

Submission to the joint meeting of the OECD Working Party on Responsible Business Conduct and the NCPs 20 March 2015

1. Introduction

OECD Watch appreciates the opportunity to make a submission to the OECD Working Party on Responsible Business Conduct (WPRBC) in relation to the agenda of its meeting on the 20th of March 2015. This submission provides input for the WPRBC's discussions on nine subjects:

- ◉ *Addressing the functioning, performance, and impact of NCPs*
- ◉ *Facilitating wider adherence to the OECD Guidelines for Multinational Enterprises*
- ◉ *Proposed Changes to the Annual Report of the Guidelines for Multinational Enterprises*
- ◉ *Responsible Mineral Supply Chains*
- ◉ *Changes in Personnel and Mandate at the Norwegian NCP*
- ◉ *Deepening engagement with China on issues related to RBC*
- ◉ *Proactive agenda projects (agriculture, extractives, textiles, finance)*
- ◉ *2015 Global Forum on RBC in June*
- ◉ *NCP peer reviews and the Core Template for Voluntary Peer Reviews*

2. Addressing the functioning, performance, and impact of NCPs

OECD Watch strongly commends the Secretariat and the WPRBC for taking the initiative to develop a plan of action and implementation process to address the functioning and performance of National Contact Points (NCPs) (DAF/INV/RBC(2015)1). Increasing the effective implementation and overall impact of the OECD Guidelines starts with improving the functioning of the NCPs. Research and analysis by OECD Watch has revealed that many NCPs are still not functioning in line with the core principles of visibility, accessibility, transparency, accountability, impartiality, and predictability. For example, OECD Watch's 2014 review of NCPs¹ found cases where NCPs had allowed specific instances to languish (in one case for more than 3 years) without even issuing an initial assessment, other cases where NCPs set unreasonably high barriers for accessing the mechanism, and still other cases where different NCPs confusingly interpreted the Guidelines in vastly different ways. This is damaging the credibility and reputation of the Guidelines and limits the overall contribution of the Guidelines to responsible business conduct.

OECD Watch is thus encouraged to see the WPRBC's suggestions on how to implement measures to improve the functioning and performance of NCPs and the plan to use the 15-year anniversary of NCPs in their current form to take stock of the impact that NCPs have had on promoting responsible business conduct. We would like to work with the WPRBC and secretariat to ensure that this exercise addresses and analyses the real impact that NCPs have had in avoiding, minimizing and addressing the adverse impacts associated with business activity on the ground and in enhancing the positive contribution of business activity to sustainable development. OECD Watch's analysis indicates that whereas NCPs have played a role in improving sustainability and CSR policies at the corporate headquarters level, their impact in changing corporate practices on the ground and addressing actual impacts of corporate activity on people and the environment has been much more limited. OECD

¹ http://oecdwatch.org/publications-en/Publication_4090/

Watch has received reports of some cases in which the actions and omissions of NCPs have actually had a negative impact on human rights and sustainable development on the ground. While there certainly are positive outcomes to learn from, the WPRBC should not shy away from using the stock-taking to address the hard questions about the track record of impact of NCPs in facilitating the prevention and mitigation of adverse impacts and provision of remedy.

The WPRBC should then use the results of the stock-taking to develop a plan to significantly step up its efforts to improve the functioning of NCPs. Though the specifics of the plan should be guided by the results of the research, OECD Watch's ongoing analysis and stock-taking indicates that the plan should include the following elements:

- *Revising the OECD Guidelines' Procedural Guidance.* The 2011 update of the OECD Guidelines saw important advances in improving the content of the OECD Guidelines (e.g. on human rights, supply chain responsibility, etc), but very few changes were made to the Procedural Guidance that instructs NCPs on how to carry out their tasks, including handling specific instances. Based on research into the more than three years of implementation of the "updated" OECD Guidelines, the Investment Committee should revise the Procedural Guidance so that it provides more specific and concrete guidance to NCPs and sets minimum standards for NCP functioning with a view to ensuring that NCPs are sufficiently accessible, transparent, impartial and predictable.
- *Enhancing the oversight role of the OECD Investment Committee, the WPRBC, and the Secretariat.* The Investment Committee must play a more proactive role to ensure NCPs are functioning properly. Some steps – including encouraging an increased rate of NCP peer reviews – are underway, but the Investment Committee must to more to actively address NCPs that are underperforming and preventing greater adherence to the Guidelines by damaging the credibility of the NCP system. This implies that the OECD and adhering governments should ensure that sufficient funds are allocated to the secretariat to fulfill this crucial function.

