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**Seminar: Challenges for Chilean Investors. The
Effects of the OCDE Guidelines for Multinational
Enterprises. A practical approach**

**Analytical Report for the Norwegian and Chilean National
Contact Points**

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¹ The responsibility for assessments, evaluations and opinions in the analytical part of the report is of the author alone and does not represent any of the institutions mentioned, and specifically, is not necessarily the point of view of the Norwegian or the Chilean NCPs. I want to thank Almendra Benaventes and Consuelo Navarro for their research assistance.

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Introduction

The 2011 version of the OECD Guidelines for Multinational Enterprises represents an important effort to update the standards included in the instrument, and to improve the procedure in front of National Contact Points (NCP) in light of the experience of the past 30 decades since the adoption of the first Guidelines. While voluntary commitment by companies and a mediation process available at the disposition of both companies and civil society parties in conflict over compliance continue to be the heart of the Guidelines, the 2011 version provides greater clarity and detail about recommended commitments for enterprises. While for companies the Guidelines are voluntary, States that adhere to the Guidelines assume a series of international obligations. One of the obligations of the adhering states is to establish a National Contact Point (NCP), a non-judicial grievance mechanism. As of March 2013, 42 countries have created an NCP.²

The present report is inspired by discussions that were had at the seminar “**Challenges for Chilean Investors. The Effects of the OCDE Guidelines for Multinational Enterprises. A practical approach**” held on November 16th in Chile, organized jointly by the Norwegian and Chilean NCPs, and by Sofofa, a Chilean federation of companies and industry associations. The report provides analysis on several aspects that were mentioned at the seminar, regarding the opportunities and challenges of mediation and the question of implementation of specific instances. The analysis borrows from different solutions that exist in public international law, and in the discussion on business and human rights. While the seminar and the report used the *Cermaq* case as an example, mediated by the Norwegian NCP with collaboration from its Chilean and Canadian counterparts, this report does not aim to *evaluate* compliance with the joint declaration in that specific instance; therefore, it does not study sustainability reports or other evidence necessary for such an evaluation. In that sense, this report only summarizes the most important arguments mentioned at the seminar; it is not a complete account of what was said and does not deal with all the issues mentioned throughout the seminar.

² See contact details of the NCPs, available at <http://www.oecd.org/daf/inv/mne/NCPContactDetails.pdf>.

This introduction briefly gives an overview of the salmon industry in Chile, as well as the *Cermaq* case, in order to explain the framework in which the seminar took place. The rest of this report then addresses advantages and challenges of mediation, and analyzes different models of implementation in specific instances, in order to conclude by formulating a series of recommendations.

The salmon industry in Chile

While this report does not attempt to describe the opportunities and challenges of the fisheries and aquaculture sector in Chile, it is useful to provide some information because out of all “specific instances” (controversies accepted by an NCP for mediation) in which the Chilean NCP was somehow involved, most come from that sector of business. According to the industry association of food producers, salmon exports were at a historic high in 2012.³ With respect to environmental issues, the association of salmon industry producers and suppliers (SalmónChile) reported that 48 companies affiliated with the association have signed an Agreement on Clean Production (APL, for *Acuerdo de Producción Limpia* in Spanish), a voluntary commitment entered into within a regulatory framework sponsored by the State. Mainstream Chile S.A., a subsidiary of Cermaq ASA, has signed APL agreements.⁴ The APL does not establish provisions for the breach of those self-imposed goals of environmental protection.⁵ During the seminar, panelists agreed that during the crisis of the ISA virus in the salmon industry, it became clear that the lack of regulation of the sector was an essential element; one of the participants added that it was also necessary to improve existing institutions and create new mechanisms within those institutions that would be responsible for sustainability in the industry. While salmon production is considered by many stakeholders as an opportunity if carried out responsibly, unresolved challenges include the impact of the crisis on employment, sanitary regulation,

³ See <http://www.chilealimentos.cl/es/noticias/alimentos-procesados/productos-del-mar/14843-chile-env%C3%ADos-de-salmones-alcanzaron-nuevo-r%C3%A9cord-en-ejercicio-2012.html>

⁴ See for a description of the agreement, <http://www.produccionlimpia.cl/link.cgi/Acuerdos%28APL%29/116>. See for example, <http://www.aqua.cl/noticias/index.php?doc=48879>. It is not clear whether the APL refers to all of Mainstream’s operations in Chile. Véase también <http://www.salmonchile.cl/frontend/seccion.asp?contid=&secid=6&secoldid=6&subsecid=62&pag=1>.

