STUDY

TRANSPARENCY AND THE OECD DISPUTE SETTLEMENT PROCESS

ACCESS TO DOCUMENTS, THE USE OF INFORMATION ON SPECIFIC INSTANCES AND POSSIBLE (LEGAL) CONSEQUENCES

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On behalf of Germanwatch

Summary

This concise study shall help clarify the rights of, in particular, non-government organizations (NGOs) to disclose documents by the participants of, and facts gathered during, dispute settlement proceedings under the OECD Guidelines; as well as whether other, third parties, have a right to documents from dispute settlement proceedings. For this purpose, the dispute settlement mechanism shall be described and divided into three stages.

In the first stage, before the actual dispute settlement proceedings described in para. C-2.d, no special confidentiality requirements are in effect. The complaint itself, as well as, where appropriate, first statements by the National Contact Point and the company concerned may be made public and, as the case may be, access may be requested on the basis of Art. 29 of the Administrative Procedures Act (VwVfG) or Art. 3 (1) of the Environmental Information Act (UIG).

While dispute settlement proceedings are underway, they are subject to the confidentiality requirement specified in the Procedural Guidance under section C-4.a, which state that the "confidentiality" of the proceedings shall be maintained. However, this is not an absolute confidentiality, but must rather – in keeping with the tension between transparency and confidentiality found in the Guidelines –be decided on a per case basis.

After the conclusion of the proceedings, no confidentiality requirements - or only weak ones - are in effect; in particular the general rule stated in Procedural Guidance C-4.b, according to which the NCP will "after consultations [...] make publicly available the results" of the proceedings. This is not dependent on the agreement of all parties.

A table provides an overview of individual activities allowed and indicates points to be considered where applicable.

In the final section, it is made clear that under current German law, non-participants are generally entitled to disclosure of documents generated before and during proceedings under the Environmental Information Act and the Freedom of Information Act. The confidentiality requirements of the OECD Guidelines do not apply in this case. Exceptions to entitlement must however be judged on a case by case basis.

Imprint

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October 2007

Purchase order number: 07-4-06e

This publication can be downloaded at: http://www.germanwatch.org/corp/transpa07e.htm

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Foreword

The OECD Guidelines are currently the most comprehensive instrument for global corporate responsibility. That's why Germanwatch has decided to utilize the Guidelines in our work on corporate responsibility, particularly the dispute settlement mechanism.

In practice, the Guidelines' full potential often is not realized. The interpretation of both the Guidelines and their scope is often quite restricted. This is due not least to the structure of the OECD Guidelines' National Contact Points, responsible for implementation of the Guidelines. In Germany, the Contact Point is situated in the Federal Ministry of Economics' Directorate General for External Economic Policy.

One of the main points of contention between the National Contact Point and both trade associations and, in particular, non-government organizations, is the question of transparency and confidentiality within the OECD Guidelines. This includes basic questions such as whether a complaint which has been filed may be made public and to what extent a non-government organization may disclose information on the proceedings of dispute settlement procedures.

Whereas Germanwatch accepts confidentiality requirements during proceedings, and has taken this into account in dispute settlement proceedings to date; we believe that some confidentiality requirements made of us, particularly by the German Contact Point or German business associations go too far.

Germanwatch also makes use of non-confidential information on OECD complaints to inform sustainability rating agencies about individual companies. These agencies are very interested in complaints filed under the OECD Guidelines and the proceedings which follow.

The results encourage us to continue to disclose information, particularly when filing a complaint, unless we decide this is not a strategic move in a concrete case. The study also indicates further ways in which the transparency of the National Contact Point could be improved, information which we intend to utilize in the future.

Christoph Bals and Cornelia Heydenreich, Germanwatch

Concise study

This concise study attempts to delineate the rights parties to a dispute settlement, particularly non-government organizations (NGOs), have under the OECD Guidelines; it also examines the question of whether documents of the proceedings may be requested by third parties.

To this end, the Guidelines themselves shall be introduced (I) and the dispute settlement mechanism described (II). Following this is a discussion of the confidentiality requirements made of the parties (III) and an overview in tabular form of which activities (disclosure of facts or documents) are permissible and which are not (IV). In the final part (V), I look at the entitlement of private individuals and NGOs to the disclosure of documents from an OECD dispute settlement they themselves were/are not parties to.