3. Facilitating wider adherence to the OECD Guidelines for Multinational Enterprises

OECD Watch is cautiously optimistic about the proposal to provide non-member States the option of adhering to the OECD Guidelines only and not necessarily the full Investment Declaration. Such a move carries the potential to facilitate greater adherence to and uptake of the Guidelines by businesses operating in and from non-member States. Before such a decision is taken, however, OECD Watch would advise the OECD Investment Committee to ensure that a number of assurances and safeguards are put in place. The annotation on this point in the 20 March 2015 agenda notes that "The procedure for adhering to the Guidelines would be designed so as to ensure a full commitment by new adherents to furthering the effectiveness of the Guidelines and putting in place a functioning NCP". Given the fact that a not insignificant number of current OECD and adhering countries do not have a functioning NCP themselves, ensuring that this actually happens is no small commitment. As suggested in point 2 above, OECD Watch recommends that the WPRBC undertake at least two concrete actions prior to opening up the OECD Guidelines-only "opt-in" arrangement:

- Conduct a thorough analysis of the track record and effectiveness of NCPs in promoting RBC and facilitating access to remedy for corporate abuses.
- Formally revise the Procedural Guidance so that it provides more specific and concrete guidance to NCPs and sets minimum standards for NCP functioning with a view to ensuring that NCPs are sufficiently accessible, transparent, impartial and predictable.

OECD Watch feels that the only way for the WPRBC to genuinely ensure that new adherents establish a functioning NCP – as is the ambition – is to set and enforce clear minimum standards in the Procedural Guidance.

4. Proposed Changes to the Annual Report of the Guidelines for Multinational Enterprises

The document on the "Proposed Changes to the Annual Report of the Guidelines for Multinational Enterprises" (DAF/INV/RBC(2015)3) suggests that one of its goals could be to provide “a more useful tool to National Contact Points, by including more analysis on particular challenges...and sharing experience on how these challenges have been addressed.” In order to accomplish this goal and enhance the transparency and effectiveness of NCP performance, we recommend the following additions to the document.

- The Proposed Changes document makes no specific mention of peer reviews. However, under the second-to-last point of paragraph 11 in the draft Peer Review Template, it states that a “summary of the [peer review] assessment and recommendations will be submitted to the Investment Committee and included in the Annual report to the Council. The final report will be published on the OECD website.” The Proposed Changes document should state that a summary and recommendations of each peer review from that year will be included in the Annual report, and that each final peer review report will be attached to the Annual report as an Annex.
- Furthermore, the Annual report should include a brief section on peer review follow-up actions, which would include the actions that previously-reviewed NCPs have taken to implement recommendations from its peer review and the impact of those actions to date. OECD Watch would suggest that the previously-reviewed NCPs make this submission within a year of the peer review, and annually thereafter.

5. Responsible mineral supply chains

OECD Watch is positive about the work that is being done by the OECD, its partners, and stakeholders within the project on Responsible Mineral Supply Chains. OECD Watch would like to call the WPRBC’s attention to a recent research report by OECD Watch member Centre for Research on Multinational Corporations (SOMO)² that proposes expanding the scope of the project to develop specific guidance for minerals other than tin, tantalum, tungsten, and gold (3TG) in order to reduce the financing of armed groups and security forces through mineral proceeds in conflict-affected and high-risk areas.

SOMO’s research reveals how dozens of minerals are associated with conflicts worldwide. In 2013, conflicts that were associated with minerals occurred in 17 countries throughout Asia, Latin America, and Africa. In the conflict regions, a wide variety of minerals was produced, ranging from iron ore, zinc, sulphur, nickel and molybdenum to silver, jade, diamond, and many others. Copper was the mineral most frequently associated with conflicts. Many of these minerals are used in the supply chains of companies based in OECD and adhering countries.

² Centre for Research on Multinational Corporations (SOMO), “There is more than 3TG”, February 2015, http://somo.nl/publications-en/Publication_4167

OECD Watch thus encourages the OECD WPRBC expand the scope of the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas beyond the realm of conflict minerals to explicitly include all minerals, mineral fuels (coal, oil and gas) and non-mineral natural resources. Similarly, the OECD WPRBC's work to prevent companies from (indirectly) financing conflict and contributing to human rights abuses in high-risk or conflict-affected areas should expand beyond mineral chains only and take into account non-mineral natural resources that can also function as conflict items and that are frequently imported by companies operating in OECD and adhering countries.

The WPRBC may find it interesting to note that SOMO has been calling on the European Commission to bring its current proposed regulation into conformity with the OECD conflict minerals due diligence guidance, including ensuring that the regulation and due diligence expectation applies to companies throughout mineral supply chains.

