

OECD Watch 2008 Review of National Contact Points and the Implementation of the OECD Guidelines

Submission to the Annual Meeting of NCPs, June 2008¹

Introduction

At their 2007 Annual Meeting, National Contact Points (NCPs) agreed that the 2007/2008 implementation cycle on the OECD Guidelines should give priority to the improvement of NCP performance, and OECD Watch welcomes the effort by the OECD to review NCP activity. This follows the presentation by OECD Watch of its Model NCP which was intended as a positive contribution to the improvement of NCP performance. The Model NCP was the result of a broad, year-long multi-stakeholder consultation process.

Similarly, the G8, in its June 2007 Heiligendamm statement, highlighted the importance of the OECD Guidelines and the need for improving and clarifying the instrument's procedures. And on the opening day of the OECD's 2008 CSR Roundtable, the Secretary General of the OECD, Ángel Gurría, acknowledged that NCP performance is "patchy".

OECD Watch would like to highlight the recent report of Professor John Ruggie, the Special Representative to the UN Secretary General on Human Rights and Business (SRSG) as being of particular significance. One of the key findings in Ruggie's report concerns the governance gaps in global corporate accountability and human rights and in this context he makes specific reference to the potential of the Guidelines while acknowledging the current shortfalls in the implementation procedures. We welcome the decision by the Human Rights Council to extend the Special Representative's mandate which called on him inter alia to make recommendations both for enhancing access to and improving the effectiveness of mechanisms like the OECD Guidelines.

The chorus of high-level voices calling for major improvements in the OECD Guidelines and NCP procedures leaves OECD Watch convinced that this year and the immediate years to come offer a unique opportunity for the OECD, the UN, State governments, the private sector and civil society to collectively participate in putting a process in motion to strengthen global corporate accountability. OECD Watch hopes that the NCPs will take advantage of this opportunity to actively and constructively engage with the Special Representative and the various stakeholders to provide an effective forum and guidance for multinational corporations to identify the persistent shortfalls and gaps in the OECD Guidelines process and to recommend concrete and effective solutions to close the governance gaps.

OECD Watch has received contributions from its members assessing their NCP and their experience with the Guidelines in the 2007/2008 reporting period.² Following the Model NCP, OECD Watch has focussed on three key elements that to a large extent decide the effectiveness of the NCP:

¹ A draft of this review was submitted to the Annual Meeting of the NCPs. This final version was revised taking into account a number of comments received from various NCPs as well as additional comments from NGOs.

² Contributions were received from members in Australia, Argentina, Brazil, Canada, Czech Republic, Denmark, Germany, India, Netherlands, Norway, Philippines, Peru, Romania, Spain, South Korea, United Kingdom.

1. Structure and oversight
2. Promotion and information; and
3. Handling of complaints.

With a few exceptions, according to the reports that OECD Watch has received, improvements in these three key areas have been minimal. As a result, most of the concerns raised in this current OECD Watch report will sound familiar for they are concerns that have been raised time and again at previous consultations. The continuing disappointing experiences with NCPs and the procedures have contributed to a widespread perception among NGOs that the Guidelines can never become truly effective.

John Ruggie's report to the Human Rights Council has provided some support to OECD Watch's criticisms of the NCP process, when he states that the Guidelines have "too often failed to meet [their] potential".³

Structure and oversight

Model NCP Proposal:

- * **The MNCP should be independent, informed, and authoritative. It should command the confidence of all parties. The MNCP cannot function unless it has proper resources.**
- * **Oversight of the MNCP should be reinforced at a national level. External advisers should assist the MNCP.**

OECD Watch however is encouraged by some recent positive developments in the NCP restructuring, in particularly in the Netherlands, UK and Argentina.

