

Submission to the OECD Working Party on Responsible Business Conduct March 6, 2019

Introduction

OECD Watch welcomes the opportunity to provide input on several agenda items of the OECD Working Party on Responsible Business Conduct (WPRBC).

Our submission highlights:

- Concerns and suggestions regarding the proposed revised procedures for handling substantiated submissions;
- Concerns and suggestions regarding the proposed revised peer review template; and
- Comments regarding the performance of NCPs.

1. Draft procedures for considering substantiated submissions

In November 2017, OECD Watch filed the first-ever substantiated submission to the OECD Investment Committee, and subsequently we engaged in the year-long process for review. We appreciate the timeliness and rigor with which the review was undertaken, but our engagement enabled us to see serious gaps in the process established by the informal guidance (DAF/INV/RBC(2015)1). In October 2018, we presented to the Investment Committee seven demands for revising the substantiated submission process.¹ In December 2018, we welcomed the WPRBC's agreement to revise the procedure, but again expressed concern about the limited scope of those proposed revisions (Annex 1 to this submission).

The latest draft procedure is an improvement on the earlier proposals, and we appreciate that some of our concerns have been addressed. In particular, we welcome the proposals that:

- The NCP-party be asked to excuse itself from WPRBC and IC deliberations on the submission;
- The submitter be sent the response of the NCP-party; and
- The parties be regularly updated on the status of the review.

However, we are seriously concerned by several elements in the proposal. We make the following suggestions for improvement:

- The timelines for the process are still not clear.
 - While timelines for initial contact with parties (para. 6) and for the drafting of the response by the NCP-party (para. 7 and 8) have been added, we seek timelines for other key moments: request by the Investment Committee Chair for the WPRBC to draft a response (para. 5); the period for drafting the response (paras. 10-13); the period for approving the response (paras. 17-22); and in general the overall timeframe for review, start to finish. The process for the first substantiated submission took about a year; that timeframe is reasonable and we encourage the Committee to adopt that timeframe as the expectation moving forward.
 - Additionally, we encourage greater clarity on the frequency of, or stages for, updates to be given to the parties (para. 16).
- The proposed process is not sufficiently transparent as regards consultations.

¹ OECD Watch, Recommendations to strengthen the substantiated submissions process, October 16, 2018, available at <https://www.oecdwatch.org/2018/10/16/recommendations-to-strengthen-the-substantiated-submission-process/>.

- We appreciate “balance” (para. 12) in consultations with each party. But it is even more important that there be transparency on the number and nature of consultations with parties. In a review process such as this one, there should be no need for confidentiality over the number of times, or subjects over which, the parties are being consulted. Parties should be updated on these elements.
 - There should also be transparency on the number and nature of consultations by the Secretariat with other NCPs or stakeholders (para. 13).
- There should be opportunity for formal comment by parties before the draft response is approved by the WPRBC.
 - Many NCPs offer parties an opportunity to review and provide comments on a draft final statement. We seek the same process be undertaken here too: parties need a meaningful opportunity to respond to the draft before it becomes final. Therefore, we urge that before the WPRBC approves the draft response by consensus (para. 17), the parties be given a formal (and simultaneous) opportunity to review and comment.
 - The annex to the final response approved by the Investment Committee should include any comments submitted by the parties at this stage that do not ultimately become adopted into the final response.
 - Note: our recommendation here essentially contradicts the proposal (para. 19) to leave to the discretion of the WPRBC the determination of how comments will be reflected. For sake of transparency and to bring greater perspective on the issues under review, we believe a moment should be afforded for official comments, and that these official comments should, if not adopted by the committee, be included as an annex to the response.
 - The response of the Investment Committee (para. 14) should also include a clear answer to each query about whether or not the NCP-party correctly fulfilled its procedural responsibilities during the handling of a specific instance.
 - The purpose of a substantiated submission is to clarify whether or not an NCP fulfilled its procedural responsibilities under the Procedural Guidance (*see* OECD Guidelines Procedural Guidance para. 2(b) and 47). Therefore, the response of the Investment Committee should confirm the answer(s) clearly.
 - The response of the Investment Committee should also explain what impact an incomplete fulfilment of procedural duties has had on the NCP’s achievement of the core criteria or complaint handling principles.
 - The response of the Investment Committee (para. 14) should include a summary of the NCP-party’s response as well as of the submitter’s submission
 - As drafted (para. 14), the response will include only a summary of the submission of the submitter. We see no reason for the response not also to present a summary of the NCP-party’s response. This one-side practice marks a break with both standard NCP practice and the procedure in the first substantiated submission, wherein both OECD Watch’s and the Australian NCP’s key points were summarized in the response by the Investment Committee. We believe it is important that both parties’ comments be summarized.
 - The response should be posted on the OECD’s website and on the website of the NCP-party.
 - At a minimum, for sake of transparency and broader understanding of how the OECD Guidelines should be interpreted and implemented by the NCP, the OECD should post