6. Changes in personnel and mandate at the Norwegian NCP

OECD Watch would first and foremost like to welcome Dr. Ola Mestad as the newly appointed Chair of the Norwegian NCP and thank Dr. Hans Petter Graver as outgoing Chair for the excellent work during his tenure at the NCP. Without wishing to call into doubt our full confidence in the integrity and ability of the new NCP personnel, OECD Watch is nevertheless gravely concerned about the recent developments (in terms of personnel and mandate) at the Norwegian NCP that appear to be a form of "punishment" for its handling of the 2013 case against NBIM. Dr. Graver has been quoted as saying that he is "in no doubt" that the decision not to renew his mandate, to leave the NCP unstaffed and effectively inoperative for nearly one year, and to curtail the independence and strength of the NCP are "connected" with the NCP's handling of the NBIM case.³ Following the NCP's final statement in the case, Graver "noticed increased pressure from the Norwegian government", which he felt set out to frustrate the work of the NCP and change the NCP's mandate to "put [its] operations more under government control".⁴ Dr. Graver also claims the NCP was pressured to reject two new cases⁵ against NBIM that were filed late last year: "It was brought to my notice that the preferred course of action would be for the NCP to dismiss these cases." Representatives of the Norwegian government have broadly dismissed claims of interference in the developments at the NCP.⁶ OECD Watch cannot independently verify either position, but if the claims of Dr. Graver's (whom, we note, was personally praised by the Norwegian NCP peer review team for his integrity and credibility⁷) are true, this represents a grave threat to the work and functioning of NCPs around the world.

Beyond the changes in personnel, OECD Watch *is* concerned that what made the Norwegian NCP a global frontrunner among NCPs and a truly effective mechanism for implementing the Guidelines – its independence and its ability to determine in cases – is in danger of being curtailed in its new mandate. Based on a comparative analysis of the Norwegian, Dutch, and Japanese NCP Peer Reviews and a

³ V. Mair, Responsible Investor, "Norway rejects claim of interference as OECD 'national contact point' exits", 5 March 2015.

⁴ Ibid.

⁵ OECD Watch notes with concern that those two cases – related to NBIM's investments in Crown Holdings and POSCO/DaeWoo – remain, approximately six months after filing, in the initial assessment phase.

⁶ Ibid.

⁷ Norwegian NCP Peer Review, at p. 35.

brief review of the new Norwegian NCP mandate, we make the following observations about the changes to Norway's NCP:

- ◉ *Independence of the NCP.* Peer reviewers gave the Norwegian NCP extensive praise for its independence,⁸ noting that its structure at the time of the review was a substantial improvement since the shift to an independent structure in 2011.⁹ Reviewers highlighted positive outcomes due to the NCP's structure, such as increased legitimacy among civil society and businesses. Reviewers also noted that the independent structure increased the accessibility of the NCP and grievance mechanism.¹⁰ The Dutch and Japanese NCP Peer Reviews also remarked on institutional structure, and the Dutch NCP Peer Review specifically commented on the importance of independence.¹¹ Although the Norwegian NCP will retain its structure of independent experts, changes in the new mandate risk eroding the NCP's independence. The new mandate requires the NCP to consult Norwegian authorities on all issues regarding interpretation of the Guidelines. NCPs are Governments' appointed experts on the Guidelines and have a stronger knowledge and ability to interpret them compared to other government personnel, so it is counterintuitive to insist that the NCP consult other government officials on the "correct" interpretation of the Guidelines. At the very least, this diminishes the public perception of the NCP's independence, which the peer review team noted was important for the accessibility of the mechanism.
- ◉ *Ability of the NCP to make determinations of fact and non-compliance with the OECD Guidelines when mediation fails.* Peer reviewers highlighted that the Norwegian NCP's ability to make public determinations of a breach of the Guidelines when mediation fails was an important source of leverage that enhanced the NCP's ability to get business to agree to mediation in specific instances.¹² Peer reviewers further emphasized that it was crucial that the NCP make determinations of fact and breach because "...the NCP has few other tools to use when a Party does not want to engage in the Specific Instance process, or when mediation fails."¹³ The new mandate prohibits the NCP from using the term "breach" or equivalent language with reference to corporate behaviour that is in non-conformance with the Guidelines. If the new NCPs indeed refuses to make public determinations of conformance or non-conformance with the Guidelines, this will diminish its effectiveness to successfully resolve specific instances.
- ◉ *Budget control and priorities.* Finally, changes to how the Norwegian NCP receives and manages its budget allocations risk weakening its effectiveness. Peer reviewers for the Norwegian NCP specifically commented on the importance of a dedicated budget to ensuring the success of the NCP's model¹⁴ (e.g., paying for Secretariat salaries, panel member remuneration, consultancy/fact-finding costs in specific instances, information activities, and administrative costs¹⁵). Reviewers emphasized that making available resources for the handling specific

⁸ Norwegian NCP Peer Review, at p. 4.

