

To: OECD Investment Committee and Working Party on Responsible Business Conduct
From: OECD Watch
Re: Recommendations to strengthen the substantiated submission process
Date: 16 October 2018

Summary

In November 2017, OECD Watch filed the first-ever substantiated submission to the OECD Investment Committee (IC) addressing the Australian government's application, through its National Contact Point, of the OECD Guidelines' Procedural Guidance to a particular specific instance. In the intervening months, OECD Watch has engaged in the review process undertaken by the Investment Committee and its Working Party on Responsible Business Conduct (WPRBC). While we appreciate the rigor with which the review has been undertaken, we are concerned by several shortcomings with the review procedures. To resolve these shortcomings and ensure an equitable, transparent, and predictable process in future, this statement proposes that the IC implement several reforms to the substantiated submission procedures.

Background

Bases for the substantiated submission process

The Procedural Guidance of the OECD Guidelines establish in Para. 2 that the IC "will, with a view to enhancing the effectiveness of the *Guidelines* and to fostering the functional equivalence of NCPs: (b) consider a substantiated submission by an adhering country, an advisory body or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances." The Guidance asserts in Para. 48 that "A substantiated submission by an adhering country, an advisory body or OECD Watch with respect to whether an NCP interpretation of the *Guidelines* is consistent with Committee interpretations will also be considered."

Beyond these references in the Procedural Guidance, Para. 21 of the document *Working Party on Responsible Business Conduct: Addressing issues relating to the functioning and performance of NCPs* (DAF/INV/RBC(2015)1 proposes a very rough guide for the steps by which the Investment Committee will consider substantiated submissions.

OECD Watch substantiated submission regarding Australian National Contact Point

As authorized under Para. 2 of the Procedural Guidance, on 27 November 2017, OECD Watch submitted the first-ever substantiated submission to the IC challenging the Australian government's implementation of the OECD Guidelines' Procedural Guidance regarding the Australian National Contact Point (ANCP)'s handling of the case *Human Rights Law Centre and RAID v. G4S Australia Ltd.* Our submission argued that by misapplying the Guidelines to the case, the ANCP breached two of the core criteria and principles for complaint handling established in the Guidelines for NCPs:

- **Accessibility**: The ANCP failed to limit its initial assessment review to the six admissibility criteria established in the Guidelines. Instead, it effectively *added* criteria, improperly rejecting the complaint because the complaint 1) was subject to parallel proceedings, 2) did not meet an unreasonably high burden of proof more appropriate for the consideration phase of the process, and 3) could be interpreted as a commentary on government policy. By applying these unwarranted additional admissibility criteria, the ANCP unjustifiably made itself inaccessible to the complaints; and
- **Impartiality**: Having improperly rejected the case at the initial assessment stage on grounds of inadmissibility, the ANCP unnecessarily went on to accept, without question, the company's defences of its actions and absolve, without proper balanced evaluation of the

facts, G4S Australia Ltd of any responsibility for the harms incurred by the complainants. In doing so, the ANPC cast serious doubt over its impartiality in handling the case.

Participation in the Investment Committee's review

Since our initial filing of the substantiated submission, OECD Watch has engaged in good faith in the IC's review. In February 2018, we participated in a call with the Secretariat of the IC and WPRBC to provide factual clarifications on the submission. Subsequently, in April 2018 we engaged in a call with members of the WPRBC Bureau to further discuss the arguments in our submission.

Concerns over the impartiality, transparency, equitability, and predictability of the review

During the review period, OECD Watch has been deeply concerned by two particular proceedings that we feel have jeopardized the impartiality and transparency of the process:

- First, OECD Watch has not been given the opportunity to view the ANCP's response to OECD Watch's submission, whereas the ANCP has of course seen both our submission and its own response. The WPRBC's refusal to allow OECD Watch to see the ANCP's response stands at odds with what should be a balanced and transparent practice and diminishes the legitimacy of the process.
- Second, OECD Watch has not been given the opportunity to review any draft responses prepared by the WPRBC, whereas the Australian government and the ANCP have been given multiple opportunities to review and comment on the draft response. We respectfully submit that such practice is inappropriate as part of the substantiated submission review, where a country is equal party to a complaint before an OECD Committee. In such case, in the interest of impartiality and equitability, both parties should be afforded equal opportunity to comment on drafts.

