

OECD Watch thus encourages the OECD WPRBC expand the scope of the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas beyond the realm of conflict minerals to explicitly include all minerals, mineral fuels (coal, oil and gas) and non-mineral natural resources. Similarly, the OECD WPRBC's work to prevent companies from (indirectly) financing conflict and contributing to human rights abuses in high-risk or conflict-affected areas should expand beyond mineral chains only and take into account non-mineral natural resources that can also function as conflict items and that are frequently imported by companies operating in OECD and adhering countries.

The WPRBC may find it interesting to note that SOMO has been calling on the European Commission to bring its current proposed regulation into conformity with the OECD conflict minerals due diligence guidance, including ensuring that the regulation and due diligence expectation applies to companies throughout mineral supply chains.

6. Changes in personnel and mandate at the Norwegian NCP

OECD Watch would first and foremost like to welcome Dr. Ola Mestad as the newly appointed Chair of the Norwegian NCP and thank Dr. Hans Petter Graver as outgoing Chair for the excellent work during his tenure at the NCP. Without wishing to call into doubt our full confidence in the integrity and ability of the new NCP personnel, OECD Watch is nevertheless gravely concerned about the recent developments (in terms of personnel and mandate) at the Norwegian NCP that appear to be a form of "punishment" for its handling of the 2013 case against NBIM. Dr. Graver has been quoted as saying that he is "in no doubt" that the decision not to renew his mandate, to leave the NCP unstaffed and effectively inoperative for nearly one year, and to curtail the independence and strength of the NCP are "connected" with the NCP's handling of the NBIM case.³ Following the NCP's final statement in the case, Graver "noticed increased pressure from the Norwegian government", which he felt set out to frustrate the work of the NCP and change the NCP's mandate to "put [its] operations more under government control".⁴ Dr. Graver also claims the NCP was pressured to reject two new cases⁵ against NBIM that were filed late last year: "It was brought to my notice that the preferred course of action would be for the NCP to dismiss these cases." Representatives of the Norwegian government have broadly dismissed claims of interference in the developments at the NCP.⁶ OECD Watch cannot independently verify either position, but if the claims of Dr. Graver's (whom, we note, was personally praised by the Norwegian NCP peer review team for his integrity and credibility⁷) are true, this represents a grave threat to the work and functioning of NCPs around the world.

Beyond the changes in personnel, OECD Watch *is* concerned that what made the Norwegian NCP a global frontrunner among NCPs and a truly effective mechanism for implementing the Guidelines – its independence and its ability to determine in cases – is in danger of being curtailed in its new mandate. Based on a comparative analysis of the Norwegian, Dutch, and Japanese NCP Peer Reviews and a

³ V. Mair, Responsible Investor, "Norway rejects claim of interference as OECD 'national contact point' exits", 5 March 2015.

⁴ Ibid.

⁵ OECD Watch notes with concern that those two cases – related to NBIM's investments in Crown Holdings and POSCO/DaeWoo – remain, approximately six months after filing, in the initial assessment phase.

⁶ Ibid.

⁷ Norwegian NCP Peer Review, at p. 35.

brief review of the new Norwegian NCP mandate, we make the following observations about the changes to Norway's NCP:

- 🕒 *Independence of the NCP.* Peer reviewers gave the Norwegian NCP extensive praise for its independence,⁸ noting that its structure at the time of the review was a substantial improvement since the shift to an independent structure in 2011.⁹ Reviewers highlighted positive outcomes due to the NCP's structure, such as increased legitimacy among civil society and businesses. Reviewers also noted that the independent structure increased the accessibility of the NCP and grievance mechanism.¹⁰ The Dutch and Japanese NCP Peer Reviews also remarked on institutional structure, and the Dutch NCP Peer Review specifically commented on the importance of independence.¹¹ Although the Norwegian NCP will retain its structure of independent experts, changes in the new mandate risk eroding the NCP's independence. The new mandate requires the NCP to consult Norwegian authorities on all issues regarding interpretation of the Guidelines. NCPs are Governments' appointed experts on the Guidelines and have a stronger knowledge and ability to interpret them compared to other government personnel, so it is counterintuitive to insist that the NCP consult other government officials on the "correct" interpretation of the Guidelines. At the very least, this diminishes the public perception of the NCP's independence, which the peer review team noted was important for the accessibility of the mechanism.
- 🕒 *Ability of the NCP to make determinations of fact and non-compliance with the OECD Guidelines when mediation fails.* Peer reviewers highlighted that the Norwegian NCP's ability to make public determinations of a breach of the Guidelines when mediation fails was an important source of leverage that enhanced the NCP's ability to get business to agree to mediation in specific instances.¹² Peer reviewers further emphasized that it was crucial that the NCP make determinations of fact and breach because "...the NCP has few other tools to use when a Party does not want to engage in the Specific Instance process, or when mediation fails."¹³ The new mandate prohibits the NCP from using the term "breach" or equivalent language with reference to corporate behaviour that is in non-conformance with the Guidelines. If the new NCPs indeed refuses to make public determinations of conformance or non-conformance with the Guidelines, this will diminish its effectiveness to successfully resolve specific instances.
- 🕒 *Budget control and priorities.* Finally, changes to how the Norwegian NCP receives and manages its budget allocations risk weakening its effectiveness. Peer reviewers for the Norwegian NCP specifically commented on the importance of a dedicated budget to ensuring the success of the NCP's model¹⁴ (e.g., paying for Secretariat salaries, panel member remuneration, consultancy/fact-finding costs in specific instances, information activities, and administrative costs¹⁵). Reviewers emphasized that making available resources for the handling specific

