

Submission to the joint meeting of the OECD Working Party on Responsible Business Conduct and the NCPs 8-9 December 2015

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 8-9 December 2015. This submission provides input for the WPRBC's discussions on seven subjects:

- ◉ *Addressing the functioning, performance, and impact of NCPs*
- ◉ *Concept note on General Guidance on Risk-Based Due Diligence for RBC*
- ◉ *Proactive agenda: Implementation of guidance on agricultural supply chains and meaningful stakeholder engagement in the extractive sector*
- ◉ *2016 OECD Global Forum on RBC*
- ◉ *Adherence of Ukraine to the Investment Declaration*
- ◉ *Accession of Latvia to the OECD*
- ◉ *Substantial structural funding needed for OECD RBC Unit work on NCP-related issues*

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

OECD Watch 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)11/REV1). 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 4 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. 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 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

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

should not shy away from addressing the hard questions about the track record of impact of NCPs in facilitating the prevention and mitigation of adverse impacts and provision of remedy.

OECD Watch's ongoing analysis and stock-taking indicates that two crucial elements of improving NCP performance are:

- *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 WPRBC and IC 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 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.

2. Concept note on General Guidance on Risk-Based Due Diligence for RBC

OECD Watch is supportive – in principle – of the idea of developing general guidance on risk-based due diligence for responsible business conduct. Given the political and practical importance of this project, it is essential that the guidance be done right and not rushed. The concept note (DAF/INV/RBC(2015)21) provides a solid start but requires some adjustment and further consultation and development of certain areas. OECD Watch would like to provide the following specific comments at this time:

Paragraph 11 on "Target Audience" currently only identifies enterprises and sectoral initiatives as the key target groups of the guidance. It is important that the guidance explicitly include stakeholders such as unions, NGOs, and rights-holders as a target group. The document should provide these groups with guidance as to what they can and should expect in term of due diligence from companies that have impacted or may impact them. In addition, NCPs should be explicitly mentioned as a target audience as they should be encouraged to use the guidance in their efforts to promote the OECD Guidelines and in their handling of specific instances.

Similarly, paragraphs 13 and 14 highlight the "benefits to enterprises". If it is the intention that other stakeholders such as trade unions and NGOs participate in the development of the guidance, the benefits to these groups should be mentioned as well.

Paragraph 23 could mention that companies can use operational-level grievance mechanisms as a method for identifying and prioritizing risks.

Paragraph 25 on avoiding and mitigating impacts to which an enterprise is directly linked should contain additional guidance for both companies and stakeholders on what constitutes "responsible" disengagement. The question of when and how to disengage with problematic business relations is a

major obstacle for companies seeking to conduct on-going risk-based due diligence. The OECD Guidelines note that disengagement should be a “last resort”, but what exactly this means is unclear. The lack of guidance on responsible disengagement has led to many companies engaging in a “cut and run” tactic of irresponsibly abandoning suppliers, which can have significant adverse impacts on local employees, communities, and economies. At the same time, the lack of guidance has encouraged many other companies to continue to engage with business relations causing severe impacts for far beyond what is reasonable without significant action to cease the impact. The OECD guidance should fill this gap.

Figure 3 seems to imply that leverage with business relationships is determined by proximity in the supply chain, but this is not necessarily the case. There are plenty of examples of where a large brand-name company has a high degree of leverage over suppliers deep in the supply chain, even beyond the 3rd tier. We suggest that this explanation be revised and remove the suggestion that proximity determines leverage.

In paragraph 27 on external reporting on and accounting for due diligence, the guidance should note that the OECD Guidelines encourage companies to provide their stakeholders with information that is material to addressing risks of adverse impacts, including the names of their business relationships.

Paragraph 31 cites the Guidelines in noting that operational level grievance mechanisms can be administered “by an enterprise alone or in collaboration with other stakeholders”. While this may technically be true, the guidance should encourage companies to always meaningfully engage with stakeholders in setting up . This is consistent with Chapter II, paragraph 14 of the OECD Guidelines, as well as the guidance on Due Diligence and Meaningful Stakeholder Engagement in the Extractive Sector.

