

OECD Watch comments on DAF/INV/WP(2008)1 “Review of NCP Performance: Preliminary Findings”

This submission contains OECD Watch’s comments on the preliminary findings of the review of NCP performance (hereinafter “the review”). The submission begins with a number of general comments, then addresses specific sections and paragraphs of the review.

General Comments

In his 7 April 2008 report to the UN Human Rights Council, John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, noted that although NCPs are potentially an important vehicle for providing remedy for poor corporate behaviour and abuses of human rights, “experience suggests that in practice they have too often failed to meet this potential” and that “many NCP processes appear to come up short when measured against the minimum principles [of credibility and effectiveness]”.¹

These comments are an echo of what OECD Watch reported in its 2005 *Five Years On* report and reflect what provided the background for OECD Watch’s 2007 *Model NCP*, which sought to give concrete recommendations for improving NCP performance. While OECD Watch is encouraged by recent positive developments in the restructuring of NCPs in the Netherlands, UK and Argentina, we note that nearly one year after the presentation of the *Model NCP*, the vast majority of NCPs have made no significant steps toward implementing the recommendations contained therein. As a result, overall NCP performance continues to be well below acceptable and reasonable standards.

In this context, OECD Watch welcomes this Review of NCP performance as an opportunity to enhance the effectiveness and functional equivalence of all NCPs. The preliminary findings provide an adequate overview of the NCP organizational landscape, and the report poses a number important and forward-looking questions. However, OECD Watch believes the review could be further enhanced with greater detail and analysis as to why a number of NCPs have recently undertaken restructuring and have re-evaluated their composition. Identifying and analyzing the reasons that prompted necessary changes in NCP structure and performance is crucial for stimulating and encouraging further improvements. In this sense, the review is too focused on best practices (in promotion and in cases) and lacks a constructively critical look at practices that are inhibiting the potential of the Guidelines to effectively improve corporate behaviour. For an effective overview, both the best practices and problem cases should be noted and analyzed. We can praise the few NCPs that are restructuring, however, it remains disappointing that the majority of NCPs are not reforming.

We are concerned by the discussion and presentation of both the investment nexus and parallel legal proceedings in the review. In our view, the review’s framing of these important issues will provide further opportunity for NCPs to continue to reject cases on these grounds. It is important to acknowledge that NCPs use these two issues most frequently to reject specific instances, and further commentary is required to reflect the opinions of other stakeholders and expert opinion on this issue, and to acknowledge that the procedural guidance does not suggest rejection on these grounds. The investment nexus and parallel legal proceeding issues are ‘shaping up’ as the greatest barrier to the Guidelines meeting

¹ J. Ruggie, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development”, Report to the UN Human Rights Council, April 2008, p.26.

their full potential (along with ineffective NCPs), not least because the most serious violations of the Guidelines are increasingly found deep in the production chain and because a large number of OECD Guidelines cases occur in parallel with some other kind of legal, administrative or other proceedings. However, as OECD Watch and TUAC have emphasized, the Guidelines do apply to both trade and investment as demonstrated by their applicability to supply chain issues. Similarly, as reported in the OECD Watch Model NCP, expert legal opinion confirms that there would be very few circumstances when the NCP specific instance proceedings would need to be avoided to preclude prejudicing criminal proceedings. A paper submitted by the OECD Investment Committee to a Harvard conference on mediation organised by John Ruggie in 2005 stated that mediation can very often be successful despite the existence of parallel proceedings.

The issue of monitoring and follow-up by NCPs is absent from the review. NCPs should be willing and able to follow-up on recommendations issued in final statements.

The number of NCP responses reported seems to vary throughout the document. §25 and Annex 2 mention responses from 28 NCPs, but §3 cites 29. §3 states that there are 22 responses from adherent countries noted, but 23 are listed in footnote 2. Similarly, §3 mentions 7 from non-adherent countries, but only 6 are listed in footnote 3. We suggest that those NCPs that did not participate in the survey be listed. (Similarly, Egypt needs to disclose its organizational structure.)

