

OECD Watch submission to the 2016 Peer Review of the Swiss NCP 13 October 2016

Introduction

OECD Watch welcomes the opportunity to provide feedback into the peer review process of the Swiss National Contact Point (NCP). We hope that this process can help the Swiss NCP identify ways in which it can further advance the effectiveness of the OECD Guidelines for Multinational Enterprises and serve as a platform for resolving complaints related to corporate misconduct. Our feedback is primarily based on consultations with our members and our own observations of the Swiss NCP's performance and operations in the core criteria for functional equivalence of visibility, accessibility, transparency, and accountability; as well as the guiding principles for effective handling of specific instances: impartiality, predictability, equitability and compatibility with the Guidelines.

This submission provides recommendations for improving the Swiss NCP's performance, in order to advance access to remedy for the communities, civil society organisations, and workers who file complaints against corporate breaches of the Guidelines. This submission advances recommendations that we have previously put forward to all NCPs in our 2015 report [Remedy Remains Rare](#) and our 2016 [4 x10 Plan for why and how to unlock the potential of the OECD Guidelines](#). Steps that could be taken by the Swiss government and the Swiss NCP to help advance its effectiveness in terms of furthering the effectiveness of the Guidelines, and in addition to the recommendations made in this assessment, would include the following:

- The Swiss government should continue to ensure that sufficient resources are made available to the Swiss NCP to adhere to its commitments to the Guidelines, while also going further to meet best practice standards.
- The Swiss delegation to the OECD Investment Committee and the Swiss NCP should support the international call to revise the *Procedural Guidance*, in order to further strengthen NCP structures and functioning.
- The Swiss NCP should commit to implementing and annually reporting back to the OECD WPRBC on the implementation of the recommendations in the peer

review team's report. The Swiss NCP should also commit to undergoing a full follow-up peer review in 5 years' time. In addition, the Swiss delegation to the OECD Investment Committee should advocate for the adoption of a system of mandatory peer reviews for all NCPs.

- In specific instances in which mediation is not possible or is unsuccessful, the Swiss NCP should include in its final statement a determination of whether the company in question operated in compliance with the provisions of the OECD Guidelines mentioned in the specific instance.
- The Swiss government should attach material consequences to companies' refusal to engage in NCP-facilitated mediation and for non-compliance with the Guidelines.

Reflection on performance on core criteria for NCPs

Regarding the visibility, accessibility, transparency and accountability of the Swiss NCP, OECD Watch makes the following remarks:

- The Swiss NCP scores well with regard to visibility. For example, it maintains a website in English, French, German, and Italian, which provides detailed information as to how the NCP handles complaints and the indicated timelines they use. There is also contact information, information regarding past complaints, as well as a brief flyer outlining the Guidelines.
- Regarding accessibility, the Swiss NCP states that they "cannot provide the parties taking part in the discussions with any financial assistance (e.g. travel expenses, translation, or interpreting fees). In well-founded exceptional cases the NCP can in its own discretion consider a financial assistance to the parties." While OECD Watch is pleased that the Swiss NCP is open to the possibility of offering financial assistance to the parties for translation or travel fees in "well-founded exceptional cases", we believe the NCP's language to be unnecessarily restrictive. The Swiss NCP should always seek to make the specific instance process as accessible as possible. In this vein, we would suggest rewording the abovementioned procedure as such: "While the NCP does not generally provide parties taking part in the discussions with financial assistance, in well-founded cases the NCP can in its own discretion consider providing financial assistance to the parties to cover costs directly related to the handling of the specific instance (e.g. travel expenses, translation or interpreting fees)." The NCP could

also increase accessibility by offering to facilitate mediation in the country where the harm has taken place if requested by the complainant.

- Also related to accessibility, the Swiss NCP states that “sufficient evidence” related to alleged breaches must be given by the complainant during the initial assessment phase. It is unclear what is meant by “sufficient evidence”, and OECD Watch has documented¹ how some NCPs are requiring complainants to meet excessively high standards of proof at the initial assessment phase. The Swiss NCP should make it clear that meeting the “material and substantiated” admissibility criteria is intended to prevent frivolous complaints without setting an unreasonable threshold for offering good offices; at the initial assessment phase the allegations just need to be plausible, not proven. This position has also been supported by the Chair of the Working Party on Responsible Business Conduct.² Additionally, the Swiss NCP should make it clear that it takes a precautionary approach by accepting cases which deal with plausible future harms.
- Related to transparency, the Swiss NCP has excessive confidentiality requirements in which the NCP recommends that the parties restrict outside communications as much as possible throughout the mediation process. Successful past cases such as the WWF vs SOCO case³ reveal that in some situations a simultaneous public campaign by an NGO or union can actually help the NCP resolve the case by adding an incentive for the company to resolve the matter in a non-adversarial manner through the NCP mediation. The Swiss NCP should restrict its confidentiality requirements only to information exchanged during the mediation process.
- Related to both transparency and impartiality, the Swiss NCP allows for companies to submit information to the NCP for the NCP’s consideration in a specific instance process but which cannot be shared with the complainants. The UK NCP’s steering board has ruled that it is unacceptable for the UK NCP to do this.⁴ OECD Watch recommends that the Swiss NCP commit to only basing initial assessments and final statements on information that is shared with both parties, so that the NCP is (perceived as) impartial and retains the confidence of all stakeholders.
- The Swiss NCP states that “unless there is good reason not to do so, the NCP publishes the names of the parties involved in its written statement.” OECD Watch

