

To: The OECD Investment Committee and Working Party on Responsible Business Conduct
From: OECD Watch
Date: 30 November 2018
Re: 1. Comments on the final response of the Investment Committee to OECD Watch's substantiated submission against the Australian National Contact Point; and
2. Comments to the proposals for additions to the Investment Committee's substantiated submissions procedures

Overview

The substantiated submission process established in the Procedural Guidance to the OECD Guidelines, together with the National Contact Point (NCP) Peer Review Process, is a tool to ensure the accountability and functional equivalence of NCPs. In OECD Watch's recent experience, however, neither process is meeting that purpose. This submission provides OECD Watch's comments on the substantiated submission process, in respect of:

- I. The response by the Investment Committee to the substantiated submission by OECD Watch regarding the Australian National Contact Point (DAF/INV(2018)34/FINAL); and
- II. The proposed additions to the Committee's procedure for considering substantiated submissions (DAF/INV/RBC(2018)19).

As we explain in this submission, we feel the response of the Investment Committee to OECD Watch's substantiated submission has not adequately called out the Australian National Contact Point (ANCP) for failures to meet the core criteria and complaint handling procedures established in the Procedural Guidance. The response also has not adequately clarified some of the critical issues raised by OECD Watch's initial complaint. Moreover, amidst the year-long review process, neither the severe human rights violations identified in the initial complaint *Human Rights Law Centre and RAID v. G4S Australia Ltd.*, nor the failure of the NCP to address those violations, have been resolved. As a result, the Investment Committee's response has not strengthened civil society confidence in the NCP system.

At a time when multilateralism is under threat, we need to work together to increase the vitality of and confidence in international mechanisms such as the OECD's NCP grievance mechanism. In October, OECD Watch submitted recommendations to the Investment Committee on strengthening the substantiated submission process. The additions currently proposed to this process are a step forward, but still fall far short of our recommendations. OECD Watch is committed to work with the Investment Committee moving forward to reform the substantiated submission process, ensuring accountability and confidence among stakeholders.

I. OECD Watch's comments on the Investment Committee's response

In November 2017, OECD Watch filed the first-ever substantiated submission to the Investment Committee addressing the Australian government's application, through the ANCP, of the Procedural Guidance to the specific instance *Human Rights Law Centre and RAID v. G4S Australia Ltd.* Our complaint asserted that the ANCP had failed to meet the core criteria of accessibility and transparency and the complaint-handling principles of predictability, impartiality, and equitability. Of particular note, we argued that the NCP had:

1. Failed to meet its own and the Procedural Guidance's timelines and procedures for complaint-handling (predictability and transparency);
2. Failed to limit itself to the Procedural Guidance's six admissibility criteria by rejecting the complaint with reference to broad fears of issuing commentary on government policy and interfering with parallel proceedings (accessibility); and

3. Inappropriately based its decision on information shared only with one party (impartiality, equitability, transparency).

We appreciate the Investment Committee's diligence and good faith in drafting its response, and we highlight below the findings and recommendation elements we find constructive. Nevertheless, in large part, we are disappointed with the recommendations and commentary that have been given. We explain our most serious concerns below.

1. Failure to comply with timelines and procedures

We appreciate the Investment Committee's acknowledgement that the ANCP failed to meet its own or the Guidelines' directives on both timelines and procedures for reviewing cases. The Investment Committee could not have done otherwise, given that the ANCP itself admitted these shortcomings in its own reply to OECD Watch's substantiated submission.

- We are disappointed, however, with the Investment Committee's recommendation on timelines in paragraph 25. The Investment Committee recommends that the ANCP communicate and explain to parties the reasons for any delays, but the Investment Committee does not call upon the ANCP to seek vigorously to avoid delays in the first place. Compliance with timelines is not a minor matter; it is a serious component of enabling access to justice through a grievance mechanism. In the interest of predictability, the ANCP and all NCPs have a duty to adhere to clear time schedules, and to deviate from those schedules only under limited, pre-established, and publically-disclosed conditions. We had expected the Investment Committee would make this clear in its recommendation. Instead, the recommendation enables the ANCP to delay its proceedings whenever and however regularly it chooses, so long as it gives any explanation for the delay.
- The Investment Committee's recommendation on the ANCP's non-adherence to its own procedures in paragraph 33 is even more concerning. As with timelines, the Investment Committee recommends that the ANCP simply communicate to parties the reasons for its departure from normal complaint-handling procedures. Yet other than in respect of timelines, we can think of no area in which it would be appropriate for a grievance mechanism such as an NCP to depart from its normal procedures. Rules of procedure are only meaningful if they are consistently followed.

