

The OECD Guidelines for MNEs: Are they 'fit for the job'?

OECD Watch 2009 submission to the Annual Meeting of the National Contact Points

1. Introduction

Each year in preparation for the Annual Meeting of National Contact Points (NCPs) in June, OECD Watch evaluates the functioning of the OECD Guidelines for Multinational Enterprises (Guidelines) and NCPs and their effectiveness in enhancing responsible business conduct. This evaluation is based on experiences from OECD Watch members and other NGOs from around the globe who have used the instrument in an effort to improve corporate practices. Without doubt, this year's review of NCPs is undertaken in the context of the current global economic crisis.

The crisis has brought to light the question of whether the vast number of existing international policy tools are adequate for promoting responsible business conduct. There appears to be consensus at the international level that more needs to be done to achieve the long overdue transition from the current excessively profit-oriented global economy to a world economy that is centred on human development and managed sustainably. The political momentum for change exists, but there is an urgent need to act swiftly and undertake fundamental policy changes before economic recovery changes the mood back to a short-term-profits, business-as-usual agenda. We must act now to ensure that economic recovery is effective, equitable and sustainable.

While the global economic crisis may provide the political space to address some longstanding imbalances between the rights and responsibilities of global economic actors, the crisis is nothing less than a disaster for many of the world's poorest. Workers, communities and organisations in the South are faced with a worsening of the adverse effects of inexistent or ineffective regulation of corporate conduct. It is within this context that OECD Watch calls upon the OECD Investment Committee and NCPs to consider how the content and implementation of the OECD Guidelines can be improved in order to contribute effectively to the broader OECD agenda and its support for global responsible business practice.

This year's review of the functioning of the OECD Guidelines and NCPs focuses on three key questions:

- Have the OECD Guidelines contributed to resolving conflicts between MNEs and communities in which they operate?
- Are the OECD Guidelines an effective grievance mechanism?
- What reforms of the text, commentaries and Procedural Guidance are needed to make the instrument more effective?

2. Experiences from OECD Watch members

OECD Watch has sought and received feedback from its members and other NGOs in support of this submission.¹ Several members identified developments that are encouraging for the effectiveness of the instrument. However, a number of serious concerns remain, particularly with regard to the

¹ Contributions to this report were received from Argentina (CEDHA, CIPCE, FARN; Hugo Wortman Jofre); Australia (Brotherhood of St Laurence), Belgium (GRESEA), Germany (Germanwatch, Transparency International Germany); India (Cividep); Korea (Korean House for Solidarity); Netherlands (SOMO); Norway (Future in our Hands, ForUM); Peru (Plades), Romania (AUR - ANSRU); Switzerland (ASK); United Kingdom (RAID, Global Witness), United States (EarthRights International)

handling of specific instances. The concerns regarding the performance of NCPs are not new and have been consistently highlighted by OECD Watch. Nevertheless, in the context of the crisis and the update of the Guidelines, it is prudent to address them again:

- Unequal treatment of parties by NCPs, particularly biased towards business interests
- Location of some NCPs in a single ministry with a potential conflict of interest
- Unjustifiable delays in the handling of specific instances
- Inconsistent and arbitrary interpretation of the Guidelines, e.g. on parallel legal proceedings and supply chain issues
- Lack of clarity and functional equivalence among NCPs on procedures for accepting and handling cases
- Lack of capacity and resources among the majority of NCPs
- Lack of credibility and authority to mediate

A balanced score card

OECD Watch has drawn on specific examples to identify the contrasting approaches of NCPs. These are summarised below.

Promising trends

- In the UK, there are new procedures for handling specific instances within a 12-month time frame. A review process is also in place. The most significant and far reaching change to the UK NCP is the establishment of a Steering Board. The Board has four external members drawn from four key constituencies (parliament, NGO, union and business). This initiative has been invaluable in improving the UK NCP's procedures and enhancing the quality of debate on policy issues. It is highly commended by OECD Watch.
- The Dutch NCP, which underwent a major organizational revision in 2007 towards an independent body with considerable human and financial resources, has now scheduled a peer review to assess its functioning, to be conducted by the end of 2009. OECD Watch has been calling for an NCP peer review mechanism for many years, and highly commends the Dutch NCP for taking this initiative. It is hoped that the peer review will lead to more constructive criticism and peer pressure among NCPs to raise the bar for performance in both promotional activities and handling of specific instances.
- Increasingly, NCPs have taken the initiative to conduct fact-finding missions. In the past year, for example, such missions were undertaken by the Dutch and Argentine NCPs. Fact-finding missions, in particular when the issue involves activities in non-adhering countries, are often essential for an NCP to establish the facts as a basis for mediation and to determine whether the OECD Guidelines have been complied with.
- In September 2008, the German NCP announced its intention to consult regularly with relevant ministries. While the Economics Ministry remains the sole leading and responsible ministry for the NCP, other ministries can now initiate consultations as they consider appropriate. Additionally, there have been some noteworthy improvements in transparency. For example, the NCP recently published on its website statistics about the number of cases filed since 2001 (11), those accepted and concluded (3) and those rejected (8). For the three rejected cases since 2007, the website includes a brief summary of the reasons for the NCP's rejection.

