

Submission to the joint meeting of the OECD Working Party on Responsible Business Conduct and the NCPs 4 December 2014

1. Introduction

OECD Watch appreciates the opportunity to make a submission to the OECD's Working Party on Responsible Business Conduct (WPRBC) and the NCPs, in relation to the agenda of their joint meeting on the 4th of December 2014. This submission, accompanied by OECD Watch's December 2014 Quarterly Case Update, provides input for the WPRBC and NCPs' discussions on five subjects:

- ◉ *Recent collaboration between NCPs and OECD Watch on Guidelines capacity building*
- ◉ *NCP performance (including on initial assessments) in 2014*
- ◉ *Role of the WPRBC in improving NCP performance and promoting functional equivalence*
- ◉ *Deepening engagement with China on issues related to RBC*
- ◉ *Proactive agenda projects*

2. Recent collaboration between NCPs and OECD Watch on Guidelines capacity building

In the latter half of 2014, OECD Watch organised two separate week-long capacity building seminars for civil society organisations in Brazil (September) and Colombia (November). OECD Watch invited the NCPs of Brazil and Colombia to actively participate in the respective seminars, and both accepted. In both cases, the collaboration between OECD Watch and the NCPs was a great success, thanks in no small part to the enthusiastic participation of the representatives of the Brazilian and Colombian NCPs. In the case of Colombia, the NCP even party sponsored the event. The collaboration allowed NCP representatives to communicate directly with civil society stakeholders, explaining to them the structure and functioning of the NCP, discussing hypothetical specific instances, and even participating in role-playing exercises in which the NCP 'played' the role of NCP as workshop participants split into groups to assume either the role of complainants or that of the companies. The challenge for the next set of seminars in 2015 will be to switch up the roles and have the more advanced participants try to play the role of the NCP and the NCP representative try to play the role of a company or an impacted community! Civil society participants very much appreciated and benefited from the NCPs' participation, and we hope that the NCPs gained valuable insights into how civil society perceives the Guidelines and NCPs and how they go about developing a specific instance. We feel the model deserves replication and hope to be able to continue joint exercises in 2015. The Dutch NCP has also already participated in OECD Watch events in the past (Thailand, 2010), and the UK NCP has reached out in willingness to do the same.

3. NCP Performance in 2014

The continued lack of functional equivalence in NCP performance remains a major barrier to the effective functioning of the OECD Guidelines' grievance mechanism and is diminishing the potential of the OECD Guidelines to improve responsible business conduct. OECD Watch is therefore supportive of the WPRBC's work plan to improve NCP performance and promote functional equivalence. The network is encouraged to see improvement in some areas of NCP performance but remains concerned about a number of NCP practices that are damaging the reputation and effectiveness of the Guidelines and specific instance mechanism. This section identifies some of the most salient issues arising in 2014 and provides recommendations for improving NCP performance.

Initial assessments

With more than one-third of all attempts to engage the Guidelines' specific instance dispute resolution mechanism being rejected by NCPs at the initial assessment phase, the decision to focus the first horizontal peer review on the issue of initial assessments was highly relevant. While the summary note on the horizontal peer review (DAF/INV/NCP/RD(2014)62) recognizes some of the differences and problematic issues that have long been highlighted by OECD Watch and TUAC, the summary note lacks analysis and does not contain recommendations that are generally included in a peer review. The following thus builds on the horizontal peer review to identify additional issues and recommendations for improving initial assessments.

⦿ *Rejecting cases not amenable to mediation:* OECD Watch is encouraged to read in the summary note on the horizontal peer review on initial assessments (DAF/INV/NCP/RD(2014)62) that many NCPs agree that it is neither appropriate nor in the interest of improving implementation of the Guidelines for NCPs to reject specific instances simply because they are not amenable to mediation. Rejecting cases based on the (un)willingness of one or both parties to engage in mediation significantly decreases the accessibility of the OECD Guidelines' dispute resolution mechanism and is out of line with the Procedural Guidance, which is very clear on which criteria NCPs should take into account when deciding whether to accept or reject a specific instance at the initial assessment phase. Willingness to mediate is not one of the criteria, and NCPs that use this criterion inappropriately conflate the initial assessment phase of the specific instance process with the 'good offices' phase. NCPs should note that the Guidelines' requirement that parties engage the mechanism in 'good faith' does not imply that parties must be willing to participate in mediation. Nor should the NCPs' task to provide 'good offices' be strictly limited to mediation. Experience has shown that, in addition to facilitating a mediated dialogue, NCPs have many other 'good offices' services and tools at their disposal to help parties resolve disputes. These tools include conducting fact-finding to establish the facts of a case and issuing a final statement with recommendations for improving implementation of the Guidelines. OECD Watch recommends that the NCPs that currently reject cases unamenable to mediation cease doing so and embrace their role as 'problem solver' and the other tools at their disposal to help them solve problems.