The numbers of and statistics regarding cases in the review are also incorrect, likely a result of some NCPs' failure to report at all, or to report fully on the cases they have received. For example, the review cites only 44 cases having been raised by NGOs when in fact 71 have. The most up to date information on NGO cases can be found on the OECD Watch website in the Quarterly Case Updates, the most recent issue available at: http://oecdwatch.org/docs/OW_Quarterly_Case_Update_Spring_2008.pdf. Similarly, TUAC publishes an up to date list of trade union cases on their website. NCPs' non or underreporting of cases biases and invalidates statistics collected and statistical analyses conducted by the Investment Committee. It is therefore crucial that NCPs always communicate at least to the Investment Committee and other NCPs regarding the complaints they receive and outcome of their initial assessments (in reference to §32), if not making these decisions completely public.

Specific Comments

Section III - Perceived structural strengths and weaknesses

This section contains some very useful comments, but it does not go into enough detail or breadth of the strengths and weaknesses of various institutional structures. OECD Watch believes the Investment Committee is more informed of the challenges and opportunities for effective promotion and specific instance handling than what is reflected here.

OECD Watch commends those NCPs that have evolved into, or established from the outset, multi-partite structures. OECD Watch's *Model NCP* weighs the advantages and disadvantages of the various institutional structures and recommends that, in order to be independent, informed, and authoritative and command the confidence of all parties, NCPs should be set up as an interdepartmental or multi-partite bodies or reflect an independent structure (Dutch model).

§8 suggests that government structures provide greatest access to "diverse expertise and resources". However, the majority of respondents were from single department structures and as such, may have more limited expertise than those NCPs that can rely on expertise from several different departments. In addition, this does not acknowledge the "expertise"

that business, labour and NGOs have.

Further, §20 confirms that access to adequate resources is a problem for all NCPs. This somewhat undermines the assertion that government structures ensure both expertise and resources.

The review outlines some of the advantages of the NCP being located in an economic ministry or department, and additional benefits from being located in foreign affairs (§9). This information would be enhanced by a statement that identifies that these “benefits” can only be appropriated if the NCP is active, effective and makes full use of the stated opportunities. However, as §12 – §15 indicate, such government structures have a number of disadvantages. Indeed, John Ruggie recently emphasized this point in his report to the UN Human Rights Council, noting, “The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest”.² Furthermore, §14 raises another important limitation, that of the often low priority of NCP duties compared to other ministerial work. We note that this was an issue raised by the Australian NCP, who stated OECD Watch Brussels Roundtable in June 2007 that he spends approximately 1% of his time on the Guidelines. This is a clear example of why a multi-partite NCP structure is required.

§10 would benefit from more information on the “formal consultative or advisory mechanisms” that have been established. For example, do stakeholders contribute to the agenda? What access to OECD documents and reports do they get? Is there an opportunity for stakeholders to ‘table issues’ to take to the OECD Investment Committee? This may encourage those NCPs who have not adopted such an approach to do so.

§11 makes reference to government accountability. Including Australia in this group is not entirely accurate. The distinction between reporting and accountability needs to be made.

§20 importantly documents the limitation that frequent NCP turnover can have, and further confirms the need for a structure as recommended by the OECD Watch *Model NCP*.

Section IV- Promotional challenges

§22 highlights the importance of having a “proper evaluation” to measure the effectiveness of promotional efforts. This can be developed with advice from BIAC, TUAC and OECD Watch.

With regard to §23 we agree that greater promotion and collaboration with stakeholders will increase the need for additional ‘skilling up’ of other government departments. This should be an ongoing role of NCPs, to inform other departments, and should not be a potential reason to not work collaboratively with stakeholders.

§23 also makes reference to links between and the Guidelines and government support programmes such as export credit guarantees, and footnote 10 mentions that 29 NCPs have reported such links. However, the review should identify the nature of these links and encourage NCPs to seek out strong, concrete links (such as conditioning credits on adherence to the Guidelines) rather than weak constructions in which the credit-receiving company simply has to “be aware” of the Guidelines.