¹ OECD Watch, 2015, Remedy Remains Rare, http://www.oecdwatch.org/publications-en/Publication_4201

² Ibid, p.26

³ OECD Watch case database, http://www.oecdwatch.org/cases/Case_307

⁴ OECD Watch case database, http://www.oecdwatch.org/cases/Case_31

would like to encourage the Swiss NCP to give all complainants the option to withhold their names. Individual names are often not material to the substance or handling of the case, and mediation with the company can be done by an advocate on behalf of the complainants. The option of protecting individual identities is especially important in today's context of the shrinking space facing civil society worldwide and the serious threats and repercussions that can exist for those who seek to defend human rights and the environment by using the NCP system. OECD Watch recommends that the Swiss NCP to incorporate procedures that foster for the protection and safety of human rights and environmental defenders. This will significantly increase the accessibility of the NCP to these defenders.

Reflection on NCP's institutional arrangements

- OECD Watch notes that the Swiss NCP has 3 part-time staff; however, it's unclear what percentage of time these staff members have for NCP-related work. While OECD Watch does have the impression that the Swiss NCP is sufficiently staffed, OECD Watch recommends having at least 1 staff members whose primary task is the NCP (this may already be the case in Switzerland).
- According to the OECD's 2014 Annual Report, the OECD considers the Swiss NCP to be an interagency NCP, housed in the International Investment and Multinational Enterprises Unit of the Foreign Economic Affairs Directorate and located in the State Secretariat for Economic Affairs SECO. However, OECD Watch has the impression that decisions are taken primarily by SECO, with other agencies in an advisory, rather than equal governance/decision-making, role. Furthermore, when ad-hoc committees have been set up with other ministries to deal with cases, it has been SECO that has decided which ministries to invite in the process. It is unclear whether the joining ministries have had equal decision-making authority (e.g. Sherpa *et al*/vs. Glencore International AG). For this reason, we consider the Swiss NCP to be a mono-agency NCP. If this is not the case, we recommend that the Swiss NCP clearly state on its website more information of the various ministries represented in its staffing, as well as how decisions are being jointly made. In order to ensure impartiality and the confidence of the public, **OECD Watch strongly recommends that the Swiss NCP consider changing its structure to be an independent NCP or to be a multi-partite NCP**, which is composed of representatives from one or more government ministries, as well as representatives from business associations, trade unions and/or NGOs.

- OECD Watch positively notes that the Swiss NCP has an advisory committee of 14 stakeholders, which includes a wide range of stakeholders including representatives of civil society and trade unions.
- However, OECD Watch notes that there is no oversight body, which can be important for ensuring additional accountability into the NCP's decision-making process. We recommend that the Swiss NCP develop an oversight body or independent board, which is charged with oversight and decision-making authority. This board should be composed of prominent independent individuals, with representatives from civil society organisations, amongst other stakeholder groups.

Reflection on NCP's information and promotional efforts

- The Swiss NCP states in its 2015 Annual Report that the Guidelines are promoted in its CSR promotional plan. However, it does not publish this plan in English or three of the official Swiss languages on its website (however, the plan is published in French language, but does not appear to include substantial information). Furthermore, the NCP did not organize any of its own promotional events in 2015 despite participating in a few events organized by others. The only material that the NCP appears to promote is a limited flyer that was developed in 2010 that outlines the Guidelines, but does not provide detailed information regarding the specific instance procedures and how to file a complaint. As NCPs are required to promote the Guidelines, OECD Watch would like to encourage the Swiss NCP to be more proactive in fulfilling its promotional requirements by organizing events around the Guidelines and the specific instance process (on an annual basis at the very minimum) and regularly initiating outreach to Swiss companies located in Switzerland and abroad.
- Regarding transparency, the Swiss NCP has provided access to all of its annual reports from 2007 to 2015 to the OECD Investment Committee online.
- It is noted that the Swiss NCP has not published information regarding all of its specific instance complaints on its website, including cases that are filed to the Swiss NCP but where another NCP takes on the case as a lead (i.e.: Lead Group vs. Innospec; Lead Group vs. Xstrata Plc; Sherpa et. al vs First Quantum Minerals).

