Advancing and Strengthening the OECD National Contact Point Peer Review Process – Interim Findings and Recommendations

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Accountability Counsel, the International Corporate Accountability Roundtable ("ICAR"), and OECD Watch are conducting research to evaluate the National Contact Point ("NCP") peer review process and identify opportunities for improvement, with the ultimate aim of ensuring that NCPs are functionally equivalent and provide effective access to remedy.

This document outlines the preliminary results of our research and is intended to inform discussions on the topic at the 2017 United Nations Forum on Business and Human Rights.[1] These interim findings and recommendations are based on a desk review, as well as nineteen interviews with NCPs (both those under review and those that have acted as reviewers), the OECD secretariat, and stakeholders who participated in the Belgian, Danish, Italian, and Swiss NCP peer reviews.[2]

Background on the National Contact Points and Peer Review Process

As part of their adherence to the OECD Guidelines for Multinational Enterprises (the "Guidelines"),[3] signatory States are required to establish NCPs. These entities are tasked with promoting the Guidelines and receiving complaints (known as specific instances) against companies that are operating in or from their respective countries and that have allegedly violated the standards set out in the Guidelines. As a non-judicial grievance mechanism, NCPs are recognized by many as a forum for accessing remedy as defined under Pillar III of the United Nations Guiding Principles on Business and Human Rights.[4] While a few recent cases have shown the remedial potential of NCPs, overall, complaints filed with NCPs have failed to deliver remedy to victims of business-related human rights abuses.[5]

The functioning and structure of the complaints mechanism is governed by the Guidelines' Procedural Guidance, but each NCP has some flexibility in its operations, leading to variation in

practice. Despite this flexibility, the Procedural Guidance requires NCPs to function in a manner that is "functionally equivalent" to all other NCPs.[6]

As a method for ensuring functional equivalence among NCPs, signatory States rely on a system of peer learning and voluntary peer reviews. The aim of the peer review process is to acknowledge the strengths and achievements of the NCP under review, identify areas for improvement, and provide recommendations for doing so. In June 2015, the G7 Leaders' Summit called on the OECD to promote peer reviews and peer learning on the functioning and performance of NCPs.[7] Similarly, the 2017 OECD Ministerial Council Statement committed all OECD members to undertake a peer learning, capacity building exercise, or a peer review by 2021, with the aim of having all countries peer reviewed by 2023.[8]

Until 2015, there was no standardization of the peer review process and only a few NCP peer reviews had been carried out. Recognizing that a more structured approach was needed, the OECD Working Party on Responsible Business Conduct produced a Core Template for Voluntary Peer Reviews of NCPs (the "Core Template").[9] To date, four NCPs have completed a peer review since the development of the Core Template and two additional NCPs peer reviews are expected to be finalized before the end of 2017.[10]

With an increasing number of NCPs undertaking peer reviews,[11] it is an opportune time to examine those conducted to date, analyze the achieved outcomes and develop recommendations to ensure robust and effective peer reviews moving forward. It should also be noted that this interim report is not a standalone effort to strengthen the peer review process. The OECD secretariat is currently developing a document entitled "Roles and Responsibilities of NCP Peer Review Participants" to provide background information and guidance to countries undergoing NCP peer reviews. It aims to assist (i) countries preparing for a peer review of their NCP, (ii) countries reviewing another country's NCP, and (iii) countries participating in a peer review as observers. This document will not amend or change the Core Template but will serve as a supplement, addressing practical aspects of peer reviews based on experience gained since 2015, when the Core Template was first implemented.