⦿ *Expecting unreasonable burden of proof for substantiation:* The second half of 2014 saw a continuation of a troubling trend of NCPs expecting complainants to satisfy an unreasonably high burden of proof before even accepting a complaint and seeking to bring the parties together for dialogue. For example, Reprieve's attempt to engage UK companies related to the links to US drone operations in Yemen was rejected by the UK NCP, which claimed that the allegations were unsubstantiated. Reprieve was only able to re-submit the case after independent journalists uncovered fresh evidence substantiating the allegations. Similarly, complainants in the Corriente Resources cases are disappointed that the Canadian NCP appeared to disregard the comprehensive information they provided when it decided to reject the case because it felt the allegations were unsubstantiated.

Providing incontrovertible evidence of a breach is simply not feasible for many complainants turning to NCPs for assistance in resolving their disputes with companies. NCPs that insist on such high degrees of substantiation significantly reduce the accessibility of the specific instance mechanism. It should not be necessary, at the initial assessment phase, to demonstrate that the preponderance of the evidence supports the allegations. Rather, the complainant should only be required to provide prima facie evidence, enough evidence to raise a rebuttable presumption. Further, such evidentiary burdens are particularly unnecessary in cases where mediation is

sought. It has been OECD Watch's experience that a great deal of consideration, analysis, and investigation goes into describing the facts and circumstances of alleged breaches. Rather than rejecting allegations, NCPs should view as sufficient evidence that raises a credible doubt that the Guidelines have been implemented adequately and bring parties together to explore how the problems might be resolved.

◉ *Scope of the Guidelines: Definition of multinational enterprise:* 2014 saw some NCPs apply an unnecessarily restrictive definition of 'multinational enterprise' in order to reject cases. In one case, the Korean NCP rejected a case on the grounds that the Guidelines "require" companies to "exist in more than one country" in order to be subject to the Guidelines. In another cases, the New Zealand NCP rejected a case on the grounds that the company in question was not a 'for-profit entity', claiming this disqualified it from being a multinational enterprise. The Guidelines state explicitly that no fixed definition of 'multinational enterprise' is required and only note that MNEs are 'usually' established in multiple countries. Insisting that companies must be physically present in multiple countries or 'for-profit entities' in order to fall under the Guidelines is thus erroneous, departs from previous NCP decisions, and contradicts guidance from the Investment Committee on entities such as central banks and sovereign wealth funds. The inconsistent application and interpretation of 'multinational enterprise' is damaging the predictability and accessibility of the specific instance mechanism. In OECD Watch's view, NCPs should be open to accepting cases against all types of commercial entities if there is a possibility that the NCP can contribute to resolving disputes between business and society and/or furthering the effectiveness of the Guidelines.

In a more positive development related to expanding the scope and applicability of the Guidelines to different types of business enterprises, the Canadian NCP indicated its willingness – in principle – to accept a specific instance filed against a Chinese company with operations in Ecuador because the company has a subsidiary in Canada, and neither China nor Ecuador has an NCP that could help resolve the dispute.

Timelines: indicative but within reason

The 2011 update of the Procedural Guidance introduced indicative timelines for the various phases of the specific instance process. OECD Watch supports the use of indicative timelines and understands that it is not always possible for NCPs to stick to strictly defined timelines. Indeed, some degree of flexibility on timelines can sometimes benefit an NCP's handling of a specific instance. That said, the flexibility on timelines must be within reason. The fact that the Irish NCP has allowed nearly four years to pass in the CRH case without even issuing an initial assessment is simply unacceptable. A case against Shell has been languishing at the Argentine NCP for more than six years.

