

OECD Watch Submission to the 2017 Peer Review of the Chilean NCP 17 July 2017

Introduction

OECD Watch welcomes the opportunity to provide feedback into the peer review process of the Chilean National Contact Point (NCP). The intention of our submission is to help the Chilean NCP identify ways in which it can further advance the effectiveness of the OECD Guidelines for Multinational Enterprises (the Guidelines) and serve as a forum for providing access remedy for complaints related to corporate abuses. Our feedback is primarily based on consultations with our members and our own observations of the Chilean NCP's performance and operations based on the core criteria of visibility, accessibility, transparency, and accountability.

During the last year, the Chilean NCP has undergone a new revival, with changes being made to its staffing as well as to its Mirror Committee. With these changes comes the opportunity for further improvement and revitalization. OECD Watch encourages the Chilean Government and NCP to focus on fulfilling its responsibilities under the Guidelines' Procedural Guidance and meeting the core criteria and guiding principles for specific instances in which NCPs are meant to fulfil in order to meet the concept of 'functional equivalence.' As such, we would like to encourage the Chilean NCP to take immediate steps to increase the visibility and accessibility of the NCP, as well as the recommendations for responsible business conduct made within the Guidelines, so that the NCP and Guidelines become better known and utilized by civil society organisations in Chile, as well as those located in the countries in which Chilean companies are operating. Furthermore, the Chilean NCP should ensure that the mechanism serves to provide access to remedy for victims of corporate harms, by issuing determinations of non-compliance when the offer of good offices does not result in a mediated agreement.

Chilean NCP's performance on core criteria

Visibility and accessibility

The Guidelines and the Chilean NCP lacks general visibility within Chile, as well as in countries where Chilean companies operate. Based on our conversations with civil society organisations in Chile, general public awareness over the Guidelines and the role of the NCP

to help resolve disputes is limited. This is also apparent given that very few specific instance complaints have been filed with the NCP from local communities and civil society organisations. More promotional activities are required to help raise the internal profile of the NCP and meet the core criterion of visibility.

In terms of accessibility, the Chilean NCP's website contains information regarding the Guidelines in Spanish and English, along with general information regarding the complaints procedure, as well as copies of Final Statements from specific instances. However, the NCP's visibility and accessibility is hindered by the fact that there are no documents outlining the NCP's rules of procedures. The closest document describing how the NCP operates is in its 2015 [Punto Nacional de Contacto](#) report, which contains outdated information regarding the currently staffing of the NCP. In order to improve the NCP's visibility and accessibility, more detailed information regarding how the NCP makes decisions, handles complaints, and what mediation entails would improve the accessibility, as well as predictability, of the NCP from the perspective of potential complainants. Furthermore, the NCP remains considerably inaccessible when considering the expenses involved for both local and foreign complainants in terms of translation, travel and other costs that may be involved in using the NCP.

On a positive point, the website has a useful [chart of the process](#), along with the possibility for complainants to fill out an online compliant questionnaire ([Cuestionario inicial](#)), which can help facilitate the submission of filing a specific instance complaint in a straightforward manner as it details the information that is required and the questionnaire can be submitted directly to the NCP.

Lastly, the English page of the NCP's website is not currently functional. An [older website](#) remains operational in English, but is not easy to find and has not been updated for a few years.

Recommendation: The Chilean NCP should develop detailed procedural rules for the NCP and publish them on their website.

Recommendation: The Chilean NCP should reduce the financial and procedural constraints facing potential complainants by increasing the accessibility of the NCP. The NCP should make accessible translation services for complainants if necessary and consider ways in which to make participating in mediation more feasible, such as providing financial support for a complainant's travel or offering to hold mediation where the alleged corporate harm occurred.

Recommendation: The Chilean NCP should develop procedures to protect the activists using the NCP system, given that some human rights defenders and other community members have reported threats and harassment for filing complaints with some NCPs. As such the NCP should have a system in place that helps evaluate the risks involved, and seeking to mitigate potential security risks faced by the complainants. The procedural rules should also provide the option for the complainant to request that their identity remain confidential when filing a Specific Instance complaint.

Transparency and Accountability

In order to fulfill be accountable and fulfil the core criteria, NCPs are expected regularly report to their respective governments, as well as the OECD Investment Committee. The Chilean NCP is currently not meeting this requirement, as it has not published any of its reports to the OECD Investment Committee nor provided any other information as to how it reports to the Chilean Government.