Interim Findings and Recommendations

Value of the Peer Review Process

From a process perspective, both the NCPs and their stakeholders generally found the peer reviews to be beneficial. Stakeholders interviewed were generally pleased with their respective NCP's decision to undergo a peer review. For many, it was a positive indication of the NCP's willingness to improve and strengthen its performance. In addition, they appreciated the opportunity to discuss their concerns and provide solutions. For NCPs, the process was valuable in that it provided a platform to strengthen and build relationships, including with peers,

stakeholders, and the OECD secretariat. Furthermore, the peer review process provided participating NCPs an important opportunity to learn from each other, particularly how specific instances have been handled and the lessons learned from the various types of issues NCPs have worked to resolve

While there was general consensus about the process adding value, given that a number of peer reviews have only recently taken place, there was uncertainty as to whether the reviews would actually lead to positive change. As such, the direct impact on improving the NCPs' effectiveness remains unclear, although positive steps have been taken by the reviewed NCPs to implement the recommendations made from the peer review reports. The research findings and recommendations provided below address various aspects of the peer review process. By implementing these recommendations, the OECD and NCPs can maximize the value of the process for all stakeholders.

Increasing Transparency and Stakeholder Participation

Some interviewees felt that the existence of the peer review was adequately publicized. However, our research indicates that there is confusion around the details of peer review process stemming, in part, from its lack of transparency. In general, stakeholders participating in the peer review process were not adequately informed of the steps of the process. In particular, they had not been told how their questionnaire responses will be used or how decisions will be made. They have also not been advised of the roles and responsibilities of the NCP under review, the OECD secretariat, or the peer review team.[12]

In addition, our research raised a number of issues related to how stakeholder input on individual specific instances is handled during the peer review process. To date, there has been a lack of participation of parties to specific instances. In situations where parties have participated, feedback was sometimes collected from only one party. Our findings also identified concerns with doing a joint consultation of both parties to a specific instance. Interviewees expressed discomfort with this practice, explaining that it does not foster an environment where participants can speak freely and honestly. Furthermore, some stakeholders took issue with the lack of criteria for selecting which specific instances to highlight during the review process.

A common challenge for NCPs, their stakeholders, and the peer review team was the amount of resources, particularly time, required to participate in the process. For example, interviewees from a variety of stakeholder groups indicated that the questionnaire is currently too time consuming due to its long and repetitive nature.

Key Recommendations:

- In the interest of transparency, the NCP under review should publish information about the peer review, including the agenda for the on-site visit, the composition of the peer review team, and, where appropriate, the proposed list of participants at the various meetings foreseen in the agenda, as well as how to participate in the process.
- The peer review team should prioritize meetings with both parties to specific instances, including through video conferencing or similar means if it is not feasible for them to join in person, and the OECD secretariat could provide guidance on the types of measures that will better enable participation in on-site consultations of parties to specific instances, particularly of those that reside outside of the NCP country.
- The period set aside for stakeholder consultations should be increased.
  The OECD secretariat should revise the questionnaire template to make it clearer, shorter, and less repetitive.

The Role of the NCP under Review

Some interviewees highlighted enthusiasm on the part of the NCP under review to participate in the peer review process. Although it is positive that NCPs are generally excited about the process, some interviewees expressed concern about the role of the NCP under review. A number of stakeholders expressed unease at providing their questionnaire responses directly to the NCP under review, particularly given that they were not informed how it would be shared with the peer review team. Although, interviewees were generally pleased that the final peer review reports contained lists of all stakeholders who submitted questionnaires and/or participated in the onsite visit, so that all input was accounted for in the process.

While some interviewees did not believe that the NCP's participation in the on-site consultations posed any challenges, others expressed concern that, in cases of conflict or disagreement between a stakeholder and the NCP, the stakeholder may fear that their feedback would not be kept confidential and that they might face reprisals or damage their working relationship with the NCP.

In terms of the peer review team, peer review participants generally found the peer review team to be well prepared and to ask targeted and informed questions during the onsite visit.

Key Recommendations:

- The OECD secretariat should be responsible for the collection of responses to the stakeholder questionnaire, and these responses should not be shared with the NCP under review unless anonymized. This will encourage frank feedback by stakeholders and help prevent any potential retaliation for negative feedback.
- The NCP under review should not be permitted to sit in on stakeholder and specific instance consultations. This will help facilitate the frankness of participants and will

guard against potential retaliation where a stakeholder offers negative feedback. As the final report should address all recommendations made during the peer review process, the NCP need not be concerned about not receiving all constructive feedback.

