Overview

The OECD Guidelines for Multinational Enterprises are a corporate responsibility standards that contain recommendations addressed by governments to multinational enterprises. The Guidelines cover topics including employment and labour relations, environment, anti-corruption and consumer interests. The Guidelines also have an implementation mechanism to address issues arising from their non-observance, which applies to MNEs operating in or from any of the 42 adhering countries. In recent years, increasing numbers of NGOs, communities and individuals have sought to use the OECD Guidelines to secure accountability for corporate conduct affecting their human rights.

In 2010, a process was started to review and update the OECD Guidelines, with the aim “to ensure their continued role as a leading international instrument for the promotion of responsible business conduct”. According to the Terms of Reference for the Review, this process should strengthen the human rights dimension of the Guidelines, including by considering the addition of a new, dedicated human rights chapter, in the context of the mandate of the UN Secretary-General’s Special Representative on Business and Human Rights.

The ICC Working Group on Business and Human Rights, chaired by the Danish Institute for Human Rights, organized a Side Event on the OECD Guidelines at the 10th Biennial Conference of National Institutions for the Promotion and Protection of Human Rights (NHRIs) held in Edinburgh, Scotland, on 9 October 2010. The aim of the Side Event was to provide participating NHRIs and civil society organizations with an opportunity to discuss key issues for the Review, such as:

- How the Guidelines should be revised to give stronger protection for human rights?
- How NHRIs can promote implementation of the Guidelines by MNEs and adhering country governments?

1 OECD Guidelines for Multinational Enterprises, http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html.
3 http://www.business-humanrights.org/SpecialRepPortal/Home
INTERNATIONAL CO-ORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (ICC)

- How NHRI s and “National Contact Points” may cooperate in dealing with specific cases where they have parallel jurisdiction?
- How NHRI s can work with civil society and business to promote adherence to the Guidelines?

Dr Jonas Christoffersen, Director of the Danish Institute for Human Rights, and Chair of the ICC Working Group on Business and Human Rights, moderated the Side Event.

The panellists were:

- Ms Tricia Feeney, Executive Director, RAID (Rights and Accountability in Development) and founding member of the NGO umbrella, OECD Watch
- Mr Med S.K. Kaggwa, Chairperson, Uganda Human Rights Commission
- Dr Judy McGregor, Equal Employment Opportunities Commissioner, New Zealand Human Rights Commission and ICC Chair’s Representative on the ICC Working Group on Business and Human Rights
- Dr Roel Nieuwenkamp, Chair of the Working Party for the OECD Guidelines Review, OECD Investment Committee.

Panelist presentations

Dr Roel Nieuwenkamp, Chair of the Working Party for the OECD Guidelines Review, pointed out that only some governments support the OECD Guidelines: currently 42 states had signed them, including all OECD member states and also 10 non-OECD countries. The crucial players at the national level are the National Contact Points (NCPs) that have a responsibility as a government office to encourage observance of the Guidelines in a national context and to ensure that the Guidelines are understood by the national business community. The NCPs gather information on national experiences with the Guidelines, handle enquiries and discuss matters related to the Guidelines as well as assisting in solving problems that may arise in this connection. Because of the role played by NCPs as grievance mechanisms, the effectiveness of NCPs is a crucial factor. Furthermore, NCPs try to mediate and give statements with recommendations, so problem-solving and problem-preventing are main components. For example, the UK’s NCP has tried to solve problems related to Vedanta in India. The NCP also tried to mediate with the local community, and it gave a statement with recommendations that the due diligence approach should be taken more seriously.

There is diversity between performances of NCPs, often because of different resources. However, NCPs should be recognized for their huge potential impact due to their focus on problem prevention and problem-solving. Professor John Ruggie’s mandate is an open opportunity for further cooperation. Moreover, the cooperation between NCPs and NHRI s in OECD countries is very easy to foresee, especially in problem prevention, promotion of the human rights agenda and

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5 For a full list of adhering countries, see Annex I, Review of OECD Guidelines for Multinational Enterprises: Submission of International Coordinating Committee of National Human Rights Institutions
a risk-based due diligence. NCP statements relevant to business can be used by NHRIIs, but that depends on NHRI mandate as well as mediation facilities.

Countries outside of the OECD are encouraged to comply with the Guidelines, to set up the NCP offices and to work with the existing NCPs nationally and internationally.

Ms Tricia Feeney, from OECD Watch, informed the event that she had worked on the last OECD Guidelines review in 2000 and on the testing of the Guidelines’ operation in practice. Ms Feeney argued that NCPs have progressed most where unions or NGOs push them to hear grievances. The most common reasons given by NCPs for rejecting NGO cases include the lack of an “investment nexus” (i.e. an investment-like relationship) between the company against which the complaint was filed and the company or entity that actually committed the alleged violation (e.g. a supplier) and the existence of parallel proceedings, legal or otherwise, dealing with the same or a similar issue as that raised in the OECD Guidelines complaint. More than 30 per cent of cases under the Guidelines have been rejected outright by NCPs because of a lack of investment nexus. This restriction on the applicability of the Guidelines was not originally anticipated by OECD states, and should be removed.