I. Basic principles

The OECD Guidelines for Multinational Enterprises (2000, in the following: "Guidelines") are recommendations by the OECD governments to companies active on the multinational level for

> responsible corporate action in accordance with statutory law.[1]

The Guidelines refer explicitly to international agreements such as the Universal Declaration of Human Rights and the Rio Declaration on Environment and Development and have become an important instrument for improving the conduct of multinational corporations in terms of labor and environmental standards.

They do not take the form of an international convention and thus are not statutory international law in the Federal Republic of Germany. Neither do they formally constitute customary international law or other law in terms of a code of conduct for enterprises (private entities with no status under public international law). The Guidelines were amended to an OECD Declaration of 1976 and have since been revised and expanded five times. They are recognized globally by the 40 states that signed the declaration as well as by business associations, trade unions and environmental organizations. For this reason, the Guidelines are now considered to have quasi-international law status.[2]

The Guidelines are geared towards OECD Member States, which are to implement them and also monitor the implementation.

> The *Guidelines* are not a substitute for, nor do they override, applicable law. They represent standards of behaviour supplemental to applicable law and, as such, do not create conflicting requirements.[3]

[1] Introduction to the Federal Ministry of Economics and Technology's documentation "Die OECD-Leitsätze für multinationale Unternehmen"; revised 2000.
[2] Sherpa, Yann Queinnec, The OECD Guidelines for Multinational Enterprises – An evolving legal status, Paris, June 2007, p. 19 ff.
[3] The OECD Guidelines for Multinational Enterprises, Statement by the Chair of the Ministerial, June 2000, p. 5

Furthermore, they are directed towards the multinational enterprises themselves, which can commit to them (e.g. in an official company declaration[4] or in the company's Code of Conduct). According to the Guidelines, enterprises should act "in consideration of" international agreements (i.e. also including statutory international conventions) (see Chapter V, chapeau).

Under German law, the Guidelines and their "Procedural Guidance"[5] are thus in a category between binding law and "voluntary obligation" – an area for which clarification is necessary as to which principles, (basic) laws and obligations might apply to the parties. This is particularly true for the implementation of the Guidelines in the framework of the so-called dispute settlement procedure.

II The dispute settlement procedure and the role of the NCP

II.1. Introduction

According to the Procedural Guidance of the OECD Guidelines (Chapter C: Implementation in Specific Instances) a dispute settlement procedure can be led by one of the "National Contact Points" (NCP), which OECD Member States must set up to aid the implementation of the Guidelines.[6] Here it is stated that all "parties concerned" may raise issues about the implementation of the Guidelines.

> Procedural Guidance (I, preamble):
>
> The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of **visibility**, **accessibility**, **transparency** and accountability to further the objective of functional equivalence. (emphasis by the author)

The Contact Points should offer a forum for discussion to resolve conflicts and problems arising from the implementation of the Guidelines, aiding companies' acceptance of the Guidelines. Chapter C of the Procedural Guidance outlines the main features of a "dispute" settlement procedure.

> Procedural Guidance I.C
>
> The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a **forum for discussion** and assist the business community, employee organisations and other parties concerned to **deal with the issues raised in an efficient and timely manner** and in accordance with applicable law. (emphasis by the author)

[4] 18 companies in Germany make public reference to the OECD Guidelines or have committed to them; including Allianz AG, Deutsche Telekom, Adidas and BASF.

[5] The OECD Guidelines are divided into three parts: the **Guidelines** themselves (Chapter I – X), the Implementation Procedure, consisting of the Decision of the OECD Council and the **Procedural Guidance**, and the **Commentary** on both, which is, however not part of the Guidelines, but was composed by the Committee on International Investment and Multinational Enterprises.

[6] Procedural Guidance, Chapter C "Implementation in Specific Instances."

II.2. Transparency vs. Confidentiality

According to the Guidelines and the Commentary, "Transparency is recognised as a general principle."[7] At the same time the Procedural Guidance contains the stipulation "While the procedures [...] are underway, confidentiality of the proceedings will be maintained" (para. C-4a).

This conflict between transparency and confidentiality is the subject of this concise expert opinion:

In practice, the dispute settlement procedure is utilized by trade unions and NGOs to criticize company conduct and business practices in concrete cases and to thus enter into a direct dialog. Usually, in order to achieve this goal, a political campaign is run parallel to the proceedings.

For the organizations which make use of the dispute settlement proceedings, in light of their usual political and educational work, the issue of access to and use of information generated before and during a so-called dispute settlement proceeding is paramount. The first question is whether the fact that a request for OECD dispute settlement proceedings has been made and which steps remain to be taken may in and of itself be communicated to the public.