The questions for discussion on page 10 require some additional comment. OECD Watch would caution against delegating promotional responsibility to ‘partners’ such as chambers of commerce. Certainly there is an important supportive role for chambers, peak industry bodies and industry associations in ensuring their members understand and uphold the Guidelines. However, disadvantages around conflict of interest may be even greater than currently exists with government structures and government responsibility for promotion.

² J. Ruggie, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development”, Report to the UN Human Rights Council, 7 April 2008, p.26.

Instead, governments need to adequately resource NCP structures to undertake these activities. The review, and this question in particular, presents the resource problem as too much of a ‘given barrier’, unable to be tackled. The OECD Investment Declaration is an international agreement that requires resources. If Member States do not accept the commitments that are part of this Agreement (e.g. providing resources for an NCP) this needs to be clearly stated and pressure put on those countries to provide the necessary resources. The current phrasing “Given the resource problem, can we delegate...?” sends the wrong message. We would suggest the question, “What can the IC do to influence countries to respect their signature of the Investment Declaration?”

Secondly, the question on ‘emerging best practice/trends with respect to NCP promotional activities, will hopefully elicit some more imaginative responses than the usual (but important) practices around websites, promotional brochures, seminars etc.

Section V - Governance Issues Relating to Specific Instances

§26 identifies use of parallel legal proceedings and the investment nexus for rejecting requests, but, in its current form, it may just provide additional justification for NCPs to continue to reject specific instances for these reasons, thus ultimately undermining the effectiveness of the Guidelines. As mentioned above, further commentary is required to reflect the opinions of other stakeholders and expert opinion on these issues, and to acknowledge that the Procedural Guidance does not suggest rejection on these grounds. OECD Watch and TUAC have emphasized that the Guidelines do apply to both trade and investment as demonstrated by their applicability to supply chain issues. Similarly, as reported in the OECD Watch *Model NCP*, expert legal opinion confirms that there would be very few circumstances when the NCP specific instance proceedings would need to be avoided to preclude prejudicing criminal proceedings.

The related footnote (24) is also unhelpful. This also applies to §31. Restating a narrow interpretation of the investment nexus will hinder the Guidelines from reaching their full potential.

§28 states that “the procedures for handling specific instances have become clearer and more user-friendly”, yet it should be noted that interested parties in developing countries still face significant barriers to participating in the OECD Guidelines process, a fact that is not insignificant given that nearly half of all specific instances to date have involved a non-adhering country. Most NCPs do not have the resources to invite complainants from non-adhering countries to meetings, and communication between developing country complainants and many NCPs remains difficult despite the occasional use of local embassies.

§32 deals with NCPs communicating the results of their initial assessments. As mentioned above communication among NCPs and to the IC on all decisions on cases (including on initial assessments and final statements) is crucial if any meaningful conclusions are to be drawn by the task force on NCP performance and the Working Party.

In addition to distorting statistics, a lack of communication and cooperation among NCPs has recently caused serious problems and the mishandling of specific instances. NCPs receiving specific instances that should officially be handled by another NCP should take the initiative to forward the complaint to the appropriate NCP and offer assistance, especially if that NCP’s country is in some way involved in the complaint. NCPs faced with multi-country specific instances should set down in writing how the case will be handled, by which NCP and on what basis, and this be communicated to the parties.

§33 – §35 seem limited. This section would benefit from reference to the OECD Watch *Model NCP*.

Finally in order for this report to have influence and impact, OECD Watch supports the idea of a published report (assuming it has more depth than the preliminary findings) and transmitted to both the G8 and John Ruggie in support of his CSR Initiative at Harvard University which addresses grievance mechanisms. Rather than a mere statement of current practices, it should contain recommendations for effective NCP structures, promotion and handling of specific instances. The Investment Committee could use the outcomes of this review to provide additional procedural guidance to the limited original text of 2000. In order to ensure a continuous improvement process of NCP performances OECD Watch restates its recommendation to the Investment Committee to institute an effective peer review mechanism to improve NCP performance.