the response on its website, not merely include a summary of the response in its annual report (para. 24).

- The NCP-party should also publish the response on its own website.

These changes to the substantiated submission procedure are crucial if the process is to be seen as credible and legitimate by civil society and be effective at improving NCPs' implementation of the OECD Guidelines.

2. Revised core template for peer reviews

OECD Watch has engaged in the peer review process for about a decade, and we have been increasingly concerned with the effectiveness of the process in promoting meaningful reform of NCPs. NCPs remain far from achieving functional equivalence, yet the peer reviewers still do not offer meaningful criticism of poor NCP structures and practices, nor prompt NCPs to implement tangible reforms to facilitate remedy. Civil society feels its input, if made public at all, is largely not reflected in peers' analyses, and that the handling of cases does not improve at reviewed NCPs. This reality discourages civil society from engaging in future reviews.

In June 2018, OECD Watch, together with Accountability Counsel and the International Corporate Accountability Roundtable, submitted a report outlining concerns and offering 18 recommendations to the peer review template and process.² In December 2018, we welcomed the WPRBC's agreement to revise the template and procedure and also raised our serious concerns (Annex 2 to this submission). We appreciate that several of the recommendations we made to the process are reflected, to some extent, in the proposals, including that:

- The questionnaires are clarified and streamlined;
- Stakeholders will be given progress updates;
- The institutional stakeholders' submissions will be annexed to the final report of peers; and
- Stakeholders be allowed to submit questionnaires or in-person feedback anonymously and/or out of the presence of the reviewed NCP, when requested.

We also understand that some of our initial 18 recommendations concern the final report and may be addressed without incorporation into the template. For example, greater specificity and rigor in the drafting of peers' recommendations is needed so that overly general, weak, or compound recommendations do not enable NCPs to address only a part of the recommendation and claim full implementation of the recommendation.

Nevertheless, we raise here serious concerns about recommendations we made that are not reflected, as well as concerns and suggestions about the proposed revised template and questionnaires.

- The template should ensure that final reports make clear assertions whenever the reviewed NCP's current organisational structure, written procedures, or practices are causing it not to fulfil the core criteria or complaint handling principles.
 - We appreciate that the template begins with an assertion that each peer review's objective is to 1) assess the functioning and operation of the NCP in accordance with the core criteria, and 2) identify gaps as well as strengths in the NCP's functioning (para. 8).

² OECD Watch, Accountability Counsel, and International Corporate Accountability Roundtable, *Advancing and Strengthening the OECD National Contact Point Peer Review Process*, June 2018, available at <https://www.oecdwatch.org/2018/06/15/advancing-and-strengthening-the-ncp-peer-review-process/>.