The Chilean NCP has the ability to make determinations. According to Stage 3 of the [NCP's Procedures for dispute settlement](#), the NCP states "If a solution has been found, the Chilean PNC will submit a final declaration explaining the agreement. If PNC has examined the complaint, it will elaborate and publish a final statement to clearly indicate if the Guidelines have been violated or not and, if necessary, to provide advice on how to correct the company's future behavior." This is also expressed in the [Frequent Questions](#) section of the NCP, in which the NCP answers that if the parties do not reach an agreement or if the agreement is partial, then the NCP will determine if there has been a breach by the Guidelines. Furthermore, according to the March 2016 [Business and Human Rights Baseline Study](#) in Chile, since 2015, the Chilean NCP has had the ability to follow-up and review the implementation of mediated agreements that are made. This is a positive development, but the Chilean NCP should also take into consideration some of the concerns expressed by civil society following the discussions held at a seminar organized by the Chilean Ministry of Foreign Affairs, the Norwegian Embassy and Sofofa, a confederation of Chilean companies and industry associations on "Challenges for Chilean Investors: The Effect of of the OECD Guidelines for Multinational Enterprises: A Practical Approach" on 16 November 2012. The seminar discussed the Cermaq case at length and in an [analytical report written](#) about the discussion that took place, it was mentioned that the fact that the lack of additional follow-up to the Cermaq case by the NCP(s) served as a practical obstacle to the implementation of the agreement made (Note: this case was handled by the Norwegian NCP, in cooperation

with the Chilean NCP). Determinations, follow-up reporting, as well as material consequences are all means that the Chilean government and NCP could use to promote policy coherence with the Guidelines and the NCP system.

While the Chilean NCP does not publish any confidentiality restrictions on its website, the June 2016 OECD has reported in its Scoping Paper: Confidentiality and Campaigning in Specific Instances (DAF/INV/NCP(2016)8/REV1), that the NCP requires parties undergoing mediation to agree to ad hoc confidentiality agreements. While it is not clear what these agreements entail, it is important to note that these agreements should not be necessary if the NCP explicitly states in its procedural rules what the Guidelines say regarding transparency, confidentiality and good faith participation.

Recommendation: The Chilean NCP should provide annual reports to the OECD, as well as to the Chilean Government. These reports should be published on the Chilean NCP's website.

Recommendation: In order to improve transparency, as well as accountability, around the handling of a specific instance, the Chilean NCP should commit to publishing all initial assessments on its website, in addition to the final statements, agreements and follow up reports.

Recommendation: The Chilean NCP should use its ability to provide determinations, in order to provide incentive for Chilean companies to abide by the Guidelines, as well as participate in mediation. The Chilean NCP should also make follow-up reports on mediated agreements and whether or not the agreement is being adhered to or not. In order to promote policy coherence, the Chilean government should also equip the Chilean NCP with the ability to attach material consequences on companies that have been found to have breached the OECD Guidelines.

Recommendation: The Chilean NCP should conduct fact-finding mission when necessary, to in order to help clarify facts when determining whether or not a Specific Instance is bona fide or when making determinations.

The Chilean NCP's information and promotional activities

As mentioned earlier, the Chilean NCP needs to take immediate steps to improve its visibility. For this reason, the Chilean NCP should develop and publish an annual promotional plan outlining the promotional activities they plan to carry out over the year.

The Chilean NCP's website states that the [Chilean NCP participated in 7 promotional activities in 2016](#), which were organized by other stakeholders. Similarly, the Chilean NCP's website states that they participated in [18 activities in 2015](#) and [16 activities in 2014](#). However, the NCP does not appear to have organized its own information or promotional activities. OECD Watch would like to recommend that the Chilean NCP provide outreach to Embassies and civil society organisations located in countries where Chilean companies operate.

In OECD Watch's view, the principal objectives of promotional activities should be: first, to inform business enterprises of the expectations with respect to their behavior contained in the Guidelines, as well as the expectation by the Chilean Government that the standards of the Guidelines should be abided by, and second, to make stakeholders, including civil society organisations, aware of this mechanism and to encourage them to make use of it.

Recommendation: OECD Watch recommends that the Chilean NCP develops an annual promotional plan to be published on its website, in order to increase transparency and stakeholder accessibility. This promotional plan should take a proactive approach to help increase stakeholder awareness of the Guidelines and the NCP in Chile, as well as in the countries in which Chilean companies operate, through outreach to Chilean Embassies as well as civil society organisations in these countries. The promotional plan should focus on the two objectives mentioned above.

Recommendation: Many breaches related to the Guidelines in Chile revolve around environmental and human rights violations by companies operating in Chile. It would be useful if the Chilean NCP worked with the Chilean National Institute for Human Rights (INDH) to inform stakeholders involved in [INDH's Map of Environmental Conflicts](#) project to increase awareness around the Guidelines and the possibility of filing complaints with the NCP.

The Chilean NCP's institutional arrangements

The Chilean NCP is a monoagency body with three dedicated part-time staff members, which is housed in the General Directorate for International Economic Relations at the Ministry of Foreign Affairs. The NCP is a senior official from the Ministry of Foreign Affairs, who has the dual responsibility of also serving as the Head of the OECD Department, and has sole decision-making authority over the Chilean NCP. Two officials serve as the Executive Secretary to the NCP.

The Chilean NCP also has an Advisory Council, which is composed of representatives from various government ministries, who are meant to advise the NCP on the fulfillment of its objectives, especially around the promotion of the Guidelines and the handling of Specific Instances. The exact make-up of this Advisory Council, along with its terms of reference, are not publically available.

