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Research Report

Responsible FDI is no longer optional

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Responsible FDI is no longer optional*

by
Roel Nieuwenkamp**

The OECD Guidelines for Multinational Enterprises and its grievance and promotion mechanism—the National Contact Points (NCP) for Responsible Business—are unique in the field of corporate responsibility related to FDI. While the Guidelines are not legally binding recommendations of 48 governments to businesses and fall in the category of international soft law, they are morally binding. But the obligation of governments adhering to the Guidelines to set up functioning NCPs forms part of an OECD Council Decision that is international hard law, with a legal status similar to an international treaty. NCPs have the mandate to promote corporate responsibility and to function as an impartial problem-solving mechanism. Because the ILO core labor standards and the UN Guiding Principles on Business and Human Rights were incorporated in the Guidelines, the NCPs also provide a grievance mechanism for labor and human rights. Additionally, the sectoral due diligence guidance for the minerals, agriculture, extractives, garment, and financial industries plays an increasingly important role in helping businesses to implement these standards.

The 2011 revision of the Guidelines expanded their reach to global value chains. They now include an expectation that businesses not only behave responsibly in the context of their own operations, but also across their business relationships. As such, the grievance mechanism is globally available, covering global value chains with a link to companies from any of the 48 adherent governments.

Hundreds of cases have been brought to the NCPs since 2000, addressing impacts from business operations in over 100 countries and territories. Between 2011 and 2016, more than 50% of all complaints brought, accepted for further examination and closed resulted in agreements between the parties.[1] Concrete results were, for example, achieved regarding implementing systems to end forced and child labor in garment supply chains, improving health and safety for agricultural workers, enhancing human rights due diligence for sport mega-events, and arranging compensation for indigenous people. The recent Heineken-Congo agreement, compensating workers dismissed during the civil war, is a case in point.[2]

However, further efforts are needed for the NCPs to live up to their potential. Even some mature NCPs need more resources. Increased impartiality, greater recourse to professional mediation, more meaningful recommendations, and stronger follow-up measures are needed. In particular, the requirement that the institutional arrangement of the NCPs "should be such that it retains the confidence of social partners and other stakeholders"[3] requires more attention from a significant number of NCPs. In 2016, OECD ministers decided that all NCPs will need to be peer reviewed by 2023, a useful instrument to strengthen the NCPs and their impartiality. Some NCPs have already been reviewed, leading to such reforms as improved procedures, greater impartiality and more resources.

Responsible business conduct is no longer voluntary in the sense of being optional, even though it is still not legally binding. There is an increased uptake of corporate responsibility and due diligence standards in legal instruments. For example, France adopted legislation requiring large businesses to carry out due diligence in their supply chains.[4] Other legislative initiatives have focused on particular industries, like the EU regulation on conflict minerals.

In fact, consequences increasingly attach to the non-observance of the Guidelines. Governments have various tools to incentivize companies to behave responsibly, notably through export credits and trade missions. For example, the OECD's Common Approaches for Export Credits state that export credit agencies should consider NCP statements. This could have serious consequences. Canada, for example, has withdrawn support for companies in foreign markets as a penalty for irresponsible corporate behavior and refusal to participate in the NCP process.[5] Institutional investors, such as pension funds and sovereign wealth funds, have significant potential to use finance to promote better business behavior amongst their investee companies. A critical mass of institutional investors promotes investment approaches that consider environmental, social and governance factors.[6] Past NCP cases demonstrate that investors attach hard consequences to the non-observance of the Guidelines, including engagement and divestment.[7]

Further efforts are needed for NCPs to become true responsible business authorities. Moreover, policy coherence is needed—not by making the Guidelines legally binding, but by offering businesses incentives to observe the Guidelines and attaching greater consequences to irresponsible business behavior. Governments have different tools at their disposal to promote responsible business conduct and to lead by example through economic diplomacy instruments, public procurement, state-owned enterprises, and trade and investment policies.

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[1] OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016*, http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf.

[2] "Beer, conflict and compensation: Heineken-Congo agreement," *OECD Insights*, September 15, 2017, http://oecdinsights.org/2017/09/15/beer-conflict-and-compensation-heineken-congo-agreement/.

[3] "Commentary on the implementation procedures of the OECD Guidelines for Multinational Enterprises," in OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2011), para. 10, http://dx.doi.org/10.1787/9789264115415-en.

[4] "LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", JORF n°0074 du 28 mars 2017, https://www.legifrance.gouv.fr/eli/loi/2017/3/27/ECFX1509096L/jo/texte.

[5] OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2015*, p. 21, http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf.

[6] Roel Nieuwenkamp, "The force of finance for responsible business: how the financial sector could and should contribute to responsible business conduct," *Friends of the OECD Guidelines*, June 6, 2016, https://friendsoftheoecdguidelines.wordpress.com/2016/06/06/.

[7] See for example*:* http://mneguidelines.oecd.org/database/instances/uk0038.htm.

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