On this matter, a distinction must be made between two types of consequences:

- Under the Procedural Guidance, disclosure or use of information could mean that the complainant is not "playing by the rules" and therefore the enterprise may pull out of the proceedings. In this case, the complainant would have no recourse;
- The NCP could also decide not to accept a complaint should it believe that the dispute settlement procedures are not being taken seriously. Here too, a complainant would have no recourse, except perhaps to have the legality of the discretionary decision reviewed in court;
- Disclosure of individual documents could be a breach of copyright law;
- Independent of the OECD dispute settlement proceedings, an assessment is necessary whether a company might have recourse to compensation claims and, if so, what these claims might be (based on of a variety of laws: German Civil Code, Copyright Law, etc.). This study does not investigate the latter question.

There can be no further consequences for the complainant, for example the NCP initiating proceedings, as there are no legal grounds for them in German law.

During or before dispute settlement proceedings, the following documents and information, at the very least, are usually generated:

- The complaint itself, in which, as the Procedural Guidelines put it, "issues [...] relating to implementation" are raised;
- Preliminary statements by the company involved and perhaps by other public institutions to the NCP;

[7] Commentary, para. 19.

- The NCP's "initial assessment of whether the issues raised merit further examination;"
- Further statements by the company concerned and the NGOs to the Contact Point;
- Documents presented by both sides and the NCP or other Contact Points or the multilateral committee (formerly CIME, now Investment Committee, IC) during or before dispute settlement proceedings;
- Minutes of mediation meetings, non-authorized personal minutes by individual participants;
- If no resolution is found, a final "statement" by the NCP with recommendations on implementation of the Guidelines;
- If a resolution is found, a statement or summary by the NCP.

In the following, we shall look at which prospects a complainant has to utilize or disclose information and documents generated during each stage of the dispute settlement procedure. First, however, we shall concretize the Procedural Guidance's confidentiality requirements.

II.3. Procedural stages

According to the Procedural Guidance, dispute settlement procedures can be subdivided into three stages:

- The preliminary stage of the procedure (a),
- the NCP's initiation of the procedure and the dispute settlement procedure itself (b),
- and the stage after resolution or when proceedings are not initiated (c).

II.3.a) Preliminary stage of the procedure

Before a dispute settlement procedure actually begins, or can be initiated, a party must "raise issues," i.e. send a brief to the NCP questioning a particular company's adherence to the Guidelines in a particular case (in the following: complaint). The NCP then shall

> Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them. (C-1, emphasis by the author)

Then, "(w)here the issues raised merit further examination," the NCP can, in consultation with the parties (C-2):

> (a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts;
>
> (b) Consult the National Contact Point in the other country or countries concerned;
>
> (c) Seek the guidance of the CIME if it has doubt about the interpretation of the Guidelines in particular circumstances;

At this stage, the procedure is, in my opinion, an administrative procedure. The NCP receives a petition of sorts, the complaint, and can decide whether proceedings shall take place. Thus the NCP acts within the framework of the usual principles of administrative procedure and is bound to this legal framework and the principle that it may not exercise discretion arbitrarily – i.e. arbitrarily dismiss a complaint.

On this it must be said that – in German law – one does not simply have a right to the execution of dispute settlement proceedings. The OECD Guidelines and the "right" to public participation do not – as explained above – constitute statutory law. In order to be able to take legal action on the initiation of dispute settlement proceedings, one would have to first examine whether legal entitlement can be argued. Section 13 of the Administrative Procedures Act (VwVfG), which applies to environmental and consumer protection groups and rules on the participants of administrative acts, could be of interest. Under this law, for example, parties to proceedings are entitled to sound discretionary decision making; this means decisions may not be made on inadmissible grounds.

Those making the application as defined in Section 13 Art. 1 VwVfG would be the complainant in the moment the complaint is submitted to the NCP. Should the NCP decide against dispute settlement proceedings for the sole reason that the complaint or parts thereof were made public, this would be an administrative act (Section 35 VwVfG "any order, decision or other sovereign measure taken by an authority to regulate an individual case") which burdens the complainant. In this case, it would be possible to object and go to court with the argument that the discretionary decision is unsound. The complainant does have a right to a sound discretionary decision. This does not, however, create an entitlement to dispute settlement proceedings; at the most one could refer to Article 3 of German Basic Law (Equality before the law) if other complainants were treated differently in a similar case.[8]

The fact that we are (still) dealing with an administrative act is important for an analysis of how one can make information public. As a party to an administrative act, the complainant has a right to information according to the Administrate Procedures Act (Section 29 VwVfG). This means that he or she must also receive, at the very latest after applying for them, copies of, for example, all statements which the NCP gathers during this stage (business secrets may be blacked out).