The Dutch members of OECD Watch have welcomed the recent restructuring of the NCP, which has increased the independence of the NCP, as well as the new ability of the NCP to go on fact-finding missions to assess the cases brought forward. The NCP now consists of an independent chairman and three independent members who all have backgrounds in the various stakeholder groups of the NCP's work. They are independent in the sense that they operate in their personal capacity and are not bound by the policies and goals of the Dutch Government.⁴ With the move towards more independence, the Dutch NCP has not necessarily become more authoritative. The new NCP structure still needs to demonstrate its worth by showing its ability to resolve specific instances in a fair and satisfactory way.

Over the past year changes to the structure and the procedures of the UK NCP that were agreed after an 18-month multi-stakeholder consultation have started to be put in place. In fact, the development of new procedures for specific instances and the establishment of an appeals mechanism – called a review – have occupied much of the time of the newly created Steering Board, arguably the most important innovation to the UK NCP. In March 2008, a concerning development took place, with the sudden withdrawal of the Foreign and Commonwealth Office (FCO) from the NCP, claiming that it

³ Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative to the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008

⁴ Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REPORTS BY THE NATIONAL CONTACT POINTS, p. 87

could not afford to allocate 20 per cent of one of its official's time to staffing the NCP. This is hugely damaging to the way in which the Guidelines are viewed internationally. The NGOs expressed their concern that the withdrawal would be interpreted by business and other parts of government as a sign that the OECD Guidelines and its implementation procedures were not to be taken seriously. It is particularly damaging to the running of the restructured NCP for the FCO to withdraw support even before the evaluation of the first twelve months of operations under the new system has been carried out.

Argentinean OECD Watch members report that the Argentinean NCP is undergoing significant structural changes. While these are yet to be finalized, an Executive Committee has been informally established composed of representatives of government, business, labour unions and NGOs, in a quadri-partite structure. NGOs would have full status and executive functions within this committee. The main function of the Executive Committee would be at the initial determination stage, i.e., to evaluate whether cases brought to the NCP would be accepted or rejected as a specific instance. Currently, the stakeholders involved are still debating the terms of participation, including criteria for selection and participation of representatives and transparency and confidentiality principles.

The Argentine NCP actively participated in the Model NCP consultation and has used the Model to inform its NCP restructuring. An additional development within the Argentinean NCP is a personnel change that occurred in April 2008. This is noted in this years OECD watch Review in recognition and appreciation of the previous NCP, and his willingness to work collaboratively with all stakeholders.

At the June 2008 consultations during the Annual Meeting of NCPs, OECD Watch was informed of a welcome development within the Japanese NCP. The NCP introduced indicative time frames for specific instances, and set up a tripartite advisory committee with business and union representation.

While the developments in these NCPs are welcomed, nearly one year after the presentation of the Model NCP, the vast majority of NCPs have made no significant steps toward implementing OECD Watch's recommendations. As a result, overall NCP performance continues to be well below acceptable and reasonable standards.

Two of the most problematic issues with the current NCP institutional arrangements that are hampering effective implementation of the Guidelines continue to be the location of the NCPs within single (Foreign or Economic) Ministries, and the lack of independent oversight mechanisms. This can be seen among NCPs from all over the OECD territory. For example, both the German and the US NCPs are still placed in single Ministries (the Ministry of Economic Affairs and the international investment division of the State Department respectively). As Professor John Ruggie astutely observes, "[t]he housing of some NCPs within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest".⁵ OECD Watch members have considerable experience of this potential conflict of interest in the handling of cases. It has resulted in a narrow interpretation of the Guidelines, an unequal treatment of the parties, and a perception that NCP actions frequently protect business interest rather than seeking to resolve and remedy breaches of the Guidelines.

Many NCPs still lack any kind of oversight mechanism to increase their accountability such as steering groups, advisory groups or a requirement to report to parliament or to an ombudsman. OECD Watch is aware of only one case of an NCP sending the draft annual report to stakeholders for comment (the UK NCP shared its draft with the Steering Board). The Dutch NCP has not sent its annual report to stakeholders for comments prior its submission to the OECD Investment Committee, which is

⁵ Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative to the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008

something the NCP used to do in the past. As a result of a lack of proper stakeholder consultation on its annual report, the NCP reports tend to portray a somewhat idealised picture of the state of implementation of the Guidelines and the level of transparency and accountability towards stakeholders. Many NCPs tend to overstate their stakeholder dialogue arrangements, while overall NGOs feel the frequency and content of the consultations are woefully inadequate.

