constitute a breach of confidentiality, according tot he NCP's procedural guide. It is interesting to note that the NCP has modified its procedural guide on 13 December 2017, shortly after the publication of the draft final assessment by the BMF. It is therefore difficult to assess whether publication of a draft Final Statement also contituted a breach of confidentiality at the moment BMF opted for it. Moreover, as mentioned in the background of the case, the NCP reasons that BMFs publication of the draft final statement constituted a breach of confidentiality which was one of the reasons it

finally decided to reject the case, but the NCP had already decided – in its draft final statement – to reject the case, prior to BMF's publication of it. BMFs publication could therefore have not been a consideration in the NCPs decision to reject the case. What is more, Sakto Group can also be said to have breached confidentiality requirements when it involved Canada's Minister of justice in the process, and this happened prior to the release of the draft Final Statement by BMF.

The procedural guide from Canada's NCP does not mention the issuing of determinations or findings in specific instances. However, OECD Watch does mention in its evaluation of the Canadian NCP that the NCP issued one determination since 2011[iii]. This was done in the case Canada Tibet Committee vs. China Gold Int. Resources. China Gold, despite multiple requests from the NCP, would not engage in the process. The NCP found that China Gold Int. Resources did not operate in a manner consistent with the OECD Guidelines and subsequently withdrew TCS and other Canadian support abroad. This was the first time this has happened since the development of NCPs globally.

In its final statement dated xxx, the NCP concluded that the parties did not participate in good faith, because xxx and xxx. In its procedural guide, the NCP states that on such occurrances, the NCP can apply consequences, which will be reflected in the Final Statement. Section 14 of the procedural guide offers even more stringent guidance, stating that "If Canadian companies do not participate in the NCP process, or if the NCP determines that they do not engage in good faith and constructively in the process, the NCP will recommend denial or withdrawal of Government of Canada trade advocacy support and will mention it in the Final Statement". This happened in the Final Statement the NCP published on 13 July 2017: it details the conduct of both Sakto Group and BMF during the proceedings and recommends Canada's Trade Commissioner Service (TCS) to take this into account should Sakto approach it in future to access trade advocacy support. Notwithstanding the vagueness of this recommendation in the last Final Statement the NCP published[iv], there is no mention of Sakto Group's conduct during the proceedings at all. The NCP does reference BMF's publication of the draft initial assessment as a breach of confidentiality and subsequently concludes that offering its good offices would not contribute to the purposes and effectiveness of the Guidelines and closes the case.

4.2.3 Bureaucratic entrepreneurship and the Canadian case

Facilitation of terms and process by NCP

No specific facilitation of terms and process was distinguishable in this case.

The NCP publishes a determination on the case

The NCP did not publish a determination on the case.

The NCP will follow-up on agreements or recommendations made in relation to a complaint

The NCP has followed-up on the recommendations made in relation to a complaint in the sense that it retracted the Final Statement in which it made the recommendations. No evaluation on this case has been made by the NCP in consultation with the parties.

4.3 Results

This section will briefly discuss the results based on our empirical analysis. It was expected, based on Canada's active involvement in the case filed by BMF, that Canada would score higher on the OTRI scale than the EU and, thus, the Netherlands. This expectation was not reflected in the empirical reality, with the EU scoring slightly higher than Canada. H1 is therefore rejected. Based on neo-mercantilist theory, it was deemed possible that a higher level of protectionism would lead to an NCP that would be less independent from the state than it would be if it scored lower on protectionism. While the Dutch NCP consistently proved to be more independent from state than the Canadian NCP, the higer score on the OTRI scale of the Netherlands leads us to also have to reject H2. In the cases under review, the case filed at the Dutch NCP ended considerably more positive than the case filed at the Canadian NCP. Since the Dutch NCP was also found to be more independent from state than the Canadian NCP, H3 is confirmed: an specific instance filed at an NCP that is more independent from state will be more likely to have a positive outcome.

Two hypotheses were derived based on the literature on bureaucratic entrepreneurship. Analysis of the cases showed that H4 can be confirmed: since the Dutch NCP was found to be more independent from government than the Canadian NCP, for this hypothesis to be confirmed, entrepreneurial activity would have to be greater in the Dutch NCP. This was true with regard to our variables under review. While the Canadian NCP did, in one of the statements they produced, make recommendations regarding consequences to Sakto Group, their *final* final assessment did not include this, and this last final statement was said to supersede the previous final statement. What this may mean in relation to our theoretical heuristics will be further elaborated on in Chapter five. Finally, H5, which assumed that specific instances in which bureaucrats showed a higher amount of entrepreneurial behavior would be more likely to result in a positive outcome can also be confirmed, based on the cases that have been reviewed.

5 Conclusions

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7 Notes

[i] See https://www.oecdwatch.org/ncp/ncp-canada/, last consulted on 15-8-2021.
[ii] See https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a13, consulted last on 15-8-2021
[iii] See https://www.oecdwatch.org/ncp/ncp-canada/ , consulted last on 15-8-2021
[iv] Published on 11 May 2018