It may however be problematic that Section 29 VwVfG[9] refers to participants' "legal interests" in the inspection of documents. Properly, there can be no legal interest in the case of a voluntary procedure. However the purpose of Section 29 is to ensure fairness (Ramsauer/Kopp, Commentary on VwVfG, 9th edition, Section 29 margin note 1), and, furthermore, the inspection of documents is an important instrument in the monitoring of

[8] Under German Basic Law, "equality" applies only to cases in Germany. This would be different if the NCPs in the EU were subject to a common procedure, which, however they are not.

[9] Section 29 Inspection of documents by participants

(1) The authority shall allow participants to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests. Until administrative proceedings have been concluded, the foregoing sentence shall not apply to draft decisions and work directly connected with their preparation. Where participants are represented as provided under sections 17 and 18, only the representatives shall be entitled to inspect documents. (2) The authority shall not be obliged to allow the inspection of documents where this would interfere with the orderly performance of the authority's tasks, where knowledge of the contents of the documents would be to the disadvantage of the country as a whole or of one of the Länder, or where proceedings must be kept secret by law or by their very nature, i.e. in the rightful interests of participants or of third parties. (3) Inspection of documents shall take place in the offices of the record-keeping authority.[...]

public administrations. The NCP – as a German government agency – does not make its decision to accept or deny a complaint in a legal vacuum. Thus the complainant at least has the right to a sound discretionary decision and thus most likely a "legal interest" in the inspection of documents. This would have to be established in a concrete case.

II.3.b) The actual dispute settlement proceeding

To resolve the dispute on the "issues raised" the NCP, according to C-2 d), can:

> Offer, and with the agreement of the parties involved, facilitate access to
>
> consensual and non-adversarial means, such as conciliation or mediation,
>
> to assist in dealing with the issues.

This marks the transition into another type of procedure, a mediation or dispute settlement proceeding, in which the NCP plays only the role of mediator.

Dispute resolution proceedings are usual in German law (private and public law) as well as in international private and public law. The difference from a normal court case or arbitration is that, at the end of a dispute resolution or mediation procedure, the arbitrating body makes no decision on the dispute of the two parties. Rather, the parties should reach an amicable settlement with the assistance of a neutral third party.[10]

Usually, a private contract is drawn up, which lays down the duties and obligations of the participants of the dispute settlement or mediation proceedings.[11] In the case at hand, such a contract is not drawn up; the parties participate in a procedure as outlined by the Guidelines.

Participation in and of itself can however be interpreted as a declaration of intent. The complainant, by registering a complaint, shows that he wants to participate in a procedure as stipulated by the Procedural Guidance. (Contractual) resolution can however only take place with the company and only after the NCP has made its assessment as stipulated in C-1 of the Procedural Guidance.

Following this – after the company has also accepted the proceedings – the duties of the participants in this stage can be inferred from the Procedural Guidance and from the general principles of dispute settlement and mediation. During this stage, the National Contact Point only plays the role of facilitator; which may however include gathering objective information or arranging for the production thereof (expert testimony or reports, local inspections, etc.).

II.3.c) After resolution or after denial of a complaint

Either the NCP begins the procedure described in C-3, or decides against doing so after an initial assessment. In both cases, this is no longer a dispute resolution proceeding under private law; rather further steps taken by the NCP again fall under the Administrative Procedures Act. Particularly in drawing up recommendations and in deciding whether recommendations should be made, the NCP must adhere to the above-named principles. The complainant is then not subject to confidentiality requirements.

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[10] Compare Lachmann. Handbuch für die Schiedsgerichtsbarkeit, 2nd ed. 2002, p. 8.
[11] Compare final report (in German) of the research project "Gerichtsnahe Mediation in Niedersachsen," Prof. Dr. Gerald Spindler, University of Göttingen, Sept. 2006.