Content of the Final Report

The final reports provide comprehensive information regarding the NCP's structure and operations, along with an overview of some of the NCP's strengths and weaknesses, particularly in terms of its institutional arrangements.

However, while a key goal of the specific instance process is the facilitation of remedy for those harmed by breaches of the Guidelines, the peer reviews do not sufficiently address this issue. In the final reports to date, there have been recommendations related to some of the procedural aspects of the specific instance process, but a lack of recommendations addressing the NCPs' performance on actually resolving disputes and facilitating remedy, and how to improve its performance in this regard.

Thus far, the final reports have also often failed to include the recommendations of civil society stakeholders or of certain OECD institutional stakeholders. In fact, in some instances, recommendations have actually run counter to the feedback provided with no explanation as to why. Some stakeholders, particularly those involved in the NCPs' respective advisory boards, were confused about whether they would be given the opportunity to review and comment on the final report. Moreover, reviewers have not provided any explanation or reasoning for the prioritization of recommendations.

In general, there was some frustration around the editing process as the review team members worked to arrive at language they all found acceptable. Furthermore, review teams have taken a consistency rather than needs-based approach to the number of recommendations, meaning that they have attempted to keep the number of recommendations consistent across the later peer reviews (typically six), whereas it is logical to think that some NCPs may need more recommendations than others. Additionally, one NCP peer reviewer felt that the Core Template hindered the substance of the final report, restricting the process and the recommendations that could be made.

Some NCPs expressed concern that the final report does not discuss the issue of functional equivalence with respect to other NCPs. There is thus no information available on how NCPs compare to or contrast with others, which means that better performing NCPs are not necessarily being recognized or rewarded.

Key Recommendations:

- The final report should include an analysis of the NCP's performance in resolving disputes between parties to specific instances and in facilitating or recommending the provision of remedy for victims of corporate misconduct.
- Given that a component of the peer review process is to share and facilitate best practices, as determined by the OECD secretariat in consultation with the institutional stakeholders, final reports should measure the NCP's performance against such practices.
- The review team should explicitly state if an NCP is in non-compliance with the Procedural Guidance, offering recommendations as to how it can improve its performance to ensure that it meets the standards set out therein.

Follow-Up to and Implementation of Recommendations

A number of interviewees expressed dissatisfaction with the dissemination of the final report. They indicated that there is often opacity around timelines for when the report will be released, particularly any requisite translated version. Some indicated that they never received the final report. Furthermore, while interviewees were generally pleased that NCPs are being asked to follow-up one-year after the report to the OECD, there was concern that NCPs are not currently required to make their one-year follow-up reports to the OECD secretariat publicly available, although one NCP has published its follow-up report.[13]

Our research also indicates that there is limited transparency regarding what, if any, additional follow-up to the peer review has been done. Information collected to date indicates that the follow-up that has been done is often ad-hoc, focusing on relatively easy fixes like promotion-related activities, rather than changes to more institutional issues, such as those related to the specific instance process. Furthermore, one of the NCP peer review follow-up reports frequently indicates the intention to implement a recommendation, but does not highlight specific actions that have been taken or can be taken to do so. Implementation is described in only vague or general terms and lacks specific details about how it will be achieved.

In relation to the implementation of recommendations, one NCP mentioned that it did not fully agree with the NCP peer reviewers on one or more recommendations and was not planning to implement them. It was not clear whether there would be any consequences for this action, however it seems unlikely that it would garner any sort of response given that the peer review has been completed and there is no further interaction or follow-up regarding the recommendations apart from the one-year follow-up meeting.

Key Recommendations:

- Reviewed NCPs should publicize the final report, including by submitting it to relevant government departments, their respective legislative body, and publishing it on their own website. The final report must be translated into all relevant languages.
- Reviewed NCPs should be required to respond to the recommendations that come out of their peer reviews, indicating what, if any progress has been made and the expected timeframe for response to the outstanding recommendations.
- In addition to the one-year follow-up reporting, the OECD secretariat should conduct ongoing monitoring and evaluation of the implementation of the recommendations set out in the final report, and NCPs should be required to report on progress on a yearly basis.
- Follow-up should be broadly publicized. Stakeholders, many of whom invested significant time and resources participating in the peer review, should be kept informed of how the recommendations are or are not being implemented and should be consulted with respect to their implementation. All follow-up reports provided to the OECD secretariat should be published on the NCP's website and distributed to stakeholders and respective legislative bodies.