The Guidelines possess a unique feature that provides the means actively to attend to and potentially resolve conflicts between aggrieved communities and companies. If that potential is to be realized, it is imperative that there should be genuine improvements to both substance and procedure so that the Guidelines become more than a set of voluntary recommendations.

The uneven performance of NCPs is uncontested. The effects of unequal access and the unequal and arbitrary treatment of specific instances have resulted in a loss of confidence and have undermined the standing of the Guidelines as a whole. There is an uneven performance and distribution of cases among NCPs, with approximately half (23) of all NCPs having received one or more NGO cases and half (17) having never handled a case.\(^6\) Out of the 23 NCPs that have received NGO cases, only seven NCPs have received more than five cases. In terms of geographic distribution, the OECD Guidelines are clearly being put to use beyond the borders of the adhering countries. The average duration of an OECD Guidelines case filed by an NGO is just over two years, with some cases going on for more than seven years. Given the time and resources that must be put into researching, drafting and filing an OECD Guidelines complaint, it is disheartening that the most likely outcome of a case filed by an NGO is outright rejection by the NCP. NCP handling of specific instances has been erratic, unpredictable and largely ineffectual.

Many NCPs claim not to have a mandate and lack capacity to undertake their own assessment and conduct fact-finding missions in order to make an informed determination. NCPs also lack the power to compel companies to disclose information or engage in the process. Very few NCPs have ever ensured adequate follow-up of a case, for example, by ensuring NCP recommendations are integrated into business practices and promises are kept.

Still, the Guidelines have had ripple effects on other CSR processes and instruments such as the Global Compact and ISO 26000. Professor Ruggie, the UN Secretary-General’s Special

\(^6\) Data to October 2010.
Representative on Business and Human Rights (SRSG) has frequently referenced the OECD Guidelines throughout his mandate and in his “Protect, Respect, Remedy” framework, for instance. The update should incorporate the results of the SRSG’s work in clarifying supply chain responsibility. Professor Ruggie has encouraged NCPs to consider how they might apply the principles he has identified for effective non-judicial grievance mechanisms.

The human rights recommendations of the OECD Guidelines are not currently grouped into a single chapter of the Guidelines. The overarching human rights provision is very short and is contained in the General Policies Chapter, paragraph 2, which states that companies should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” But many paragraphs in different chapters contain human rights provisions, especially provisions on labour rights in Chapter 4. A separate human rights chapter could be helpful in providing further details, references and guidance for companies with regard to due diligence and human rights impacts assessments.

The 2010-2011 revision process is expected to correct a number of omissions in the human rights provisions. The Guidelines currently lack clarity on what demands companies should meet in engaging with local communities in relation to social and environmental damage and hazards to health.

There is an increasing acknowledgement that the lack of consequences attached to condemning NCP statements is a serious flaw. Investment officials are often appointed to provide remedies and are not informed of human rights law or policies, and they are not trained mediators. This has resulted in a recent groundswell of support from parliaments and some governments for more effective measures against corporate abuse and to help develop an international consensus for enhancing access to a remedy; for a resolution on the link between state aid and violation of the OECD Guidelines; and led to a motion in parliament to develop measures at both the national and international level that prevent the involvement or complicity of a company in the abuse of human rights.

While determination of a specific instance does not provide a remedy, it is an essential first step. Even when there is no means of enforcing a remedy, an NCP, by upholding a corporate-related human rights complaint, can publicly acknowledge the harm a company’s actions has caused to affected individuals and communities. This is meaningful to victims.

Improving the effectiveness of the OECD Guidelines depends above all else on improving the effectiveness of the NCPs. The Procedural Guidance sets out the framework for NCP effectiveness. The forthcoming review is a chance to strengthen the capacity of NCPs to encourage or compel companies to cooperate in specific instance procedures, to follow up on their agreements and statements and make sure business practices are changed so as to promote sustainable development and respect for all human rights as well as the need to have authority on human rights side.

**Dr Judy McGregor**, Equal Employment Opportunities Commissioner, New Zealand Human Rights Commission, focused on three main areas; 1) the New Zealand context, 2) how the OECD Guidelines can give a stronger recognition to human rights and 3) how NHRIs can promote implementation of the Guidelines.
New Zealand, which is a member of the OECD and has signed the OECD Guidelines, is a strong governance zone and has few high-risk industries, with those risks that do appear occurring mainly in primary production. In its annual report, the New Zealand NCP emphasised that the Guidelines have limited visibility, but are important in regulating multinational enterprises. In New Zealand, there have been human rights issues relating to the internet (e.g. where New Zealand Telecom was reported to the NCP). Water consumption by corporations is also an emerging human rights issue.