III. Confidentiality requirements in detail

The Procedural Guidance is anything but clear about the confidentiality of documents and information. On the one hand, there is the principle objective of the NCP to ensure and further transparency:

> Procedural Guidance (I, preamble)
>
> The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of **visibility, accessibility, transparency** and accountability to further the objective of functional equivalence. (emphasis by the author)

On the other hand, the following holds true for the dispute settlement procedure:

> Procedural Guidance, I. C-4
>
> In providing this assistance, the NCP will:
>
> a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. **While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained.** At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. **However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.**

At the same time, the NCP shall however also:

> b) After consultation with the parties involved, **make publicly available the results** of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines. (emphasis by the author)

In practice, the German NCP has only made its final statement public in three proceedings.[12] In all other cases, the NCP, the competent authority at the Directorate General External Economic Policy at the Federal Ministry of Economics and Technology (BMWi), insists upon complete confidentiality of all above-mentioned information and documents. No weighing of interests takes place, at least none that can be seen. The British NCP has threatened, should a complaint be made public, to judge the complaint to be "non viable" on the basis of the Procedural Guidance. The German BMWi has also repeatedly expressed general concerns about the conduct of NGO who have allowed public access to their own complaints.

In the opinion of the Business and Industry Advisory Committee to the OECD (BIAC) the following formula applies: The initial filing of a complaint and the conclusion of de-

12 Available on the Ministry of Economics website (accessed 26 Mar. 2008) www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=178196.html: Statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a specific instance brought by the German Clean Clothes Campaign (CCC) against adidas-Salomon; Statement by the German National Contact Point for the 'OECD Guidelines for Multinational Enterprises' on a Specific Instance brought by the DGB against Bayer AG (EUBP-FFW/Bayer Philippines); Statement by the German National Contact Point for the "OECD Guidelines for Multinational Enterprises" on the Complaint Filed against Bayer CropScience by German Watch, Global March, and Coordination gegen Bayer-Gefahren.

liberations are public information, otherwise the principle of complete confidentiality has priority.[13]

An OECD Watch study comes to the conclusion that the confidentiality principle applies only after dispute settlement proceedings have begun (above "the actual dispute settlement proceeding"), meaning when the NCP has accepted a case and an initial assessment has been made.[14] I am compelled to second this opinion, since proceedings in the sense of the Procedural Guidance para. C-2 begin only when a complaint has been accepted by the NCP (see above). After the conclusion of these proceedings, there are no longer any special confidentiality requirements.

Thereupon it must be asked, what is allowed **during** the procedure. The Commentary states the following:

> 8. Core Criteria...*Transparency*. Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. **Thus most of the activities of the NCP will be transparent**. Nonetheless when the NCP offers its "good offices" in implementing the *Guidelines* in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*.[15]
>
> 19. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 8 in "Core Criteria" section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. **The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*.** It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent.
>
> (emphasis by the author)

The Commentary, together with paragraph C-4.b, therefore qualifies the absoluteness of paragraph C-4.a and gives cause to take another look at the delicate balance between transparency and confidentiality. Whether and in what form information may be disclosed must be weighed carefully at this stage because of this uneasy equilibrium, whereby the key principle of confidentiality of the proceedings as delineated in paragraph C-4.a is of central importance. One should keep in mind that this is an interpretation within the framework of the OECD Guidelines procedures. Beyond this, no legal duty exists.

Furthermore, we must consider the following: if the complaint is only one instrument of a political campaign, the fact that a complaint has been filed may not lead to the general silencing of an organization. This would be a limitation of the NGO's right to freedom of expression and is unacceptable. It is rather the case that governments have an interest in

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[13] BIAC, OECD Guidelines for Multinational Enterprises, Business Brief, Guidelines: Confidentiality of Proceedings, Aug. 2003.
[14] OECD Watch, Briefing Paper February 2006, The OECD Guidelines for Multinational Enterprises: The Confidentiality Principle, Transparency and the Specific Instance Procedure.
[15] Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises para. 8.

NGOs and businesses settling their disputes amicably. Should participation in a dispute settlement proceeding mean that an NGO was generally required to keep silent, they could no longer participate in such procedures, as NGOs both need public interest for and serve public interest in their campaigns.

In the following, I attempt to provide an overall view of the consequences of this legal opinion. Although proposals may be made for specific cases (during the procedural stage), please remember that they can not truly be considered in the abstract.