- The Romanian NCP, installed since Romania's adherence to the OECD Declaration in 2005, has undertaken promotional and outreach activities. The office of the Romanian NCP has strived for a high degree of transparency in its functioning and has demonstrated a keen interest in working closely with various stakeholders.
- In light of UN Special Representative on business and human rights Professor John Ruggie's observations on parent company responsibility for its subsidiaries, we welcome the Dutch NCP's position that it "considers the involvement of the parent company in the [specific instance] procedure at least equally important as of the subsidiary". In specific instances involving a parent and a subsidiary in two different OECD/adhering countries, close cooperation between host and home country NCPs is crucial. OECD Watch commends the Dutch, Argentine and Irish NCPs for doing so in recent specific instances.

Discouraging developments

- In a complaint against Daewoo and Kogas for alleged breaches of the Guidelines related to natural gas development in military-ruled Burma, the complainants are most unsatisfied with the handling of the case by the Korean NCP. There are concerns about the perceived conflict of interest in the NCP office, located solely in the Ministry of Knowledge Economy. Furthermore, the complainants are disappointed that the NCP failed to demonstrate or even question how the companies' response to environmental impact assessments and stakeholder consultation could be considered in line with the Guidelines. As a result of these procedural inadequacies, the Korean NCP's summary dismissal of the case is in stark contrast with the handling of Burma-related specific instances by other NCPs that issued specific recommendations for appropriate corporate conduct.
- The alleged existence of parallel legal proceedings continues to be widely misused as a pretext for not accepting cases, or as a reason for delaying the entire NCP process. This leaves the complainants and other key OECD Investment Committee stakeholders in limbo about the status of specific instances in such circumstances. The Argentine NGOs have expressed their dissatisfaction with the Argentine NCP for allowing parallel legal proceedings to stall the pending specific instance against Shell in that country.
- A grave concern for OECD Watch and its members lies with cases where the NCP is not clear about that status of the case. In such situations, there is neither a formal rejection, nor an intention to accept as a specific instance either. OECD Watch considers such cases to be "blocked". There are a number of cases that have been blocked by NCPs for several years, such as: Alcoa/Votorantim (Brazilian NCP), Toyota Motor Corporation (Japanese NCP) and BAE Systems/Airbus S.A.S./Rolls Royce (UK NCP).²
- In a case against BHP regarding forced evictions at the Cerrejón Coal mine in Colombia before the Australian and Swiss NCPs, complainants requested that the NCPs conduct fact-finding on the ground in Colombia either in person or through the respective embassies. The Swiss NCP responded that the NCP does not have the human or financial resources to carry out local fact-finding or mediation, and that doing so would be a violation of national sovereignty. This seems to be at odds with the approaches of other NCPs (such as the UK and Dutch NCPs), and is another example of functional in-equivalence among NCPs. The Swiss NCP further argued that

² For more detailed information on individual specific instances, see OECD Watch's Quarterly Case Updates: <<http://oecdwatch.org/publications-en/quarterly-case-updates>>.

local embassies cannot carry out the duties of the NCPs. It should be noted that an independent review “*Cerrejon Coal and Social Responsibility: An Independent Review of Impacts and Intent*” was undertaken at the request of Cerrejon Coal. While “The complainants and BHP-Billiton agreed the recommendations of the independent review provided a sound basis for moving forward”³, this does not address the broader issue of NCP responsibility to undertake fact finding in support of achieving successful mediated outcomes and the desired ‘win-win’ scenario.

- In contrast to the positive trend among some NCPs to recognize parent company responsibility and the need for the involvement of home country NCPs in specific instances involving both a parent company and a subsidiary (see above), some NCPs continue to limit their responsibility for investigating parent company behaviour. In Norway, there is deep concern among trade unions and NGOs about the Norwegian NCP’s recent attempts to transfer two complaints to other countries despite the fact that the parent company, as well as the complainants, are in both cases based in Norway. In the Cermaq case the complainants emphasised the urgency of handling the complaint in Norway, claiming that local violations of the OECD Guidelines were the direct result of strategic policy decisions made by the parent company.