⁸ Norwegian NCP Peer Review, at p. 4.

⁹ Norwegian NCP Peer Review, at p. 34.

¹⁰ Norwegian NCP Peer Review, at p. 37.

¹¹ Dutch NCP Peer Review, presented March 2010, p. 54, *available at*:

http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/report/2014/12/16/final-report-peer-review-nl-ncp/final_peer_review_report_dutch_ncp_with_annexes_17_march_2010.pdf.

¹² Norwegian NCP Peer Review, at p. 26.

¹³ Norwegian NCP Peer Review, at p. 26.

¹⁴ Norwegian NCP Peer Review, at p. 35.

¹⁵ Norwegian NCP Peer Review, at p. 8.

instances should be prioritized in the budget: "...the Norway NCP should ensure that it has adequate and dedicated human and financial resources...**particularly when called upon to handle new Specific Instances**" (emphasis added).¹⁶ However, the new mandate places greater discretionary control of the budget with the Ministry on matters of how the resources should be allocated among the different functions. Dr. Graver has communicated to OECD Watch that the Ministry now wants to prioritize the NCP's promotional activities and assisting the Government in its CSR work over ensuring that the NCP has sufficient resources to appropriately handle specific instances. OECD Watch hopes that this will not be the case and that resources for specific instance activities such as fact-finding and contracting external experts to assist in the mediation phase will continue to have budgetary priority, as recommended in the NCP peer review.

7. Engaging with China on RBC

OECD Watch welcomes the initiative to deepen the engagement with China on issues related to responsible business conduct. Given the size, scale, and sheer number of Chinese enterprises operating in the countries of Africa, the Mekong region and the Pacific – countries prone to conflict and corruption, particularly in extractives and hydropower – the mapping and analysis of Chinese laws and guidelines related to RBC will be a significant contribution to the mutual understanding of what is expected of Chinese enterprises, especially when operating abroad. As is the tradition at the OECD, this project should strive to provide space and opportunities for a range of stakeholders, including Chinese civil society organisations and workers' representatives, to provide input.

8. Proactive agenda projects

Financial sector

OECD Watch has the following comments on the Terms of Reference for the Proactive Agenda Project on Responsible Business Conduct in the Financial Sector (DAF/INV/RBC(2015)6).

🕒 *Relational scope (i.e. directly linked vs causing vs contributing).* OECD Watch would caution against prematurely limiting the relational scope of the project. The draft ToR limits the primary focus to situations in which financial institutions are directly linked to an adverse impact, with only limited consideration for the "contributing" scenario (and no consideration of the "causing" scenario). OECD Watch would recommend taking impacts and financial sector products as the starting point, and then determining the relationship scenario (and appropriate due diligence action) that follows from that. The determination of the specific relationship (e.g. directly linked or contributing) between the financial institution and an adverse impact has important implications for the issue of providing remedy. This element is currently missing from the draft ToR and should definitely be included. In this regard, the issue of financial institutions establishing grievance mechanisms should also be addressed by the project.

🕒 *Case studies vs guidance.* Case studies are useful as a way of making guidance more grounded and alive to people, but should not be the whole story. Many of the WPRBC's other proactive agenda projects aim to produce guidance, which raises the question as to why this sector/project should be different.

¹⁶ Norwegian NCP Peer Review, at p. 20.