Project Next Steps

Upon the publication of the pending final reports, we intend to interview those NCPs, their stakeholders, and members of their review teams to complete our analysis of the NCP peer reviews conducted to date. We have also begun and will continue to monitor the implementation of the recommendations that have been delivered so far. Finally, we anticipate incorporating insights and lessons learned from other OECD peer review mechanisms, particularly the anti-corruption peer review monitoring system.

For more information about the project or to offer your feedback on an NCP peer review in which you participated, please contact ICAR's Legal & Policy Associate, Heather Cohen, at heather@icar.ngo; Accountability Counsel's Policy Director, Kindra Mohr, at kindra@accountabilitycounsel.org; or OECD Watch Coordinators, Ame Trandem, at a.trandem@oecdwatch.org, and Joseph Wilde-Ramsing, at j.wilde@oecdwatch.org.

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[1] More information about these discussions can be found at http://www.ohchr.org/Documents/Issues/Business/ForumSession6/41_LessonsLearnedOECD.pdf (last visited November 14, 2017).

[2] The Danish NCP peer review was ongoing to the Core Template's development and finalization, while the other NCPs completed their peer reviews after the finalization of the Core Template.

[3] OECD, *OECD Guidelines for Multinational Enterprises* (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

[4] United Nations Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[5] Caitlin Daniel, Joseph Wilde-Ramsing, Kristen Genovese & Virginia Sandjojo, REMEDY REMAINS RARE (2015). Amsterdam: OECD Watch Secretariat, http://oecdwatch.org/publications-en/Publication_4201.

[6] The core criteria for functional equivalence between NCPs are visibility, accessibility, transparency, and accountability. Furthermore, NCPs must follow the guiding principles for dealing with specific instances, which includes impartiality, predictability, equitability, and being compatible with the Guidelines. OECD, IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: THE NATIONAL CONTACT POINTS FROM 2000 TO 2015, 9 & 31 (2016). OECD, https://mneguidelines.oecd.org/oecd-report-15-years-national-contact-points.pdf.

[7] *Leaders' Declaration G7 Summit, Schloss Elmau* (June 7-8, 2015), https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf.

[8] Ministerial Council Statement, OECD, *Making Globalisation Work: Better Lives For All* (June 8, 2017), http://www.oecd.org/mcm/documents/2017-ministerial-council-statement.htm.

[9] OECD Working Party on Responsible Business Conduct, Core Template for Voluntary Peer Reviews of National Contact Points, DAF/INV/RBC(2014)12/FINAL (April 2015).

[10] The Danish, Belgian, Swiss, and Italian NCPs have completed peer reviews using the core template. The French, German, US, and Chilean have completed onsite visits. The final reports of the French and German NCP peer reviews are expected to be completed before the end of 2017. The Chilean and US NCP peer review reports are in progress.

[11] Several NCPs are scheduled to undergo peer reviews in the next few years. Austria is scheduled for 2017. Canada, Argentina, and the United Kingdom are scheduled for 2018. Sweden, Korea, Australia, and Brazil are scheduled for 2019. OECD, NATIONAL CONTACT POINT PEER REVIEWS, https://mneguidelines.oecd.org/ncppeerreviews.htm (last visited November 7, 2017).

[12] The peer review team consists of the OECD secretariat and representatives of two or three different NCPs, either as reviewers or as observers.

[13] The Belgian NCP has published a follow-up report to its peer review report. Belgian NCP, *Report from the Belgian NCP regarding the implementation of the Peer Review recommendations* (15 June 2017), http://economie.fgov.be/nl/binaries/2017_Report%20Peer%20Review%20Belgium%20%2B1%20year_tcm325-283929.pdf.