Promotion and information

Model NCP Proposal:

The MNCP should engage in a range of promotional and training activities. These should be complemented by other government initiatives.

The NCPs' promotional and informational activities are clearly substandard in the view of the OECD Watch members that contributed to this year's review. In some instances, such as in Australia and Czech Republic, the NCPs' promotional and informational activities even seem to have slowed down and website accessibility and depth of content has deteriorated. The quality of NCP websites is far below what could be considered a satisfactory, minimum level of accessibility and comprehensiveness; they are often out of date. In fact some NGOs, like the Argentinean members, feel that the task of promoting the OECD Guidelines is mainly taken up by NGOs. Transparency International Germany states that "*the German NCP and the OECD Guidelines are one of the country's best kept secrets*".

Most NCPs have undertaken some promotional activities such as presenting the Guidelines in business forums, CSR conferences or disseminating the Guidelines. The Australian NCP (along with relevant stakeholders) actively participated in a panel discussion on business and human rights, drawing on the GSL case. One of the independent members of the Dutch NCP participated in a panel discussion with NGOs from the South on the invitation of the Dutch CSR Platform and participated in a meeting organized by OECD Watch on responsible investing. Occasionally, the NCP and the OECD Guidelines are mentioned in government statements or other publications, in response to questions in parliament. In the Netherlands, a separate full time post has been created at the CSR knowledge centre (MVO Nederland), and a promotional strategy has been presented to stakeholders. The UK NCP has acted on a recommendation in OECD Watch's Model NCP and produced a standard form indicating the information that it is required. This should assist NGOs and others wishing to file a complaint.

Apart from these positive steps, in general NCP activities are hardly ever grounded in a robust and clear promotion and communication strategy to ensure all internationally operating businesses in the respective country are aware of the content of the Guidelines and understand what it means to adhere to them. Such a strategy should be based on an assessment of relevant national sectors and activities that pose risks in terms of possible non-compliance to the Guidelines, and directed at providing guidance to companies operating in these sectors to prevent often recurring breaches. The UK NCP however is planning an ambitious promotional strategy and delays in improving the website have been caused by wider government website reforms.

In addition to general awareness-raising among the public and business, NGOs have expressed concerns about the consultation arrangements of NCPs. In many OECD countries, consultations and exchanges rarely take place. When they do, NGOs feel these that the meetings are failing to fulfill the NCPs' obligation to behave with transparency, visibility and accountability. It is often unclear to what

extent any of the contributions or suggestions are taken up by the NCP or in any way influence the NCP's position at the Investment Committee. In Germany, the NCP holds confidential meetings with NGOs and other stakeholders on an annual basis. These meetings are the only occasions where the NCP informs stakeholders about the activities of the Investment Committee. But these meetings take place after the NCP Annual Meeting, so there is no room for NGO input beforehand.

Handling of specific instances

Model NCP Proposal:

- * The MNCP should aim to complete the proceedings within a twelve-month time frame.**
- * The MNCP makes whatever efforts it properly can to resolve questions of fact, including by carrying out information-gathering or fact-finding visits.**
- * At each stage of the specific instance, the MNCP should follow consistent procedures, keep the parties informed and treat both fairly. At the end of the process the MNCP should issue a reasoned final statement.**
- * The MNCP has a dual role: that of mediator and that of adjudicator. If mediation fails then the MNCP makes a determination on compliance with the Guidelines.**