3. Major lessons learned since 2000

- *With the exception of a few cases, the OECD Guidelines have not been able to resolve conflicts between MNEs and communities in which they operate.*

After nine years of a revised set of Guidelines and procedural guidance, very few NCP complaint procedures have contributed to a meaningful and effective resolution of the problems addressed in the complaint. Only 5 out of the total of 85 NGO cases raised since the 2000 revision have been concluded through a mediated solution or a satisfactory final statement.

The credibility and effectiveness of the Guidelines as a tool to promote corporate responsibility must be assessed. An assessment of why so relatively few cases are filed by NGOs with NCPs is useful. Given the vast number of well-known and well-documented cases of corporate malpractices throughout the world, it is concerning that the Guidelines complaint mechanism is ‘underused’. The Dutch NCP draft report for the Annual Meeting of NCPs, takes note of this as well:

“The number of newly brought specific instances can be considered low, given the means and efforts put into the Dutch NCP. This low number could be explained by the scepticism with the NGO world towards the NCP procedure, the fact that the procedure remains known with only a small group of actors, or the general lengthiness of the procedure.”

In the opinion of OECD Watch, the lack of knowledge of the Guidelines among the broader NGO community is not the critical problem. Rather, the poor reputation of the OECD Guidelines complaint procedure in terms of expected outcome relative to the time and resources required to adequately engage in the NCP process is what keeps many NGOs from using the instrument. The OECD Watch secretariat receives numerous requests for support and advice from NGOs considering filing complaints. All too often, the decision is made not to pursue the case because the company involved is headquartered in a country whose NCP is notorious for its lack of willingness to effectively promote

³ Statement by the Australian National Contact Point, BHP-Billiton – Cerrejon Coal Specific Instance, 12 June, 2009

the Guidelines and engage in the specific instance process, such as the United States, Japan and Korea.

A recent report by the London School of Economic and Political Science, "The Reality of Rights" provides further illustration of this point.⁴ The report evaluates the effectiveness of existing systems of redress available to individuals and communities affected by human rights abuse by UK companies. In four out of the five cases examined, the NCP procedure was "judged a poor investment of resources given weakness of enforcement capacity and other procedural weaknesses."

○ *Very few complaints are satisfactorily resolved through mediation*

On many occasions NCPs have stated that they see their key role as one of facilitating and offering a forum for mediation. However, OECD Watch case study data confirms that in reality very few successful mediation processes have been achieved.⁵ Even the Dutch NCP, commended for its restructuring into a more independent body two years ago has yet to facilitate a single mediation process between the NGO complainants and the company involved.

In recent years, many efforts to facilitate mediation between NGOs and companies have failed. Often, it is the reluctance of companies to discuss the real issues at stake, and demanding unreasonable and narrowing conditions for their participation in the mediation. Some recent examples include:

- A case against British mining company Vedanta Resources filed by Survival International at the UK NCP in December 2008, Vedanta turned down the invitation to mediation.
- In September 2008, the Swedish company Skanska withdrew from the Argentine NCP mediation over disagreements on confidentiality with the complainants.
- In a case filed by Friends of the Earth et al. against Shell in the Philippines, the NCP was unsuccessful in getting the parties to agree on the terms of mediation.

The fact that mediation is the self-proclaimed key role for NCPs makes this conclusion even more concerning and should give rise to reflection among NCP themselves as to whether they have the appropriate skills, mandate and authority to act as a forum for mediation. The question could also be asked whether there is really much need for the mediation forum that the NCP offers. NGOs and trade unions in particular have often decided not to file a complaint with NCPs if the company appeared willing to discuss and negotiate on a specific issue directly. In such instances the NCP mediation is seen as adding little or no value. As such, it is important to acknowledge that the NCP process is often called upon when the issue has escalated and there is a need for an alternative assessment of the facts and examination of the alleged breaches.

○ *NCPs are unable to compel companies found to have breached the Guidelines to change their corporate practices*

At present there is a widespread lack of confidence in the effectiveness of the Guidelines' specific instance procedure because the NCP cannot compel a company found to have breached the Guidelines to change its corporate practices. For the mediation process to be given a fair chance and engender genuine commitment to the process and outcome from the companies, it seems evident that NCPs need 'teeth' to sanction companies that are unwilling to take part in the mediation or are found to be in breach of the Guidelines. Furthermore, NCPs must be willing and able to monitor company behaviour after final statements have been issued and to ensure compliance with any recommendations made. Without doing so, breaches of the OECD Guidelines may continue.