The SRSG framework should not be the only human rights support in the Guidelines. Amongst companies, there is still lack of understanding of the human rights framework, so that they need more information about basic human rights instruments and standards, and Prof. Ruggie’s materials do not offer enough content in this respect. There should exist strong guiding statements on corporate responsibility to respect in the OECD Guidelines and a mainstreaming of human rights across the chapters. The human rights chapter should be used to provide businesses with a proper understanding of the international human rights framework. The employment chapter in the OECD Guidelines should also reference relevant ILO standards.

NHRIs have a role in monitoring and reporting to UN treaty bodies and special procedures. In this context, the OECD Guidelines should be included in reporting under the UPR. There is currently very little promotion of NCP activities. NHRIs should actively consider the question, “How can NHRIs promote effective adherence to the OECD Guidelines?” and should share best practices between themselves on promoting awareness and engaging with the OECD Guidelines.

Finally, Mr. Med S.K. Kaggwa, Chairperson of the Uganda Human Rights Commission, pointed out that there has been a trend towards increasing the use of the OECD Guidelines in Uganda. However, the Guidelines have proved weak on protection of the human rights abuses that are widespread in Uganda. These include low wages, below living wage level, and a lack of remedies. Collaboration with the NCPs is supported and encouraged. There had been a move towards closer cooperation with the NHRI on business and human rights issues: for example, a coordinating committee had been formed to work on removing corruption amongst businesses.

At the regional level, there should be more sharing of information and activities among NHRIs and ICC need to further implement recommendations made by NHRIs in this respect. NCPs do not have any consequences or do not provide any sanctions on the violators and they are not independent. They can therefore be seen merely as promoters of business. Confidentially has also been an issue. It is true that NCPs lack a functional equivalence and differ in functions. Furthermore, the Guidelines are mainly used by OECD countries, but should be easier to use for those outside.

Improvements should be made to the mediator role of the NCPs. Consultations should be held with impacted groups and stronger guidance on role of governments should be provided. NCPs should also be evaluated regularly.
Discussion

A representative from the National Human Rights Commission of Thailand inquired as to examples of success stories and concrete measures and activities. Dr Roel Nieuwenkamp noted that mediated outcomes have been successful, and gave as an example a textile producer where a dispute between enterprise and workers escalated to a diplomatic conflict. This resulted to the company installing an ombudsman in a factory in India. However, the list of real success stories is not yet long, but we should hope there will be more to come. Ms Tricia Feeney pointed out that the OECD Watch has produced lists of success stories, which can be found on-line.

Dr. Claire Methven O’Brien, Danish Institute for Human Rights and Coordinator of the ICC Working Group on Business and Human Rights, suggested the review should address the question of what the procedure should be where NCPs and NHRIs have parallel jurisdiction. She also urged the need, given such issues, and the need for greater policy coherence at national level, as identified by SRSG, for NHRIs to be involved concretely in the OECD Guidelines review process from here on. NHRIs should also be explicitly recognized as relevant stakeholders in the revised Guidelines text. The value of an MOU between ICC and OECD addressing such issues should be considered. She also noted that the ICC Working Group on Business and Human Rights would be consulting with NHRIs and preparing a submission to the Guidelines review.

The Ambassador of France for Bioethics and Corporate Social Responsibility, M. Michel Doucin, concurred with the previous comment regarding the potential role of NHRIs in supporting the Guidelines, and welcomed the prospect of greater collaboration between the ICC and the NCPs. There exist strong potential for cooperation but it is currently underused. NHRIs needed to improve links to state representatives. The criteria for impartiality of NCPs were too vague, and left room for challenges e.g. where NCPs were established by ministries whose remit included promoting exports. The UN Paris Principles for NHRIs could be useful in helping to define higher levels of autonomy.

Ms. Myriam Montrat, Canadian Human Rights Commission, noted that there were certain components missing from the SRSG approach. We must prevent and remedy abuses by corporate actors. But that is only one aspect: key actors and processes that contribute to the promotion of human rights at national level, including awareness and understanding, were not properly included in the framework, but were crucial for building effective respect and enjoyment of human rights. This included the promotional work of NHRIs with reference to business actors.

The following comments suggestions were made by panelists and other participants during the remaining discussion.

- The SRSG three-pillar framework should not be the only human rights content in the Guidelines. The new human rights chapter should include core human rights instruments. This will aid NHRIs in their reporting and monitoring mandates, especially in regard to UN treaty bodies.
- The revised Guidelines should include a strong guiding statement on the corporate responsibility to respect.
- The OECD Guidelines could be included as part of the UPR process.
• NHRI could provide guidance to governments as well as companies regarding the Guidelines

• More concrete ‘success stories’ are needed to illustrate utility of the Guidelines

• NHRI would like clarification on the timeline of the Guidelines review process, and seek the ability to feed into the process.


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