Despite our concerns with these recommendations, we do appreciate the Investment Committee's acknowledgement of the ANCP's lack of communication with the complainants during the case proceedings, and the Investment Committee's focus on calling for regular communication with both parties in the future. Regular communication is another important measure in enabling access to remedy through supporting the predictability and transparency of the NCP.

2. Failure to remain limited to the six admissibility criteria

The Investment Committee's response asserts in paragraph 38 that the ANCP's "reasons for not accepting the specific instance" included

- (a) that "[t]he ANCP considers that aspects of the complaint could be interpreted as commentary on government policy. ... It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law;" and
- (c) that "there have been various legal proceedings in relation to incidents at the MIRPC, some of which [were] ongoing" and "it is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international."

Although these reasons for rejecting the case appear to fall outside the scope of the six admissibility criteria, the Investment Committee justifies them by explaining that the admissibility criteria are broad and these reasons fall under the sixth criterion of “whether the consideration of the specific instance would contribute to the purposes and effectiveness of the Guidelines” (paragraph 40). The IC’s assertion here is deeply concerning, for a couple reasons.

- First, the Investment Committee permits – even itself describes – such a broad interpretation of the sixth criterion that it renders that criterion meaningless, a tool that may be used by NCPs to justify almost any rationale for case rejection. The sixth criterion is unhelpfully vague to begin with, but ironically the IC’s response has made that catch-all even more broad. Until the criterion can be amended, OECD Watch urges the Investment Committee fulfil its responsibility to clarify what the criterion means and how it should be applied appropriately and narrowly.
- Second, and perhaps more importantly, because the ANCP did not actually refer to *any* of the criteria in explaining its rejection, the Investment Committee effectively reads the sixth criterion into the ANCP’s logic. We strongly believe the Investment Committee should not do this. Such an approach implicitly condones an NCP’s imprecise or lax application of the admissibility criteria to its case review. The admissibility criteria set the boundaries for an NCP to determine whether to accept a case. If an NCP does not explain its acceptance/rejection rationale clearly in terms of those boundaries, then the boundaries become meaningless. The IC’s condoning of the ANCP’s approach has weakened the importance for all NCPs of explaining, with concise reference to the admissibility criteria, their decisions to accept or reject cases.

Beyond the IC’s assertions on the admissibility criteria, we think the Investment Committee also missed an opportunity to clarify critical points raised by the ANCP’s rejection rationales, on the state duty versus corporate responsibility regarding human rights (a) and parallel proceedings (c).

First, on the state duty to protect versus the business responsibility to respect human rights, the ANCP is of course correct that “it is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law.” To state this is to deflect from the actual point, which is that the NCP *does* have a duty to extract from the complaint those aspects that are not commentary on government policy, and to proceed in considering those.

- We very much appreciate the IC’s assertion in paragraph 42 that “it is important that NCPs carefully distinguish the enterprise responsibility to respect human rights and the due diligence requirements that accompany that, from the broader State duty to protect human rights. The role of NCP is to address the former but not to address the latter.”
- We are disappointed, then, with the next assertion the Investment Committee makes in paragraph 43, that “it is not the role of the Investment Committee to *evaluate whether the ANCP adequately distinguished* the corporate responsibility to respect human rights from the state duty to protect human rights...” (italics added). To the contrary, it is indeed the responsibility of the Investment Committee to evaluate *whether the ANCP adequately distinguished* the state duty from corporate responsibility – and also, we would argue, to evaluate the validity of the ANCP’s reasoning. The ANCP’s own language made clear that only “aspects” of the complaint could be interpreted as commentary on government policy; it

is therefore clear that the ANCP failed adequately to distinguish the non-state aspects of the complaint, *because the ANCP did not distinguish at all*. We hoped the Investment Committee would state clearly that the ANCP failed in its responsibility to distinguish, and further failed to proceed with the non-state duty-related aspects of the claim.

- While we appreciate the intention behind the Investment Committee’s recommendation in paragraph 44 for the ANCP to explain how it distinguishes state duty from corporate responsibility, the qualifiers in the recommendation weaken it. The ANCP should not merely “strive to articulate,” but should state plainly, in its rules of procedure as well as individual case publications, how it undertakes this critical distinction analysis. A clear explanation is necessary to enable the Investment Committee and stakeholders to evaluate the validity of the NCP’s reasoning against the Guidelines and UN Guiding Principles.
- The Investment Committee also did not take advantage of a critical opportunity to clarify how NCPs should handle cases linked to government policy. The ANCP itself, in its reply to OECD Watch’s submission, noted that “[c]ases that are linked to state policy can nevertheless be problematic for NCPs, so we would support further consideration of their handling by the NCP Network, and subsequently the development of formal guidance from the OECD.” Both OECD Watch and the ANCP sought the Investment Committee’s clarification here – but the Investment Committee provided none. OECD Watch urges the Investment Committee to issue such clarification in the near future, with input from the institutional stakeholders.