In a continuing trend from 2007, there are very few positive experiences in 2008 among NGOs with the handling of their complaints. Respondents were asked to evaluate their NCP's handling of cases, outcomes of cases, treatment of parties, as well as to compare their NCP with the Model NCP in their approach to the assessment phase, fact finding, investment nexus, parallel legal proceedings, mediation phase, and final statements. This section highlights a number of recent case experiences in various OECD countries. For more information about specific cases mentioned here, and all other pending cases, please refer to OECD Watch' Quarterly Case Update, Summer 2008 (available at www.oecdwatch.org)

In this year's implementation period eight new cases were filed by NGOs. Two of these cases were filed by NGOs in OECD countries, two were filed by NGOs in non-OECD countries, and four were filed jointly by NGOs in the North and the South. In the same period, NCPs finalised 10 NGO cases, of which six were rejected (the majority on either investment nexus or parallel legal proceedings grounds), two were closed due to the sale of an accused company and an externally resolved case, and two concluded with an NCP statement.

In Australia, one case was filed last year that concerned the mining sector. The case was filed in June 2007, and the Australian NCP completed the initial assessment phase in accordance with their operating procedures. The case was accepted, and the complainants are perceived to be satisfied with the timeframe and the willingness of the NCP to proceed. The case suggests a potential willingness, capacity and resources to undertake 'in-country' fact finding, if necessary, albeit indirectly. As the case is still proceeding, it is too early to evaluate the NCP's approach to the mediation phase or final statement.

In Germany, the NCP was regarded as having handled last year's cases in an unsatisfactory manner. The NCP is seen as having narrowed its interpretation of the scope of the OECD Guidelines, and rejected even more cases on the basis of the lack of investment nexus, or due to parallel legal proceedings. The cases filed against 57 German companies by Transparency International were rejected because of these arguments. Up to date, the German NCP has rejected 7 of the 11

complaints filed, and forwarded one additional case. Only three cases were handled, for none of which the German NCP initiated a fact finding mission. Due to this unwillingness to accept cases, not much experience exists of how the German NCP would actually handle a case.

Although it was regrettable that the German NCP decided to reject the Volkswagen complaint – the first ever complaint related to climate change - in November 2007, this case is an example of how NGOs might enhance the poor transparency of some NCPs. Using the 'legal approaches' provided for under the Administrative Procedures Act and the Environmental Information Act, Germanwatch was able to get access to a number of case documents that were not initially made available to the NGO. These documents included Volkswagen's response to the complaint and a statement of the Ministry of Environment. This information will be used to make a more detailed appeal to the NCP's rejection of the case. OECD Watch is encouraging NGOs that are unhappy with the handling of their case to explore and use such avenues (judicial review, ombudsman) in other countries as well.

In the UK, the NCP has spent a lot of time trying to conclude the outstanding NCP cases i.e. ones that had been presented before the consultation process ended. It is worth recording that after six years, the UK NCP issued a final statement in relation to the Anglo American plc Zambia case. The British Government took the position that these older cases should not fall under the revised procedures but be dealt with in an ad hoc manner by another civil servant operating on a part time basis in isolation from the rest of the NCP. The NGOs involved felt that they had been doubly penalised: first, the initial mishandling of their complaints by a series of NCPs had led to inordinate delays; and, second, instead of benefiting from the review their cases were being relegated to an unclear process, without any timeframes and sidelined from the mainstream NCP process. The Steering Board is conducting its first ever review (appeal) in relation to the BTC case.

Regarding the revised procedures the UK NGOs welcomed the clearer timeframes, the agreement to publish initial assessments and the acceptance that the NCP in the final statement would make clear when breaches have occurred. They also report that the treatment of the parties to a complaint has become more balanced. However, NGOs have voiced concerns about a number of aspects. Not only have there been unnecessary delays in bringing some of the older cases to conclusion but also there has been poor record keeping by the NCP unit (in relation to the older cases). The credibility of the NCP process depends on the careful maintenance of case dossiers and related correspondence, which requires adequate resources. Another problem that has beset many of the UK cases is the NCP's failure to establish which aspects of a complaint are admissible at the appropriate stage. The grounds on which the NCP accepts a complaint should be set out clearly in the initial assessment and then discussed during mediation or the examination phase. At present, at the last minute, often just before a statement is finalized, issues are reopened that should have been or were decided on at a much earlier phase.