IV. Legitimacy of individual acts under the Procedural Guidance and/or German law

To answer the question of whether information or one or more of the above-mentioned documents may be disclosed, one must differentiate depending on the stage of the procedure:

Information/ Document	Written by	Legal opinion
Before and during proceedings		
Complaint 1. fact 2. text	NGO, trade union	1. No one challenges the right to report 2. The text may be made public. The NGO/trade union is the creator of the work according to copyright law and it was written in the stage before the initiation of dispute settlement proceedings and concurrent confidentiality requirements
Company statement before the NCP has made an assessment	MNE	1. A status report may be made 2. At this stage of the procedure, the text may be requested under Section 29 VwVfg, with the exception of those portions which may contain trade or business secrets; copyrights must also be observed (case by case decision necessary)
"Assessment of whether the issues raised merit further examination"	NCP	1. A status report may be made 2. The text may be made public, as it is an institutional act which still falls under the Administrative Procedures Act. There is no confidentiality requirement with the exception of those portions which may contain trade or business secrets.
Company statement made to the NCP 1. fact 2. content/text	MNE	1. A status report may be made Information on the status of the proceedings may be released, as consideration shall reveal that there can be no interest in keeping this information secret. 2. Content/text – legal interpretation of the Procedural Guidance: if dispute settlement proceedings have begun, as of this moment confidentiality requirements exist. The

		document itself is subject to copyright law; furthermore it is explicitly confidential under paragraph C-4.a of the Procedural Guidance. Disclosing the contents/summary: may not be disclosed without agreement of the MNE as it is a central element of the dispute settlement proceedings. **Assessment of other laws:** The statement is (environmental) information, therefore (perhaps partial) disclosure may be requested, see V.1 below.
Further information by the opposing party, where applicable	MNE	as above
Documents of the proceedings	NCP	Each document must be treated separately. A status report (the fact that an expert opinion, etc. has been made) may always be made.
	NGO	Agreement given, but disclosure must be considered in view of the purpose of dispute settlement proceedings
	MNE	Each document must be considered separately
	Other NCP	Each document must be considered separately
	IC	Each document must be considered separately
Minutes of the mediation and personal minutes by individual participants	NCP / NGO	Must be considered individually, most likely confidential under the Procedural Guidance A status report (fact that a meeting has taken place) may be made.
After proceedings or when proceedings are denied		Legal presumption for paragraph C-4.b: "make publicly available the results of these procedures" – not dependent upon the agreement of all parties
"Assessment" in which further proceedings are denied	NCP	1. A status report may be made 2. Text may be made public as it is an institutional act which falls under the Administrative Procedures Act. There is no confidentiality requirement - with the exception of segments which may contain trade or business secrets
Statement refusing the procedure (also after proceedings have begun)	MNE	No confidentiality requirement; may therefore be disclosed as long as it does not contain sensitive company data. Under Section 29 VwVfG and, if applicable, the Environmental Information Act it must be made available upon request, with the exception of business secrets and personal data. Should it be published, copyright law must be observed – individual consideration necessary. However, the legal presumption is: para. C-4.b applies.

Statement by other ministries or public institutions	Other	1. A status report may be made 2. The text may be disclosed, as it is an institutional act which falls under the Administrative Procedures Act. There are no confidentiality requirements with the exception of portions which may contain trade or business secrets.
When no agreement is reached: final statement and recommendations	NCP	1. A status report may be made. According to para. C-3, this should be done by the NCP ("issue a statement"). NGOs may in particular publicize the fact that the NCP does not wish to disclose its statement. 2. Text/content: In general, C-3 and C-4.b apply. Although under the Procedural Guidance, confidentiality requirements remain after proceedings have ended, usually individual consideration will show that the text may be disclosed (with the exception of business secrets and personal data).
Statement after amicable agreement or summary of agreement or non-agreement.	NCP/NGO	1. A status report may be made 2. Text/content – transparency requirements predominate. It is unlikely that a company not agree to disclosure at this stage. Legal presumption of the Procedural Guidance: disclosure by the NCP

This overview shows that information and documents may be disclosed in most cases, particularly the "results" (para. C-4.b) at the end of proceedings.

V. Non-participants' access to documents and information

Since the Procedural Guidance requires a certain amount of confidentiality from participants according to this interpretation; for the sake of completeness it shall be examined whether the information concerned may be requested and utilized by parties not involved in the proceedings. In this case, the documents would be public and the NGO which lodged the complaint would also have access to them.

The deliberations of this section also apply should the complainant decide to make documents and information public although this could be a violation of the Procedural Guidance. The difference is that a non-participant is not subject to confidentiality requirements which could counteract the right to disclosure of information. Legally, this means even less possibility that compensation claims would hold up in court.