Second, on parallel proceedings, the Investment Committee did not call out a truism and deflection made by the ANCP, that it would be wrong for the NCP, like any government entity, to interfere with legal proceedings. The real point at issue here is that NCPs must determine whether they run an actual risk of interference with parallel proceedings, and if so, whether and how they can extract and consider the portions of the claim that would not prejudice those proceedings.

- We understand that the Investment Committee is not in a position to evaluate the ANCP’s assessment that an offer of good offices would represent an intervention in due process with respect to particular other ongoing proceedings. We also appreciate the intention behind the IC’s recommendation in paragraph 48 that the ANCP should “strive to clearly articulate the reasons for such a position in its public statement(s).” But again, we would have urged against the use of weakening qualifiers.
- We also believe the Investment Committee missed another opportunity to provide, through this substantiated submission process and response, further clarification on how NCPs should understand and implement the important Commentary 26 of the Procedural Guidance, which warns against dismissing cases simply on grounds of parallel proceedings.

3. *Inappropriate basing of rejection decision on communications available to just one party*

OECD Watch is also seriously disappointed by the Investment Committee’s recommendation in paragraph 37 on the ANCP’s use in its decision-making of information withheld from one party: “[i]n order to avoid creating a perception of a lack of impartiality, the Investment Committee recommends that when information is withheld from one party and/or when withheld information is used as the basis of a decision of the ANCP, the ANCP should notify the relevant party and explain why the information was withheld (i.e. why it is sensitive).” This language is concerning for two reasons:

- First, the clear implication of this recommendation is that the ANCP may use “withheld information...as the basis of a decision of the ANCP.” That should never be permitted. It is a

basic matter of fairness and justice that a party should not be denied a hearing on the basis of evidence he or she has not had a right to see and confront. While it is fine for the ANCP to accept confidential information, we believe the Investment Committee should have clarified that NCPs may not use such information to decide a case.

- Second, using information only one party has seen to decide a case does not just “create a perception of lack of impartiality” – it actually demonstrates partiality against the complainant not afforded a right to dispute the evidence. We expected the Investment Committee would come clear in critiquing the NCP on this point. In this respect, the Investment Committee’s finding in paragraph 53(2) that “the ANCP contributed towards a perception of a lack of impartiality and accessibility” does not at all capture the essence: the ANCP did not merely appear to be partial, but actually was partial in its handling of the underlying specific instance.

OECD Watch appreciates the recommendation that the ANCP should promote information-sharing between parties to the [greatest] extent possible through redacting, summarising, or anonymising information as necessary. OECD Watch also appreciates the recommendation in paragraph 52 that “the ANCP should ensure that if conclusions of fact are made in a specific instance statement, they should be based (and appear to be based) on more than the assertions of one party.”

Finally, we are disappointed that the Investment Committee response does not clearly meet our asks, neither by asserting that the ANCP did not fulfil its responsibilities with regard to its handling of this specific instance, nor by urging the ANCP to reconsider this specific instance.

II. OECD Watch comments on the proposed additions to the substantiated submission handling

OECD Watch welcomed the commitment made by the Investment Committee in October to revise the substantiated submission procedures, and we appreciate the OECD secretariat’s quick efforts to propose additions to the procedure. The additions represent a step forward, but at present they fall far short of constituting the full reforms needed to strengthen the procedure.

In October, OECD Watch made a submission to the Investment Committee that laid out seven recommendations to strengthen the substantiated submission process. The proposed additions take a step towards addressing OECD Watch’s recommendation 2, on ensuring that the government/NCP-party in question cannot veto the response to a submission about itself. However, the proposed additions merely state that the “Adherent whose NCP’s conduct is the subject of a substantiated submission would be expected not to object to the finalisation of the response by the Investment Committee where all other Adherents are in agreement.” OECD Watch’s recommendations 5 and 6, on setting clear and equitable moments for consultation with parties during the review process, are also partially addressed in the proposed additions. But at present, the proposed additions do not actually establish set moments for consultation, nor do they consistently ensure equitability in the number of times the submitter and NCP will be provided draft, updates, and consultations.

OECD Watch’s other four recommendations are not addressed at all. At a basic level, the proposed additions do not yet establish a timeframe for the handling of substantiated submissions, ensure parties equal and contemporaneous access to replies and drafts, or ensure the Investment Committee response clarifies when an NCP party has not interpreted or applied the Guidelines correctly. These and other reforms are critical.

OECD Watch remains interested in making the substantiated submission process a more meaningful tool to promote accountability and functional equivalence of NCPs, and we seek to engage with NCPs, Adherent governments, and the OECD to ensure appropriate reforms.

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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