Unlike the UK, the newly established Dutch NCP did take on the cases that were filed at the NCP before its restructuring. The NGOs involved in these cases were unhappy with the handling of their case by the former NCP. Despite increased efforts by the new NCP to resolve the cases, some of the concerns of the NGOs continue to be present. Procedures are unclear and seem to be changing during the process. In particular, the procedure is still considered to be slow (due in part to legal proceedings) and its added value in resolving conflicts is not yet demonstrated.

Another question from NGOs has been what role the Dutch NCP is willing to take, that of mediator or that of independent assessor of the case. The NGOs are concerned that the NCP is reluctant to ever determine breaches of the Guidelines. In its first communication to stakeholders, the NCP stated that its primary role is that of mediator. It also stated that, in the initial assessment phase, it would take into consideration to what extent the parties were open for mediation, implying that if there was no

possibility for mediation, it could reject the case on that ground. However, in a recent stakeholder consultation, the NCP gave assurances that a final statement determining compliance will be made if mediation fails, based on its own assessment and possibly including independent fact-finding.

There has been much discomfort from the NGO complainants about the Dutch NCP's handling of the G-Star case. In their view, the Dutch NCP failed to demonstrate leadership in the mediation process and in seeking to resolve the case. The Dutch NCP apparently lacked authority to persuade the company to agree to enter into a mediation process on reasonable terms. After a lengthy process with an unclear status because no mediation could be set up, the situation escalated at international level, when the Indian supplier took legal actions against the Dutch and Indian NGOs. A separate and more highly profiled mediation process was set up by the Dutch Government outside the NCP office and the NCP process was put on hold. Within the NGO community this was considered harmful for the credibility and perceived effectiveness of the OECD Guidelines and the NCP as an authoritative forum to resolve serious conflicts between civil society and business. As part of the mediated agreement, the NGOs had to withdraw their complaint with the Dutch NCP. To the disappointment of the NGOs, the NCP then issued a final statement that lacks an assessment of the validity of the complaint, an analysis of what compliance to the OECD Guidelines means in this situation and recommendations towards the parties to prevent similar conflicts in the future.

NCP cases: forum dropping?

Many OECD Watch members have expressed their concern with regards to the transferring of cases to other NCPs, which some appear to regard as exempting them from any further responsibility. But the home NCPs cannot transfer their international obligations so easily. The procedures for forwarding cases as well as the responsibilities of the NCP after forwarding the complaint are unclear and seem to be arbitrary. In the case filed by Transparency International Germany against Ratiopharm for violations in other OECD countries, the German NCP refused to transfer the case to the relevant NCPs.

Confusion has also arisen in relation to cases involving multiple jurisdictions. The case against BP and its consortium partners in the BTC pipeline project, filed simultaneously before the UK, Italian, French, German and US NCPs, revealed the absence of coordination among the NCPs. NCPs tried to shift responsibilities from one to the other, leaving parts of the case lingering for years. In the case that Friends of the Earth filed against Shell's activities in Brazil at both the Dutch and Brazilian NCPs, the Dutch NCP initially stated that it would follow the case and assist the Brazilian NCP in the process. While the NCP offered its assistance more than once, there was no actual involvement of the Dutch NCP that could contribute to an expedited resolution of the case. Home country NCPs who receive specific instances that should officially be handled in another jurisdiction are supposed to forward the complaint to the appropriate NCP. In situations where the NCP is new or the government of is unwilling or unable to handle the case, the home country NCP should offer assistance. It may be appropriate for the home country NCP to play a more active role in cases involving serious and systematic breaches of the Guidelines. In future 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. OECD Watch believes the responsibility of the home state cannot be discharged simply by passing the buck.