- To date, we feel this objective has not been taken seriously. We therefore call on NCPs to renew their commitment to this moving forward. We seek functional equivalence of all NCPs. To achieve that, the peer review process must meaningfully urge correction of systems that are not working. Without that, the process just rubber-stamps ineffective practices.
 - In addition to clear assertions on the core criteria and principles, the final report should make recommendations on meaningful changes that should be implemented to bring the NCP into alignment. Importantly, the template should clarify that the peer review team should not feel limited to assessing against and providing recommendations only with regards to the core criteria and principles in the Procedural Guidance. Rather, the peer review team can provide any recommendation that could improve the practice of the NCP under review.
- The template should ensure that final reports meaningfully and systematically reflect stakeholders' comments, so that stakeholders understand their comments have been heard even when the comments are not reflected in the peer review report's recommendations.
 - Stakeholders, who frequently spend considerable time and resources participating in the peer review process, often feel their comments are nowhere reflected in the peer review reports, and sometimes even that final recommendations of peers go against a recommendation a stakeholder had provided. We understand that this is a review by peers and that not all stakeholders' recommendations will be taken up. Nevertheless, it is important that stakeholders' comments be reflected in the final report in some capacity, such as by being annexed or summarized in a simple table.
 - Reviewers should reflect, in the final report or annex table, about why recommendations that were not included were excluded. This transparency helps stakeholders see their input is considered, helps reviewer NCPs meaningfully reflect on each recommendation given by stakeholders, and helps stakeholders understand NCPs' thinking in giving their own recommendations.
 - Final reports should measure the reviewed NCP's performance against structures and practices found to be effective in achieving the mandate for NCPs, such as organizational structures that promote semblance of impartiality, or evidentiary standards that facilitate hearing of disputes.

In addition to recommendations on the core template, we provide the following recommendations to the annexes to the template:

- In the Questionnaire to the Network of NCPs (Annex 3), we encourage that NCPs offer recommendations of practices that have worked well for them, not just commentary on past engagement with the reviewed NCP. This will facilitate sharing of good practices.
- In the Questionnaires for both Stakeholders (Annex 2) and reviewed NCPs (Annex 1), we suggest adding this question:
 - "If the NCP has rejected a large portion of specific instances at the initial assessment stage – what can explain this?"
- In the Questionnaire for Stakeholders (Annex 2), we suggest amending this language as follows:



- “Are the means used by the NCP to promote the Guidelines/promote itself appropriate? In particular, do you consider that the communication tools or avenues being used by the NCP (website, brochures, leaflets, participation in public events, etc.) are adequate to reach each distinct stakeholder group (civil society, unions, business)? (Addition in italics).
- In the Questionnaire for reviewed NCPs (Annex 1), we suggest the following amendments:
 - Amend the language on parallel proceedings to encourage more meaningful input on how the existence of parallel proceedings can be productively addressed: “If the NCP has considered cases subject to parallel proceedings, how has the NCP endeavored to “make a positive contribution to the resolution of the issues raised” without “[creating] serious prejudice for either of the parties (Procedural Guidance para. 26).”
 - Amend the language on public campaigns: “How have public campaigns supported or constrained resolution of specific instances?”

These changes to the peer review template and process are vital to regain the confidence of civil society and ensure actual improvements in NCPs’ implementation of the OECD Guidelines. Without these changes, OECD Watch may curtail its involvement in the peer review process, which we fear has not always been worth the time spent on engagement.

3. Comments and recommendations on Draft progress report on National Contact Points to the MCM

After nearly two decades of close engagement with the OECD grievance mechanism, civil society confidence in NCPs and the OECD Guidelines is declining. At a time when multilateralism is under threat globally, OECD member states must ensure the Guidelines and NCPs serve as effective tools to promote responsible business conduct and facilitate access to remedy. Yet in the experience of civil society, effective access to remedy and corporate accountability via specific instances remains unacceptably rare. Too many NCPs continue to operate with structures and procedures that are not transparent or predictable and that do not ensure impartiality between parties and accountability for harms.

The draft report correctly acknowledges that “a key criteria of success is having the confidence of stakeholders.” The report should recognize that this confidence on the part of civil society is waning and that governments must to more to win back the confidence of civil society. Several of the figures from the draft report on progress of NCPs underscore serious concerns we have raised for over a decade.

Structure and composition of NCPs

Adhering governments are legally obliged to set up an NCP that is impartial and accountable equally to all stakeholders. OECD Watch has presented research collected over 15 years of complaint handling that finds that over three-quarters of complaints resolved positively have been handled by NCPs with a structure involving diverse governmental and stakeholder perspective in the form of an independent expert structure, a multipartite structure formally involving stakeholders in the NCP governance, or a steering board with oversight on case handling. Having pointed out the comparative strengths of these models for years, we are thus deeply disappointed that:

- 32, or nearly three quarters, of NCPs are still located in ministries of economy, trade or investment.
 - Among those, 5 NCPs are based specifically in investment promotion agencies, which have a clear conflict of interest.