OECD Watch recommends that NCPs take the indicative timelines mentioned in the Procedural Guidance seriously and do their utmost to adhere to them, only deviating if there is a clear and justifiable benefit for the resolution of the case to extending the timelines. One common cause of inordinate delays at the initial assessment phase is when NCPs try to assess parties' willingness to participate in mediation before accepting the case. As mentioned above, this practice is not in line with the Procedural Guidance and serves to diminish the accessibility of the specific instance dispute resolution mechanism. In addition, it causes unnecessary delays in the initial assessment phase. In cases in which one party unjustifiably stalls and delays the process at any stage, NCPs are encouraged to proceed to the determination and final statement phase and not allow the case to linger without progress for extended periods of time.

Follow-up on NCP statements and implementation of the Guidelines by State-owned enterprises

In its final statement in the case against NBIM, as a manager of the Norwegian State Pension Fund Global, the Norwegian NCP concluded in May 2014 that NBIM had violated the OECD Guidelines by refusing to engage with the NCP in the specific instance process. NBIM is owned by the Norwegian State and is therefore what the Guidelines refer to as a “state-owned enterprise.” The OECD Guidelines explicitly underscore that public expectations are higher for State-owned enterprises than for other companies (Commentary to Chapter II, para. 10).

OECD Watch is therefore surprised to see that – as a follow-up to the NCP’s statement – the Norwegian Government has concluded in its annual budget that “it is up to the companies themselves to consider how the recommendations in the OECD Guidelines can best be used”. While many of the provisions of the Guidelines do indeed allow for flexibility and ‘appropriateness’ in their application, the expectation that companies – in particular state-owned enterprises – engage with NCPs when they receive specific instances is clear and should not be left to the discretion of the company as to whether to engage or not. Everyone acknowledges that there are not binding on companies, but OECD Watch is concerned about the tendency to diminish the status of the Guidelines and the signals the sends to the business sector. After all, if one of the world’s major state-owned enterprises is not clearly expected to cooperate with the NCP, why should private enterprises with far less resources bother to do so?

4. Role of the WPRBC in improving NCP performance

With competent, experienced personnel and oversight capabilities, the WPRBC has an important role to play in improving NCP performance and promoting functional equivalence, and OECD Watch supports the WPRBC’s ‘Work plan to improve NCP performance’ (DAF/INV/RBC/RD(2014)9/FINAL). We also note, however, that the entire section on ‘Underperforming NCPs’ in the previous draft work plan (DAF/INV/RBC/RD(2014)9) has been removed. OECD Watch expects that the issues in that section will be included and elaborated in the separate document dealing with the role of the WPRBC and Secretariat indicated in the note in the final version of the work plan. The need for the WPRBC to play a role in overseeing the functioning of NCPs cannot be understated. Case in point is the recent decision by the UK NCP’s steering board to require the UK NCP to revise its draft final statement in the GCM Phulbari Bangladesh coal mining case. This highlights that even the best performing NCPs sometimes make mistakes and are in need of oversight. The UK NCP’s steering board structure is to be commended for providing such oversight. However, given the fact that no other NCPs have a structure mandated to review the NCP’s performance, the WPRBC can and must play this role, both actively as well as passively (i.e. after receiving requests for clarification).

NCP peer reviews

Peer reviews provide key opportunities for learning for both individual NCPs and NCPs collectively. The three NCP peer reviews that have taken place so far (Netherlands, Japan, Norway) were of varying quality, relevance and impact. OECD Watch recognizes the importance of allowing a certain degree of flexibility in the methodology and design of peer reviews. However, incorporating minimum criteria in peer review methodologies are important to guarantee that the peer review exercise is likely to generate accurate and useful insights regarding NCP achievements and opportunities for improvement. OECD Watch furthermore supports the proposal that the OECD IC should play a more active role in peer reviews and is key in providing consistency across all peer reviews and ensuring that peer review methodologies are sufficiently comprehensive.