Reflections on the implementation of specific instances

- In its 2015 Annual Report, the Swiss NCP acknowledges that it has difficulty meeting its procedural deadlines due to the complexity of cases and recommends that

complaints are handled with flexibility. This has also been observed by OECD Watch in recent specific instances filed with the Swiss NCP. As predictability in the process is important for both parties, and at times corporate harms are underway, OECD Watch encourages the Swiss NCP to do its utmost to adhere to the indicative timelines. In cases where this is not possible and more time is required, the NCP should clearly and promptly communicate to partners that an extension is necessary, the reasons the extension is necessary, and what the new, extended timeline is. This should be followed up with regular updates provided to both parties.

- The Swiss NCP significantly limits its ability to provide remedy for victims of corporate harm by only limiting its role to “encourage discussion between the parties involved rather than establish whether or not a breach of OECD Guidelines has taken place” and to choose whether or not to make recommendations. OECD Watch believes that the Swiss NCP could do more to further the effectiveness of the Guidelines, by also making determinations as to whether or not the Guidelines were breached in cases where mediation fails or is not possible, and that recommendations should be made at the conclusion of all complaints.
- The Swiss NCP states that follow-up activities may take place and that the NCP can provide “support following completion of the specific instance procedure.” OECD Watch believes this is very positive and encourages the Swiss NCP to carry out follow-up processes for all completed specific instances by contacting the parties, reviewing and reporting on whether the recommendations made within the final statement were or were not met.
- The Swiss NCP does not actively encourage that companies undergo the mediation process. In its *Information on the Specific Instance Procedure*, the Swiss NCP states that it is “essentially up to the parties.....to take an active part in the dialogue” and then later states that the “parties are not obliged to participate in discussions.” In order to incentivise constructive participation to increase the chances of success in cases, OECD Watch recommends that the Swiss government should attach material consequences to companies’ refusal to engage in NCP-facilitated mediation.
- OECD Watch notes that few cases were submitted to the Swiss NCP after 2011, while prior to 2011, the number of cases was more substantial. While the reason for this is not known, it could be that the NCP has not promoted the Guidelines widely enough or that there is a general lack of trust that the NCP will provide access to remedy. OECD Watch recommends that the Swiss NCP should do more to actively raise

awareness about the specific instance compliant process and do more to ensure that complainants receive access to remedy through the process. As such, OECD Watch would like to encourage the Swiss NCP to carry out determinations for all complaints that are accepted and by putting out recommendations that the Swiss government attach material consequences for companies who refuse to undergo mediation or who have breached the Guidelines.

General outcomes of the Swiss NCP's specific instance complaints:

- Since the OECD Guidelines were updated in May 2011, there have only been 5 NGO related complaints submitted to the Swiss NCP. Of these five cases:
 - 1 case is currently in the initial assessment phase;
 - 1 case is currently in mediation;
 - 1 case was rejected;
 - 2 cases were jointly handled with other NCPs taking the lead role.

Of the cases handled directly by the Swiss NCP, no form of remedy or positive outcome has been reached.

Between 2000 and 2011, there were 11 CSO related complaints submitted to the Swiss NCP, in which no form of remedy was achieved. Some notable outcomes of these cases, include the following:

- *Sherpa et al*/vs Mopani Copper Mines Plc & Glencore International: The mediation process for the Specific Instance against the companies reached an agreement between the parties with both sides agreeing to exchange information and explore further dialogue. However, upon completion of this case, the company has not complied with the agreed outcome of the mediation process, as they have never responded to any of the communication attempts made by the complainants following the complaint. Final outcome: No remedy reached.
- Thai and Filipino labor unions vs Triumph International: While the Triumph company originally was open to the NCP compliant process, they refused to go through mediation if the core provision of the case, which was the reason for the complaint in the first place, was discussed. The Swiss NCP decided to then close the case due to the deadlock. The NCP in its final statement did not make any assessment of whether Triumph's actions were in breach of the Guidelines, nor were any material consequences placed on Triumph for

refusing to undergo mediation on the issues of the compliant. Final outcome: No remedy reached.

- Columbian communities vs Xstrata: There are two notable outcomes of this case. One, while the Swiss NCP was not the lead NCP, they issued a Final Statement at the end of the process supporting the final outcome made by the leading NCP, which is something not currently done. Two, during the process of the mediation, the complainants had requested that the NCPs conduct a fact-finding mission on the ground. The Swiss NCP responded that the mission would be considered a violation of Columbia's national sovereignty. Furthermore, they said local embassies could not carry out the duties of the NCPs, which was at odds with the other NCPs involved. Final outcome: No remedy reached.

Contact details

For questions or clarification on this submission, please contact the OECD Watch secretariat:

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