- 20 NCPs are still single-ministry.
- Just 12 – only a quarter of NCPs – are handled by multipartite or expert-based models.

Placement of NCPs within ministries focused on trade and investment creates a very real risk of conflict of interest or even bias towards business in the operations of the NCP. It also results in a lack of expertise among staff on how to address the issues – such as human rights, labour rights, and environmental concerns – that are typically raised in cases. The draft report shows that over 50% of specific instances handled since 2011 cite the human rights chapter of the OECD Guidelines. It is doubtful whether staff otherwise focused exclusively on economic and trade promotion issues will have the training and capacity to handle these cases. We continue to believe that NCPs that do not involve expertise across the scope of the Guidelines' chapters cannot be truly effective.

Adequate resourcing for NCPs

Adhering governments are also legally obliged to provide their NCP with the human and financial resources necessary for the NCP to effectively fulfill its responsibilities. An under-resourced NCP is forced to cut corners, thereby becoming less visible, less accessible to stakeholders, and unable to operate in a timely, predictable manner. Ensuring adequate resources includes employing full-time staff trained to handle the types of issues that arise in complaints. Given our long focus on resourcing of NCPs, we are frustrated that still:

- 36 NCPs, a full three quarters, have just 1 full time staff member or just part time staff.
 - Among these, 4 NCPs have no dedicated staff at all.
 - Further, as the draft report observes, “many NCPs are composed of one individual, working only part-time on the tasks related to the Guidelines. This is most often the case with NCPs based in Ministries of trade or economy.” This means that particularly at NCPs that already risk a conflict of interest due to their location in a ministry of economics, staffing is too low.
- Again just 12 NCPs, only one quarter, have two or more full time staff.

Visibility of NCPs

Adhering governments are also mandated to ensure their NCP is visible. OECD Watch has called on NCPs for years to take more action to engage in outreach with all stakeholders – not merely with business to encourage them voluntarily to adhere to the Guidelines, but to civil society to help them understand how the Guidelines and NCP complaint system work. Given our concern regarding promotion of and by NCPs, we are even further frustrated by the fact revealed in the draft report that “NCPs are often not known by other government agencies or even within their own Ministry, or when known their function is not fully understood.” It is unacceptable that many NCPs are failing to meet the requirement to be visible, not only toward stakeholders, but toward their own governments.

Campaigning and consequences as tools to address common challenges faced by NCPs

The draft report mentions a couple challenges commonly faced by NCPs, such as the challenge of getting companies to engage in the specific instance process, and the challenge of ensuring equality of bargaining power between the parties to a case. OECD Watch has also observed these challenges, and suggests a few simple solutions:

- NCPs should commit *before a given specific instance is underway* to seek consequences for companies that do not engage in good faith in the specific instance process. When NCPs make this commitment up front, warning recalcitrant companies that their refusal to engage

or their bad faith during the mediation process will be met with trade-related consequences, this provides a meaningful incentive for companies to engage.

- NCPs should take an open stance towards campaigning by complainants around a case. Raising public awareness about a case is another good way to right the imbalance between companies and complainants and urge companies to take part in the otherwise voluntary procedure, and to engage in good faith during mediation.
- OECD Watch also encourages NCPs to provide parties with guidance on how to approach mediation, and ensure mediators are trained to address power imbalances between the parties.

Need for greater engagement with stakeholders

According to the draft report on NCP progress, some of the key issues raised in peer reviews include lack of adequate engagement with stakeholders, concerns around perceptions of impartiality raised by stakeholders, unclear expectations of advisory bodies associated with NCPs, and lack of engagement by advisory body members to carry out promotional activities. These issues are closely intertwined.

- OECD Watch members have recently called for comparative research and greater engagement by the institutional stakeholders, the OECD secretariat, individual advisory groups, and NCPs that formally engage civil society voices in their governance, to understand effective models for engaging stakeholders. We believe there is broad interest in this issue, and therefore we urge delegates to seek the Secretariat's analysis of this issue.

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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