⁴ See "The Reality of Rights", <http://www.corporate-responsibility.org/module_images/reality_of_rights.pdf>.

⁵ One successful case involves a case by the trade union UNI against G4S for the UK NCP that was successfully settled with the help of an external mediator.

- The specific instance filed by Global Witness in the UK NCP against Afrimex highlights the problem as to what should happen when a company is found to have breached the Guidelines, but no follow up steps are taken to monitor the company's adherence to the recommendations in the final statement. Without monitoring or oversight, companies may continue to act abusively. Afrimex continued trading in minerals from eastern DRC at least until September 2008. Also, the company did not provide information to the NCP on whether, or how, it was implementing the recommendations in the final statement.
- In the case against GSL (Australia), a case regarded as one of the best examples of a successful mediated outcome, agreement was reached on 34 different issues to improve the management of Australia's immigration detention centres. Given that the Guidelines lack provisions for follow-up and monitoring, the NCP was unable to ensure the agreements reached in the final statement were implemented and successful in changing corporate behaviour. Furthermore, the NCP did make the final statement available to other organizations, such as the Commonwealth Ombudsman and the Australian Human Rights Commission, that have the authority to monitor conditions in Australia's immigration detention centres⁶.

Actions that might be taken by the NCP depending on the nature of the case include, but are not limited to:

- Formally notifying a company that a case has been raised and that the NCP is examining its behaviour
- Obliging companies to disclose to shareholders that they are involved in a specific instance
- Referral (if appropriate) to the UN or EU Sanctions Committees, or other appropriate national authorities
- Disqualification of company directors
- Delisting of public companies
- Withdrawal of public subsidies or export credits
- Blacklisting companies, so as to exclude them from public procurement and trade missions

4. Recommendations for a revision of the Guidelines

It has become evident that fundamental and far-reaching changes needed to harmonize NCP performance and enhance the effectiveness of the OECD Guidelines will only be achieved through a revision of the OECD Guidelines' provisions and in particular the Procedural Guidance concerning the structure and functioning of NCPs. In light of recent references to a possible revision, OECD Watch calls upon the Investment Committee to commence discussion on the proposed scope, conditions and timelines of an upgrade of the Guidelines with NCPs, TUAC, BIAC, OECD Watch and other relevant stakeholders.

As stated in the OECD Investment Committee's report of March 2009, "Building Trust and Confidence in International Investments", such a revision:

*"..would need to be preceded by careful consideration of whether and how the Guidelines need to be reviewed and would need to seek the views of business, trade unions and civil society"*⁷

Key issues for consideration in the revision of the Guidelines

⁶ Called the Human Rights and Equal Opportunity Commission at the time of the GSL case

⁷ See <<http://www.oecd.org/dataoecd/18/47/42446942.pdf>>.

The following key issues should be addressed in the Guidelines' revision. The list should be seen as indicative, not exhaustive.

General:

- The revision process must be a transparent and inclusive process involving NGOs, BIAC and TUAC on an equal footing and would ideally involve wider consultation including stakeholders from non-OECD countries.
- A revision would need to take into account the manifold interrelated developments in the global economy and consider what needs to be improved for more stringent implementation and effective application of the OECD Guidelines to all MNEs and all their activities, including finance, trade and global production networks.
- The framework of UN Special Representative on business and human rights, Professor John Ruggie, could be used as a starting point for a revision to ensure specific provision for human rights. Further, an upgrade should address the shortcomings, identified by Professor Ruggie, that are preventing the Guidelines from meeting their full potential. These include: the potential conflict of interests due to NCPs' institutional set-up, the lack of resources to investigate complaints, the lack of training to provide effective mediation, unclear timeframes and the lack of transparent outcomes.
- The OECD must offer leadership in these efforts to ensure that the standards, principles and scope of the Guidelines are not diluted and narrowed but strengthened and enhanced.

Content issues that need to be addressed:

- It is imperative to strengthen the human rights provision – possibly through a 'dedicated chapter', rather than by the enumeration of a list of rights in the text. Concrete provisions on human rights duties and standards should be stated in the Guidelines.
- The supply chain provision requires significant strengthening. This could be in either a 'dedicated chapter' or in the commentary. Reference to supply chain transparency must be strengthened in other chapters, such as the Disclosure and Consumer Interest provisions.
- There is a need for a provision that is clearer on the relationship between companies and the local population, specifically including the rights of indigenous peoples. The Guidelines lack clarity on what demands companies should meet in engaging with local communities in relation to social and environmental damage and hazards to health. Further detail of what constitutes adequate and timely consultation with local stakeholders should be provided on the basis of existing best practices, such as free, prior and informed consent.
- The Employment chapter would be strengthened through harmonisation with the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization.
- The current environmental chapter needs revision to ensure the policy developments and available knowledge on climate change over the last decade is better integrated into clear guidance of what is expected from individual companies in this regard.
- Greater clarity should be provided about the due diligence steps that companies are expected to adopt along their supply chains, in particular in situations of weak governance and conflict zones.
- The Disclosure chapter should be strengthened to reflect the importance of due diligence in corporate governance and responsible business conduct.