The current template could be improved with a stronger recommendation in paragraph 14 to always involve parties to specific instances handled by the NCP under review in the review process. To

assess the effectiveness of NCPs as a grievance mechanism, it is crucial to incorporate views of parties involved in specific instances. We would therefore welcome the development of a more specific stakeholder questionnaire (in addition to the more general stakeholder questionnaire) tailored toward those parties in order to capture the concerns they may have, especially with regard to the NCP's responsiveness, ease of access, and handling of cases. OECD Watch supports including meetings with parties to specific instances during site visits of the peer review team. Although it may not be feasible to hold meetings with all parties to all specific instances handled by the NCP under review, the template should recognize that such meetings would always be relevant to a review process.

Following up and reporting back on the implementation of peer review recommendations by the NCP is important for all peer reviews, not just the more robust ones. As a 6th element of the core peer review, NCPs undergoing peer reviews should be required to report back – for example in their annual report to the OECD – on how they have implemented the recommendations. Continuous learning for both NCPs and the OECD WPRBC should be fostered by incorporating best practices of past peer reviews in future peer review methodologies.

Thematic horizontal peer reviews

OECD Watch supports and sees added value in the WPRBC's initiative to undertake horizontal peer reviews on issues related to NCPs' handling of specific instances. The decision to focus the first horizontal peer review on the issue of initial assessments was relevant. While the summary note on the peer review (DAF/INV/NCP/RD(2014)62) recognizes some of the problematic initial assessment issues and practices that have long been highlighted by OECD Watch and TUAC, the summary note lacks analysis and does not identify areas that require improvement nor make recommendations to the WPRBC as stipulated in the Secretariat's 'Work plan to improve NCP performance'. Such recommendations could serve to improve and harmonize NCP performance in the interest of functional equivalence. Without such recommendations, the entire exercise remains a mere documentation of current practice (which is important, but insufficient to improve performance and functional equivalence'. In the future, OECD Watch would recommend consulting stakeholders on the terms of reference for horizontal peer reviews prior to undertaking them in order to improve their relevance and effectiveness. In terms of a topic for the next horizontal peer review, OECD Watch would suggest a review of a phase closer to the end of the specific instance process: the determination phase. OECD Watch's research and analysis indicate a significantly higher rate of success among those NCPs willing to make determinations of whether or not the Guidelines have been breached in cases in which mediation does not result in an agreement between parties. It would be interesting for NCPs to exchange views, experiences, and lessons learned on this topic.

5. Engaging with China on RBC

OECD Watch welcomes the initiative to deepen the engagement with China on issues related to responsible business conduct. The mapping and analysis of Chinese laws and guidelines related to RBC will be a significant contribution to the mutual understanding of what is expected of Chinese enterprises, especially when operating abroad. That said, the OECD should engage with China based on the same principles with which it engages all other member and adhering countries. It is notable, for example, that the five-year programme of engagement did not benefit from the input of civil society or free trade unions. OECD Watch recommends that the OECD clarify whether and to what extent these two stakeholder groups will be included in the discussions, dialogues, and development of RBC tools envisaged in the programme. Engagement between OECD and Chinese governments and businesses only without the participation of civil society cannot be supported by OECD Watch.

6. Proactive agenda projects

Agriculture supply chains

OECD Watch looks forward to reviewing a new draft of the guidance for responsible agricultural supply chains and supporting the public consultation process, scheduled for early next year. We hope that the next draft restores references to human rights that were removed from the current draft. In particular, references to the right to free, prior, and informed consent (FPIC) have been removed or marginalized in the current draft, despite the fact that FPIC is established in international law and recognized in many RBC standards, including the policies of the International Finance Corporation, among others. Regardless of its legal status, stakeholders increasingly demand that companies respect their right to FPIC, and the guidance represents an opportunity to provide enterprises operating along agricultural supply chains with much needed advice.

Stakeholder engagement and due diligence in the extractive sector

OECD Watch continues to engage in the project but is concerned that the most recent draft focussed a disproportionate amount of attention on companies' internal due diligence on their own stakeholder engagement policies and practices, detracting from the core issue of due diligence to identify, avoid, mitigate and remedy impacts and the ongoing meaningful stakeholder engagement that must accompany this process. Another issue that remains important for OECD Watch and our constituents with regard to this project is the importance of recognizing FPIC as an established right in international declarations and conventions, and the fact that stakeholders expect that FPIC be respected by extractive companies whether or not it is required by law.

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