The report of the Special Representative to the Secretary-General on Business and Human Rights John Ruggie

OECD Watch welcomes the recent release of the SRSG's third report, entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights," which culminated the mandate of the SRSG. The decision of the Human Rights Commission to extend the mandate to another three year period provides an opportunity to explore solutions to the governance gap identified in the report. OECD Watch believes the governance gap cannot solely be solved through legislation at state level and voluntary guidelines at multilateral level. A binding international framework is needed at UN level.

Ruggie provides a good analysis of the key problem concerning human rights and business, namely in imbalance between rights and powers of companies and an effective regulatory framework to address the human rights duties and responsibilities. However, OECD Watch believes that global standards are needed and crucial to address the gaps that he mentions.

OECD Watch welcomes the special attention in the report to the OECD Guidelines and its implementation procedure and regards this report as recognition of the concerns raised by NGOs for many years now.

The Report regards the NCPs as "potentially an important vehicle for providing remedy". But it also notes that they have "too often failed to meet this potential". With regards to the functioning of NCPs, Ruggie states: *"The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short"*.

Ruggie's report gives guidance on how measures that need to be taken to improve non-judicial mechanisms such as the OECD Guidelines. OECD Watch would draw to the Investment Committee's attention to the following elements which in Ruggie's view are minimum requirements.

- i) Legitimacy: a mechanism must have 'clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process'.
- ii) Predictable: a mechanism must provide 'a clear and known procedure with a timeframe for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome'.
- iii) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms.
- iv) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognised human rights standards.

Professor Ruggie, whose renewed mandate includes a request 'to identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises' observes that many NCP processes are inadequate when measured against these minimum principles.

Ruggie suggests that a revision of the Guidelines would be timely, in particular to bring the human rights provision up to date with the current best practices in standard and code development for corporate responsibility. If the OECD were to decide on a review, it would need to include significant modifications to the current procedural guidance to ensure that the shortcomings identified by Ruggie are addressed.

Such a review must be a transparent and inclusive process involving NGOs, BIAC and TUAC on an equal footing and would ideally involve wider consultation. It should consider how to amend the Procedural Guidance for NCPs so that Ruggie's principles are incorporated. The human rights provision should be reviewed so that companies are left in no doubt that "their responsibility to respect human rights exists independently of States' obligations and is a baseline expectation". The references in the Commentary should also be amended to include the International Bill of Rights. Guidance to companies on how the human rights provision can be operationalised – particularly in conflict or weak governance zones – should be elaborated.

The Investment Committee's Review of NCPs performance

In its Model NCP, OECD Watch called on the Investment Committee to consider how its role could be revitalized in order to ensure consistency and coherence in the treatment of cases and the interpretation of the Guidelines. OECD Watch welcomes the initiative taken by the Working Party to create a task force of interested delegations to carry out a survey of NCP performance, and has submitted detailed comments on a draft version of the Review of NCP Performance (DAF/INV/WP(2008)1). However, the final report (Review of NCP Performance: Key findings DAF/INV/WP(2008)1/FINAL) fails to take into consideration any of OECD Watch's comments and is still far from depicting an accurate picture of NCP performance. While this initiative creates some space to discuss some of the best practices, it can hardly be regarded as an appropriate answer to the lack of oversight by the Investment Committee.

The survey has provided some interesting insights into the current functioning of NCPs. However, the Review of NCP Performance: Key findings" fails to contribute to the commitment made by NCPs to focus on improving NCP performance, as no clear recommendations for improvements are presented. The current report is an assessment of the current status quo but does not provide NCPs with clear guidance for improving their performance. OECD Watch calls on the Investment Committee and the task force to go beyond this review to develop recommendations for effective NCP structures, promotion and handling of specific instances.

The work of the task force on NCP performance should therefore be further enhanced and methodologies should be developed to assess levels of NCP performance and measure progress. Given that the often referred to method of "peer learning" has not resulted in a substantial uptake of needed improvements, OECD Watch recommends that the Investment Committee reconsider effective peer review mechanisms to improve NCP performance.

Drafted by the OECD Watch secretariat, with input from its members