⁵ See for an explanation of the mechanism, <http://www.produccionlimpia.cl/medios/documentos/PoliticaFiscalizacionAPL.pdf>.

and procedures associated to the regulation which would permit avoiding re-infection of fish populations.

The crisis in the salmon industry lasted for three years, between 2007 and 2010, generating the loss of around half of the 50.000 jobs in the sector, and resulted in a reduction of exports of around 20%.⁶ Neither the State nor the companies were at the time prepared to prevent or face the crisis.⁷ Since then the sector has been recovering, but during the seminar, doubts have been voiced that nowadays, the sector would be significantly better prepared. It is important to develop further regulations on both cumulative impacts and prevention soon, in order to address scenarios like the 2007 crisis.

The Cermaq case

The specific instance of the *Cermaq* case was initiated before the Norwegian NCP on April 19, 2009, by the NGOs Friends of the Earth Norway and the Norwegian Forum for Environment and Development (ForUM), with support from Ecocéanos in Chile. The complaint was directed against Cermaq ASA, a private-public joint venture in the salmon industry. (A history of the specific instance resulting in the complaint is included in the Annex). The complaint was based on alleged violations of workers' rights, insufficient consideration of indigenous peoples' rights, discrimination against women workers, lack of prevention against the ISA virus crisis, and lack of a participatory environmental policy. It was initiated after several years of failed attempts by Friends of the Earth Norway to engage in direct negotiations with the company about these issues. The Norwegian NCP led the case because it concerned policies at Cermaq ASA's headquarters, not just local management, standards and policies in Chile. Nevertheless, the Norwegian NCP collaborated closely with the Chilean NCP on relevant issues on the ground. Negotiations lasted until 2011,⁸ when the parties signed a Joint Declaration in which the company assumed responsibility and committed to taking a series of measures.

⁶ See <http://www.emol.com/noticias/economia/2012/10/31/567503/industria-del-salmon-ya-casi-ha-olvidado-la-crisis-del-virus-isa-con-sus-numeros-recuperados.html>.

⁷ See <http://cnchile.cl/economia/2012/04/16/industria-del-salmon-repunta-tras-crisis-provocada-por-virus-isa/>.

⁸ During 2010, the Norwegian NCP was reformed and made more independent of the Government. The new NCP entered into office on 1 March 2011, and accepted to assume the case from the former NCP on 30 March 2011 formally. The new NCP examined assessments already made in the case, and decided to offer its good

The Joint Declaration describes how Cermaq will operate according to the precautionary principle, indigenous peoples' rights, human rights, labor rights and sustainability reporting. The joint statement also acknowledges that Cermaq, after the ISA outbreaks, has contributed to knowledge development to make the industry more sustainable. Not all issues were solved, and the parties agreed that some accusations in the complaint related to labor rights had been refuted. The parties also agreed that their relations should be based on mutual trust and clarification of facts. The complete Joint Declaration is attached in the Annex, together with a press statement released by all three parties in August 2011.

The panels at the seminar

The seminar was divided into four panels. The first panel, dedicated to discussing the relationship between the OECD Guidelines and other international instruments, as well as the concepts of due diligence and sustainability, consisted of Dante Pesce, an academic and consultant on corporate responsibility (Vincular); Judith Schönsteiner, Director of the Human Rights Center at Diego Portales University; Linda Deelen, from the ILO's Regional Office for Latin America and the Caribbean, and Claudia Cerda, from the National Institute of Normalization, and moderated by the Chilean National Contact Point, Rodrigo Monardes.

The second panel referred to the importance of the OECD Guidelines for Multinational Enterprises as a voluntary mechanism to promote social dialogue and responsible business conduct, and the role of the NCPs in this task. The panelists were Eduardo Ordoñez, Development Director of Acción RSE, a business association that promotes CSR (RSE in Spanish) among Chilean enterprises; Juan Carlos Corvalán, President of the Sustainability Committee of the Chamber of Commerce in Santiago; and Alejandra Cisneros, from the office of the NCP of Mexico; the moderator was Pablo Lazo, from the General Directorate for International Economic Relations of Chile's Ministry of Foreign Affairs(DIRECON).

offices to the parties. After a dialogue meeting, the parties accepted an offer of mediation. Mediation took place in June 2011.