Additionally, the Chilean NCP has a Mirror Committee, in which stakeholder representatives from business associations, trade unions, NGOs and academics, advise the Chilean NCP on its work. However, according to its [terms of reference](#), the Mirror Committee does not have the authority to comment on Specific Instance complaints that have been submitted to the Chilean NCP. While the Mirror Committee is meant to meet on a quarterly basis, it appears that the committee became inactive after 2014, as minutes of meetings have only been posted on the Chilean NCP's website up until June 2014. The Mirror Committee then appears to have been re-launched after late 2016, when the NCP put out a public call for new civil society actors to join the committee on its website.

According to the [2016 Annual Report of the OECD Guideline for Multinational Enterprises](#), the Chilean NCP has stated to the Investment Committee that they have financial resources accessible for all of its NCP related activities, however, it is unclear whether the amount is sufficient and if this is a dedicated financial budget or rather if it is accessible only on an ad hoc basis. This statement contradicts the [Business and Human Rights Baseline Study](#), which recommends that the Chilean NCP be strengthened with "fresh funding and human resources needed to hold sessions, promote and offer mediation services throughout Chile, and where Chilean companies invest abroad."

Recommendation: The current structure of the Chilean NCP risks being perceived as partial towards government and business interests. As such we recommend that the Chilean NCP consider restructuring its existing NCP to have multipartite decision-making through a multipartite structure or independent unit with a steering body charged with oversight.

Recommendation: A terms of reference for the Chilean NCP's Advisory Council should be drafted and made public. The NCP should explain when and how they will utilize the Advisory Council in its work, especially in terms of the handling of specific instances.

Recommendation: The Chilean government should provide the NCP with a dedicated annual budget that allows it to sufficiently fulfil all of its responsibilities, including carrying out its own promotional activities inside and outside of Chile.

Reflections on the implementation and handling of specific instances

When analyzing the implementation and handling of specific instances, some common themes arise that merit specific consideration, namely that:

- The Chilean NCP has directly handled 11 specific instances since 2000, of which only one of these specific instances came from civil society, which was the case against [Marine Harvest in 2002](#). There is another case in which the Chilean NCP cooperated with the Norwegian NCP between 2005 and [2011 regarding Cermaq ASA's](#) operations in Chile. The majority of complaints are coming from trade unions, which demonstrates the poor visibility of the Chilean NCP amongst civil society both within Chile and in the countries in which Chilean companies operate.
- In regards to the Forum for Environment and Development (ForUM)/Friends of the Earth Norway vs Cermaq ASA case, while an agreement was made in 2011 between the parties, the lack of regular follow up has served as an obstacle to the implementation of the Agreement, as mentioned earlier in this submission. After the Norwegian NCP carried out one follow up meeting in May 2012, they declared the case concluded despite requests by the complainants for additional follow-up, stating that there was no clause in the agreement for further follow-up. The Chilean NCP also did not follow-up further on the case. However, in November 2012, [ForUM issued its own-follow up investigation](#) demonstrating that despite the agreement reached and Cermaq's commitment to improve its policies, the company had failed to change its operations in Chile. In reflection to the case, the OECD stated in its [2012 Annual Report](#) that "all parties agreed that including more details on monitoring in the joint statement could have made the follow-up process more predictable, and enabled better co-ordination and a higher level of trust between the parties."
- The last specific instance compliant that the Chilean NCP handled was in 2015, demonstrating both the need for the Chilean NCP to be perceived with stakeholder confidence and to make greater promotional efforts around the NCP complaints mechanism.

- Finally, according to the Question and Answers section of the Chilean NCP's website, it states that the timeline for handling a specific instance usually falls between 6 to 18 months. OECD Watch encourages the Chilean NCP to do its best to meet the 1-year indicative timeline.

Recommendation: When a joint agreement between parties cannot be made or when a company refuses to engage in mediation, the NCP should still seek to deliver a positive outcome by issuing a determination, in addition to recommendations. By focusing on delivering more positive outcomes through mediation, by issuing determinations, carrying out fact-finding investigations and regular follow-up meetings/reports on the mediated agreements that are made, the Chilean NCP will deliver more meaningful outcomes for victims of corporate breaches to the Guidelines.

Conclusion

This submission advances recommendations that we have previously put forward to the Chilean NCP, as well as all NCPs, in our 2015 report [Remedy Remains Rare](#) and our 2016 [4x10 Plan for why and how to unlock the potential of the OECD Guidelines](#).

OECD Watch hopes that the recommendations made in this submission are considered and acted upon. As Chile is currently in the process of developing its National Action Plan for Business and Human Rights (NAP), it is an opportune time for the recommendations of the Chilean NCP Peer Review to become integrated in the NAP. In addition to providing concrete actions to advance the recommendations made in this process, we encourage the Chilean government to adopt a policy towards ensuring regular peer reviews for the Chilean NCP at least once every five years, along with a system to publicly report back on how the recommendations of the peer reviews have been implemented, in order to lead to further improvements, as well as a means to achieve functional equivalency.

Contact details

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