⁹ Norwegian NCP Peer Review, at p. 34.

¹⁰ Norwegian NCP Peer Review, at p. 37.

¹¹ Dutch NCP Peer Review, presented March 2010, p. 54, *available at*

http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/report/2014/12/16/final-report-peer-review-nl-ncp/final_peer_review_report_dutch_ncp_with_annexes_17_march_2010.pdf.

¹² Norwegian NCP Peer Review, at p. 26.

¹³ Norwegian NCP Peer Review, at p. 26.

¹⁴ Norwegian NCP Peer Review, at p. 35.

¹⁵ Norwegian NCP Peer Review, at p. 8.

instances should be prioritized in the budget: "...the Norway NCP should ensure that it has adequate and dedicated human and financial resources...**particularly when called upon to handle new Specific Instances**" (emphasis added).¹⁶ However, the new mandate places greater discretionary control of the budget with the Ministry on matters of how the resources should be allocated among the different functions. Dr. Graver has communicated to OECD Watch that the Ministry now wants to prioritize the NCP's promotional activities and assisting the Government in its CSR work over ensuring that the NCP has sufficient resources to appropriately handle specific instances. OECD Watch hopes that this will not be the case and that resources for specific instance activities such as fact-finding and contracting external experts to assist in the mediation phase will continue to have budgetary priority, as recommended in the NCP peer review.

7. Engaging with China on RBC

OECD Watch welcomes the initiative to deepen the engagement with China on issues related to responsible business conduct. Given the size, scale, and sheer number of Chinese enterprises operating in the countries of Africa, the Mekong region and the Pacific – countries prone to conflict and corruption, particularly in extractives and hydropower – 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. As is the tradition at the OECD, this project should strive to provide space and opportunities for a range of stakeholders, including Chinese civil society organisations and workers' representatives, to provide input.

8. Proactive agenda projects

Financial sector

OECD Watch has the following comments on the Terms of Reference for the Proactive Agenda Project on Responsible Business Conduct in the Financial Sector (DAF/INV/RBC(2015)6).

- *Relational scope (i.e. directly linked vs causing vs contributing).* OECD Watch would caution against prematurely limiting the relational scope of the project. The draft ToR limits the primary focus to situations in which financial institutions are directly linked to an adverse impact, with only limited consideration for the "contributing" scenario (and no consideration of the "causing" scenario). OECD Watch would recommend taking impacts and financial sector products as the starting point, and then determining the relationship scenario (and appropriate due diligence action) that follows from that. The determination of the specific relationship (e.g. directly linked or contributing) between the financial institution and an adverse impact has important implications for the issue of providing remedy. This element is currently missing from the draft ToR and should definitely be included. In this regard, the issue of financial institutions establishing grievance mechanisms should also be addressed by the project.

- *Case studies vs guidance.* Case studies are useful as a way of making guidance more grounded and alive to people, but should not be the whole story. Many of the WPRBC's other proactive agenda projects aim to produce guidance, which raises the question as to why this sector/project should be different.

¹⁶ Norwegian NCP Peer Review, at p. 20.

- *Selection of case studies.* OECD Watch agrees with the approach of having the case studies be fictitious (as per section 12 in the draft ToR); however, it will be important that these be drawn from actual experiences in order to maintain relevance to the audience. There needs to be a robust process to identify the right kind of case studies, as well as the individuals/organisations that will prepare them. OECD Watch would strongly suggest that at least one of the case studies involve the “contributing” scenario.
- *Added value of work on ‘new’ financial products.* OECD Watch is encouraged to see there is still an open category on the list of financial products and services to be looked into as some of the products on the list are by now relatively well-trodden territory. This calls into question the added value of additional work on these products would be. Examining other products that have received less attention – such as indices – would ensure that the project has real added value. The ToR should explicitly mention some of the ‘new’ financial products that will be explored.
- *Budget and governance.* For purposes of transparency and accountability, the ToR should include a mention of which governments have agreed to finance the project.
- *Balance of stakeholders in the Advisory Group.* The WPRBC and secretariat should ensure that advisory group membership reflects a balance in division among the various stakeholders (government, business, trade union, civil society – including a representative of communities impacted by irresponsible corporate behaviour in the financial sector, academia, etc).