V.1. Entitlement under the Environmental Information Act

Should the complaint filed or in proceedings have an environmental component, one may be entitled to information under the Environmental Information Act (UIG).

According to the UIG, every person has a right to information (Art. 3, para. 1 UIG) available from an authority and consisting of "information about the environment." In the following I assume that all documents generated in an environmental complaint are information about the environment as defined by Art. 2 para. 3 UIG. This may at first be denied by the competent authorities, but jurisdiction has been very broad since the revision of the EU Directive on Environmental Information[16] and the courts usually confirm the existence of environmental information.

However, the exclusions and restrictions of the Environmental Information Act also apply:

Art. 8 UIG is on the denial of applications for information to protect public interest such as, e.g., diplomatic relations, defense, advice from authorities (i.e. ministries and other public institutions), etc. It is possible that the BMWi could deny disclosure on the basis of Art. 8 para. 2 UIG regarding "internal memoranda within the administration," or "the transmission of material in completion, documents not yet completed or data not yet compiled." However, in an interpretation adhering to the guidelines, grounds for denial shall be subject to strict construction so that the above would not, in my opinion, be applicable - particularly not after the conclusion of dispute settlement proceedings. Furthermore, statements by other ministries would not fall under this paragraph as these shall not be interpreted as "internal memoranda," but rather as memoranda of "other authorities" (compare Schrader in Schomerus/Schrader, UIG Art. 7 margin note 29). This is however in dispute.

Under **Art. 9 UIG**, "other interests" shall also be protected, particularly personal data and information identified as trade or business secrets:

[16] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, ABl. EG L 41/26 (2003).

> (1) No entitlement shall exist insofar as
>
> 1. disclosure of the information releases data relating to persons and thus restricts interests worthy of protection of the person concerned,
>
> 2. the protection of intellectual property, particularly copyrights, is in conflict with the issuing or the provision of environmental information or
>
> 3. trade and business secrets are revealed by the disclosure of the information or the information is subject to fiscal or statistical confidentiality, unless authorised by the parties involved or outweighed by public interest in access to the information. Entitlement to environmental information on emissions can not be denied under sentence 1 and sentence 3. There shall be a hearing of the people concerned prior to the decision on the revelation of the information protected by sentences 1 to 3. Usually the authority has to assume that a third party has been affected in the sense of para. 1 sentence 3 provided that transmitted information has been identified as trade and business secrets. If the authority so requires, the third party shall demonstrate in detail that it is a case of a trade or business secret.

In my opinion, one could argue that on this basis at least parts of a company's statement must be made public, as it is unlikely to be worthy of protection in its entirety. The NCP must decide this on a case-by-case basis.

Particularly relevant is the exclusion due to voluntary transmission:

> Art. 9 para. 2 UIG:
>
> Information on the environment that has been passed on to an authority by a private individual third party without legal obligations and the publication of which could have negative consequences for the interests of the third party may not be made accessible without the permission of the third party, unless outweighed by public interest in disclosure. Entitlement to environmental information on emissions may not be denied under sentence 1.

This exclusion would generally come into effect for company statements, as both NGOs and companies participate in dispute settlement proceedings voluntarily. It would not however apply to other documents, such as the statement by the NCP, internal memoranda on on-site inspections, etc. as long as this information was generated by the NCP. For this reason, one must possibly resort to an application for the inspection of documents under Section 29 VwVfg for statements written before proceedings began.

A general exclusion for an administrative act in progress does not (any longer) exist. This exclusion was, after ECJ intervention, restricted to criminal law and administrative offences (now Art. 8 para 1 No. 3 UIG).

In summary, under the Environmental Information Act, most documents from dispute settlement proceedings must be released to third parties, particularly after conclusion of the proceedings. This includes statements by other ministries (in dispute).

V.2. Entitlement under the Freedom of Information Act

As a general principle, under Art. 1 of the new Federal Freedom of Information Act (IFG), which applies to all federal authorities, everyone is

> Entitled to access to official information

As defined by Art. 2 IFG, official information is

> any official recording, independent of its means of storage. It shall not include drafts and notes that are not intended to form part of a record.

This includes all documents generated for official purposes and intended to form part of a record.[17] In my opinion, this also includes documents generated and gathered, or brought in from outside sources, in the course of a voluntary procedure. The BMWi, in its role as NCP, fulfils an official duty to implement the OECD Guidelines, even if the Guidelines themselves are not legally binding. To clarify this point, access to internal directives on the implementation of the procedure and on the establishment of the NCP would be helpful.