Revision of the Procedural Guidance:

- The Procedural Guidance needs to be strengthened to give greater direction to the institutional structure and functioning of NCPs. OECD Watch would like to bring again to the attention the Model NCP that was developed in 2007, which provides valuable recommendations in this regard.⁸
- A revision of the Procedural Guidance should ensure that all NCPs meet the minimum requirements identified by Professor Ruggie for effective non-judicial mechanisms: legitimate, accessible, predictable, equitable, rights-compatible, and transparent.
- The Procedural Guidance should address the issue of parallel legal proceedings. OECD Watch's position is that the existence of parallel proceedings should not automatically result in the NCP suspending its process on the related complaint. The NCP should only suspend the complaint if there is strong evidence that continuation of the NCP process may prejudice parallel proceedings.
- The Procedural Guidance should include mechanisms to ensure a 'race to the top' among NCPs through a peer review mechanism. Lessons and recommendations resulting from the Dutch NCP's peer review experience could provide a valuable basis for discussion.
- Finally, the Investment Committee must strengthen its oversight role and implement a serious monitoring system to evaluate NCPs' compliance with minimum institutional and operational standards. This is imperative if the inconsistency and lack of functional equivalence in NCPs' structure, functioning and results is to be reduced.

These suggestions for improvement are provided at this point to demonstrate that a review of the Guidelines is timely and has the support of OECD Watch. They are not, at this stage, a complete inventory of suggested improvements. OECD Watch looks forward to active participation in a review.

5. OECD Watch activities in this review period

Throughout the 2008/09 period, the OECD Watch Secretariat, Coordinating Committee and individual OECD Watch members have actively promoted the OECD Guidelines and participated in a wide range of related corporate accountability events. Some activities include:

Training and capacity building

- Austrade Advisers Conference, Lorne, Victoria, Australia, September 2008 (230 Austrade officials)
- Diplomacy Training Program capacity building workshop, Manila, Philippines, September 2008 (35 civil society participants)
- OECD Watch capacity building seminar, Buenos Aires, November 2008 (40 civil society participants)
- University of Melbourne Faculty of Law, February 2009 (20 masters students of Law)

OECD Watch submissions to the OECD Investment Committee:

- "OECD Watch comments on 'Review of NCP Performance: Preliminary Findings'", April 2008
- "Effective Application of the OECD Guidelines to the Financial Sector", March 2009
- "OECD Watch response to the OECD Public Online Consultation on Corporate Governance and the Financial Crisis", April 2009
- "The OECD Guidelines for MNEs: Are they 'fit for the job'?", June 2009

Presentations:

- Australian Centre for Human Rights Education, RMIT University, Melbourne, August 2008
- ILO Decent Work Conference and side event, Oslo, September 2008
- German Green Party "Business as usual?" conference, Berlin, November 2008 (Event on occasion of 60 Anniversary of General Declaration on Human Rights)

⁸ The OECD Watch Model NCP: <http://oecdwatch.org/publications-en/Publication_2223>

- Responsible Investment in Australia (RIiA), Melbourne, November 2008
- ForUM multi-stakeholder conference and NGO side event, Oslo, February 2009
- Australian Centre for Corporate Social Responsibility (ACCSR) Annual Conference, Sydney, February 2009
- Norwegian Ministry of Foreign Affairs / Norwegian Compact, Oslo, April 2009
- OECD Global Forum "The Crisis and Beyond", Paris, June 2009

Advice and support

- OECD Watch has advised and supported NGOs from Australia, Philippines, Korea, Bangladesh, Liberia, Colombia, Norway, Switzerland, Pakistan, Netherlands, Philippines, Ireland, France, Italy, UK, Democratic Republic of Congo, Germany, Malawi, Peru, Romania in preparing, filing, and following-up on OECD Guidelines specific instances.
- OECD Watch has continued to work closely with trade unions in the Netherlands, India, Australia, Norway, Germany and Argentina.
- OECD Watch has continued to advise business and government representatives in the Netherlands, Norway, Australia, Argentina, Germany, and France.

About OECD Watch

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

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