Agricultural supply chains

OECD Watch commends the OECD Secretariat for its work incorporating into the Guidance the numerous and often disparate comments received from the Advisory Group and the public consultation. Especially as the Guidance is voluntary in nature, it should reflect the highest standards and the best practices to provide useful and constructive advice for enterprises operating in agricultural supply chains. However, OECD Watch is concerned that, in places, the Guidance is weaker than the standards from which it draws. In particular, references to resettlement and free, prior and informed consent (FPIC) are inconsistent with and weaker than what is required by international human rights law and the International Finance Corporation’s Performance Standards. FPIC should be obtained when operations i) are located on or near, or will commercially develop natural resources on, lands traditionally owned or occupied by indigenous peoples; ii) may lead to the physical and/or economic displacement of indigenous peoples from lands and natural resources that they traditionally own, use or occupy; iii) may have significant impacts on the cultural heritage of indigenous; or iv) intends to use the genetic resources and/or traditional knowledge held by indigenous peoples.

Further, OECD Watch believes the Model Enterprise Policy should establish a company’s expectations of its business partners, including the possibility that the company will consider terminating the relationship if its business partners engage in human rights abuses, after attempts to end and mitigate the human rights abuse have failed. OECD Watch would also like to see references to NCPs reinstated in the draft, as we believe that the Guidance should inform their recommendations on the implementation of the OECD Guidelines in specific instances. OECD Watch provided these, and other, comments during a meeting of the Advisory Group earlier this week, and hope they will be reflected in the next and final draft of the Guidance.

Stakeholder engagement and due diligence in the extractive sector

OECD Watch would also like to commend the Secretariat for its hard work in incorporating all of the Advisory Group’s comments on the second version of the Guide. We have similar concerns to the

agriculture project in terms of the Guidance being weaker than the standards upon which it draws on the issue of FPIC (see above).

Textiles

OECD Watch recommends that the secretariat and WPRBC ensure that this proactive agenda project build upon and not duplicate the good work already done on textile sector due diligence by the French and Italian NCPs, as well as stakeholders such as the Clean Clothes Campaign and the ILO. The work on remedy in textile supply chains (work stream 3 in the project) should be sure to at least partly focus on reforming the NCP system to provide remedy before looking elsewhere.

9. 2015 Global Forum on Responsible Business Conduct

OECD Watch is positive about the proposed format and topics for the 2015 Global Forum on Responsible Business Conduct (GFRBC). One topic not currently on the programme that OECD Watch would like to see addressed in the context of RBC is tax avoidance / fiscal optimisation. This topic ties in well with the OECD's own BEPS work and the G20 agenda.

A general recommendation is not to pack the panels with an excessive number of set speaking slots in order to leave plenty of time for lively debate and participation from the audience. We feel a good rule of thumb would be to strive for a four-person panel in each session with one panellist from each of the major stakeholder groups – government, business, trade unions, and civil society organisations. Should the organisers decide to have more than four speakers in a session, they should ensure that at least one speaker from each of the four abovementioned stakeholder groups is present. Selection of panellists should also strive for gender balance and prioritize speakers and perspectives from the “ground zero” of responsible business conduct – i.e. local level managers, workers (and their representatives), and members of communities affected by corporate activities and who have sought remedy through the NCP system.

OECD Watch is encouraged to see the proposal to hold a pre-Forum even on National Action Plans (NAPs) on RBC, including business and human rights. Most adhering countries are currently developing a NAP on business and human rights, and the NAPs that have been finalized (UK, Netherlands, Italy, Finland, Denmark) all reference the OECD NCPs (primarily in the plans for implementing the 3rd pillar on remedy). Given that the NCPs are being referenced and “called upon” in the NAPs in varying – sometimes contradictory – ways, more clarity on what NAPs can and should call on NCPs to do in order to ensure access to remedy for victims of human rights abuses is appropriate and timely. In this regard, OECD Watch would like to call attention to the “NAPs Toolkit”¹⁷ developed by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), as well as ICAR's ongoing implementation of the Toolkit. OECD Watch stands ready to assist in the preparation of the pre-Forum session.

10. NCP peer reviews and the Core Template for Voluntary Peer Reviews

OECD Watch's March 2015 comments on the Core Template for Voluntary Peer Reviews of NCPs are available here: http://oecdwatch.org/publications-en/Publication_4176.

¹⁷ See <http://accountabilityroundtable.org/analysis/napsreport/>

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