We also are concerned that the overall process has not followed clear and predictable timelines – thereby noting that current procedure does not provide any timelines that should be followed – for reviewing documents, issuing drafts, seeking input from parties and external stakeholders, and updating parties on the review's status.

We understand that this substantiated submission is the first to be received by the IC, and that the IC and parties alike may not have been clear on how the process should unfold. The proposed procedures in Para. 21 of *Working Party on Responsible Business Conduct: Addressing issues relating to the functioning and performance of NCPs* (DAF/INV/RBC(2015)1) do not provide adequate detail on how substantiated submissions should be handled.

In light of the lack of clear procedures, and to ensure moving forward a robust substantiated submission process that itself meets the Guidelines' core criteria of visibility, accessibility, transparency and accountability, and the principles for proper handling of issues through impartiality, predictability, equitability, and compatibility with the Guidelines, OECD Watch calls upon the Investment Committee to implement several reforms.

Reforms needed to the OECD NCP substantiated submission process

We respectfully urge the Investment Committee formally to undertake the following:

1. **Assert that the substantiated submission process will be undertaken according to the same core criteria and principles that the Guidelines demand of NCPs in their handling of specific instances.** Such an assertion is vital to clarify for participants as well as external stakeholders the high standards by which the process will be carried out.

2. **Ensure that the government/NCP-party [in this case, Australia] in question cannot veto the response to a submission about itself.** Allowing the government/NCP-party to veto its own review presents a clear conflict of interest, casting the validity of the review's outcomes into jeopardy. The government/NCP-party should be treated separately as a party, not a reviewer. To effect this change, the Investment Committee should take two steps: First, the Committee should formally adopt a "consensus minus one" voting rule for substantiated submission reviews, to ensure that a government/NCP-party cannot veto any decisions relating to review of its own actions.
3. **Ensure the parties have equal access to documents submitted by the parties and OECD entities.** Both parties should have equal access to the complaint, the response to the complaint, and any subsequent submissions made by parties. Both parties should also have an opportunity to review and comment on a draft of the response before it is finalized. Confidentiality should be maintained only where necessary to protect personally identifying details or company trade secrets.
4. **Establish a clear timeframe for each stage of the substantiated submission review.** Taking into account the meeting schedules of the IC and the WPRBC, the overall process should take no more than nine months. Both parties should be offered an equal number of opportunities to clarify facts or arguments in respect of their submissions.
5. **Establish set moments when the parties will be consulted by the WPRBC Bureau and the Secretariat.** Both parties should be consulted 1) shortly after the filing of the submission and response, in order that parties may share with the WPRBC their thoughts regarding both the submission and the response, and answer any questions the WPRBC may have regarding the facts identified or arguments made, and 2) before any drafts are submitted to the Investment Committee, so that the Investment Committee may consider the parties' comments and concerns alongside the draft. Parties should not be consulted additionally outside of the established periods for consultation.
6. **Establish set moments when the parties will be updated on the status of the WPRBC's and/or Investment Committee's review.** Parties should be notified of receipt of their own and the opposing parties' submissions within five days of receipt. Parties should also be updated on the status of the Investment Committee's review.
7. **Ensure that the Investment Committee's response clarifies when an NCP party has not interpreted or applied the Guidelines correctly, and recommends actions the NCP should take to ensure proper application of the Guidelines in the future.** The purpose of the substantiated submission process is to determine whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances. The Investment Committee's response must therefore clearly assert whether, and in what respects, the NCP-party did not fulfil its responsibilities and what steps the NCP-party should take (i.e. reforming its rules of procedure) to ensure it fulfils its responsibilities with regard to handling specific instances in future.

Conclusion

OECD Watch appreciates the dedicated attention the IC and the WPRBC have given to reviewing this first substantiated submission. We offer the above recommendations to provide constructive

guidance to help the IC and WPRBC strengthen this crucial accountability mechanism, to ensure that it becomes a procedure that is legitimate and has the trust of stakeholders.

About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch's primary aim is to help support CSO activities related to the OECD Guidelines and the work of the OECD's Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe. For more information, please visit www.oecdwatch.org.

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