The IFG also contains exceptions and restrictions which may apply. Art. 3 IFG refers – similar to Art. 8 UIG – to the protection of the public interest and can hardly be applied in this case.

Art. 3 para. 7 IFG shall however apply to company statements. It stipulates that there is no entitlement to information collected or transmitted in confidence as long as the third party (in this case the company) (still) has an interest in the confidential treatment of this information at the time of the application. The interpretation of "collected or transmitted in confidence" is in dispute and it might be worth arguing this point further. This exception would not apply to other documents (the complaint itself, NCP documents).

For these other documents, Art. 4 IFG, which protects "official decision-making procedures," is however relevant:

> Art 4 (1) Applications for the inspection of information shall be denied insofar as the information consists of draft decisions as well as preparatory or administrative work leading directly up to a decision insofar and for as long as premature disclosure of the information compromises the effectiveness of the decision or interferes with forthcoming official measures. Not to be subsumed under preparatory or administrative work leading up to a decision under sentence 1 are, as a rule, summaries of proofs of evidence and expert reports or statements by third parties.

In this case, it is possible for the applicant to argue that after proceedings have been initiated under C-2, official decisions are no longer being prepared by the NCP. After the conclusion of proceedings as well, this ground for exclusion would no longer hold.

Art 5 IFG protects personal data. Here too, blacking out (sensitive company data, data on individual employees, etc) is possible so that general entitlement may remain. It is interesting that this term does not include the protection of legal persons (AG, GmbH, etc.)[18]. Therefore, companies do not have recourse to Art. 5 IFG.

Art. 6 IFG, on the other hand, which protects trade and business secrets, may be relevant.

> No entitlement shall exist insofar as disclosure of information conflicts with the protection of intellectual property. Trade and business secrets may not be made accessible without authorisation

[17] Compare Minden, verdict of 18. Aug. 2004, 3 K 4613/03 – on IFG NRW

[18] The term 'personal data' is not defined in the Freedom of Information Act, but rather in the Federal Data Protection Act. Under this act, personal data is information concerning personal or material circumstances to be attributed to an identified or identifiable individual (the data subject). Personal circumstances include data on the subject himself, his identification and characterization (e.g. name, address, marital status, date of birth, citizenship, religion, occupation, appearance, features, state of health, beliefs, etc.). Material circumstances refers to data on the subject's circumstances (e.g. property, contractual or other relationships to third parties, etc.). (See Gola/Schomerus, Data Protection Act, Commentary 7, 2002, Art. 3 margin notes 5 and 6). Thus is simultaneously made clear, that legal persons are not meant.

In my opinion, chances are slim that the documents administered by the NCP contain many trade or business secrets. In any event, it would be possible to black out those portions of the files containing secrets, so that entitlement is maintained in principle.

V.3. Publication of information or documents received

The question of whether information to which one is entitled under UIG or IFG may be made public is relevant to the further use of information in a political campaign, both for the release of the documents themselves or a summary thereof.

V.3.a) Publication of the documents themselves

Documents received in the manner described above may in principle be made public. This falls under Art. 5 of German Basic Law, Freedom of Expression, which also includes the dissemination of facts perhaps taken from another source.

There may however be restrictions due to copyright regulations or penal codes as well as regulations protecting personality rights or the protection of established businesses.

Copyright, however applies only to works defined in Art. 2 para. 2 of the Copyright Law (UHG) as “[p]ersonal intellectual creations.” Therefore not every document may be seen as a work, but only those which contain a so-called creative element.

Art. 2 para. 1 UHG lists some examples; for all other documents it is a matter of interpretation, a difficult task in many cases.

Expert reports for example, can on the one hand be seen as works, in so far as the compilation of individual discoveries is an intellectual, creative act. Creating a written record of scientific examinations and technical results on the other hand, is solely a scientific approach and is therefore not to be seen as a work.

“Official decisions” as defined by Art. 5 UHG are exempt from Copyright Law.

V.3.b) Publication of summaries

If only summaries are written, there is no infringement of Copyright Law unless the data used is in and of itself an intellectual creative work. As long as one is only dealing with facts however, this creative aspect usually does not play a role. As long as sources are cited, no accusation of plagiarism can be made.

As long as documents or data which can not be defined as works are published, there is still the possibility of an infringement of the Criminal Code (Section 185 et seq. insult) or the German Civil Code (Section 823, damage liability). Compensation claims are possible, concretely however they are difficult to construct and quantify.

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