The note’s final section on remediation should highlight that companies are expected to cooperate in good faith with NCPs when specific instances of non-compliance with the Guidelines are alleged by an interested party. Furthermore, in cases where companies are directly linked to an adverse impact, the note should encourage companies to use their leverage to ensure that their business relationships causing or contributing to the impact do take concrete steps to remediate the impact.

3. Proactive agenda: Implementation of guidance on agricultural supply chains and meaningful stakeholder engagement in the extractive sector

Now that the guidance documents on agricultural supply chains and meaningful stakeholder engagement in the extractive sector have been approved by the WPRBC, OECD Watch supports the plans for implementation as a way of making sure that these tools are actually taken up and have an impact on avoiding adverse impacts and improving responsible business conduct on the ground.

4. 2016 Global Forum on Responsible Business Conduct

OECD Watch is positive about many of the proposed format and topics for the 2016 Global Forum on Responsible Business Conduct (GFRBC). One topic not currently contemplated in the draft note 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 G20 agenda and the OECD’s own BEPS work, which has just come to a conclusion so this is a very opportune moment for the WPRBC to take on the issue.

While we are positive about the idea of the roundtable for RBC policymakers, we do not think it is a good idea to hold this session in parallel to the other GFRBC sessions. This would create a major risk of competing discussions and debates, both of which are important for all stakeholders to hear and to

have. OECD Watch would recommend having a lunch or special session, even an additional GFRBC day dedicated to policymakers.

A further 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.

5. Adherence of Ukraine to the OECD Investment Declaration

Given that Ukraine’s adherence to the Investment Declaration appears to be imminent, it is essential that Ukraine set up an effective NCP that will have the ability and the will to ensure that the OECD Guidelines are respected by multinational companies operating in Ukraine and Ukrainian companies operating abroad. Recent research and analysis by OECD Watch has demonstrated that in order to be effective in fulfilling its mandate, an NCP should involve stakeholders in an integral way in its structure. The most effective NCPs have a multipartite composition, include an independent board with decision-making authority, or have a steering board charged with oversight.² Involving stakeholders in the core structure of the NCP is also crucial for the NCP’s impartiality and equitability, two of the core operating criteria laid out in the OECD Guidelines’ Procedural Guidance for NCPs.

In this regard, the WPRBC could play a more useful role than it is currently doing. By revising the Procedural Guidance so that it provides clearer guidance to adhering governments on the most effective NCP structures and complaint handling procedures, the WPRBC could take an important step toward achieving its aim of functional equivalence among NCPs and correcting the wild variance and utter unpredictability that currently characterises the NCP system.

6. Accession of Latvia to the OECD

In a similar vein to the above, OECD Watch would like to stress the importance of having Latvia ensure that its NCP is visible, accessible and effective in promoting the Guidelines and resolving disputes related to non-compliance with the Guidelines. Analysis by both OECD Watch and TUAC NCPs from the Central and Eastern Europe (CEE) region are currently the least visible, least accessible and least utilized in the entire NCP system. Before further progress toward accession to the OECD, the government must take immediate steps to strengthen its NCP, including restructuring the NCP to ensure multi-stakeholder participation and oversight and providing the NCP with the financial and human resources it needs to fulfil its commitments under the Investment Declaration.

7. Substantial structural funding needed for OECD RBC Unit work on NCP-related issues

² OECD Watch found that between 2000-2015, 77% of the specific instances that resulted in a mediated agreement or some form of a successful outcome were handled by NCPs that meaningfully involve stakeholders in one of these ways. See OECD Watch, *Remedy Remains Rare*, June 2015, www.oecdwatch.org/remedy-remains-rare.

OECD Watch commends the OECD RBC Unit secretariat on its recent significant efforts and plans to improve NCP performance. Indeed, the G7 Leaders' Declaration from June of this year underscores the urgency and importance attached to improving NCP performance. However, at current levels of funding, it is unlikely that the ambitions expressed by the G7 heads of state and operationalized by the RBC unit can be met. It is crucial for their success that the OECD RBC Unit's efforts and activities related to improving NCP performance be supported by additional structural funding from Part 1 of the OECD budget. In October 2015, BIAC, TUAC, and OECD Watch, representing respectively the views of business, workers, and non-governmental organisations in the OECD discussions on the MNE Guidelines, jointly called upon the OECD to provide the resources necessary to fund an effective peer review programme, and we would like to reiterate that call here.

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