The third panel was dedicated, just as the fourth one, to the *Cermaq* case, specifically to the collaboration between NCPs in the solution and mediation of cases. The discussion was among Baard Mikkelsen, President of Cermaq's Board of Directors; Marcelo García, former NCP of Chile who was involved in collaborating with the Norwegian NCP in this specific instance; Jan Thomas Odegard of the NGO Friends of the Earth Norway, and Juan Carlos Cárdenas from Ecocéanos. The panel was moderated by Hans Peter Greve, head of the Norwegian NCP. They considered the process of mediation, its challenges and the importance of follow-up mechanisms.

The last panel, finally, looked into the lessons learnt by the Chilean private sector from the *Cermaq* case and the crisis in the salmon industry, and discussed future challenges for the aquaculture industry. With Ricardo Bosnic from the office of the Chilean NCP as moderator, the panelists were María Eugenia Wagner, president of the industry association SalmónChile, Jessica Fuentes of the Undersecretariat of Fishing and Aquaculture of the Ministry of Economy; Claudio Urrutia of the Trade Union Association (CUT), and Jaime Molina, of WWF Chile.

Advantages and challenges of mediation

Diversity of instruments dealing with social responsibility and human rights: concepts and convergence

In recent years, different international actors – governments, international organizations, business, NGOs, and multi-stakeholder initiatives – have developed a variety of instruments regarding social responsibility and human rights. These instruments are the following: the reviewed OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights (the Ruggie Principles), the ISO 26000:2010 Guidance on Social Responsibility, the UN Global Compact's ten principles, the 2011 EU Communication on Social Responsibility, the IFC Performance Standards,⁹ the Equator

⁹ IFC, Performance Standards and Guidance Notes, 2012 edition, available at http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/.

Principles,¹⁰ the Voluntary Principles on Security and Human Rights,¹¹ and various conventions and declarations by the International Labor Organization (ILO). Taking into consideration that all of these instruments cover similar topics, especially with respect to human rights or the environment, insufficient coordination or coherence between the instruments could severely damage the foreseeability and legal certainty which companies rely upon in order to operate efficiently and sustainably.

Regardless of the similarity among these instruments, their origins are different; furthermore, the OECD Guidelines are the only international standard which provides the possibility of establishing procedures and institutions for correct implementation of the standard.

The discussions in the seminar demonstrated that the concern and confusion about the complexity of dealing with so many instruments is misplaced and unjustified. Panelists agreed that enterprises do not have to review their human rights and sustainability policies according to *each one* of these instruments. Rather, the instruments cover similar topics and coincide with respect to many of the standards that they promote, with the exception of the Principles of the Global Compact which are too general to allow for sincere review and implementation.¹² For example, the OECD Guidelines were updated in 2011 *inter alia* with a new human rights chapter that reflects the wording of the UN Guiding Principles. Conversely, panelists agreed that the UN Guiding Principles, which are the most detailed document on human rights standards, can and should be used to *interpret* the OECD Guidelines insofar as human rights are concerned. This would enhance consistency in international law, as well as legal certainty for enterprises. In practice, such an approach would mean that, for example, the term “due diligence,” if used in the OECD Guidelines,

¹⁰ The Equator Principles consist of ten principles, used for “credit risk management” in order to determine, assess and manage “environmental and social risk in project finance transactions”, see <http://www.equator-principles.com/>.

¹¹ For the text of the Voluntary Principles, see http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

¹² The elaboration of a Guide on Business and Indigenous Peoples’ Rights or similar documents might in part address the problem of the overly general Global Compact standards, see http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html.

would be considered to have the same scope and meaning as the same term in the Guiding Principles.

The implementation of the OECD Guidelines can provide opportunities for the business sector to properly incorporate CSR policies into their activities, since the concept of due diligence is well known in business administration and corporate law generally. Terms like risk assessment, risk prevention and due diligence have a long tradition in corporate law, and more recently in project financing; therefore, the concept is not unknown to the business sector. During the seminar, one participant even expected virtuous synergies from using the due diligence concept in a business and human rights context. What is new to the due diligence logic in human rights contexts is the existence of a baseline *sine qua non*, a minimum standard that is not negotiable, even if the enterprise were willing to run the risk. This is similar to minimum guarantees required by banks for project financing; without these guarantees, a project will not be able to move forward.

It transpired from the discussion that the ISO 26000 standard can also be used for interpretation of the OECD Guidelines. As it represented a very wide consensus among a great variety of stakeholder (including 80 States), ISO 26000 benefits from important legitimacy. As one of the participants said, the instrument is especially interesting because it addresses social responsibility by NGOs and public enterprises, not only private business. Furthermore, it was highlighted that the standard is easy to understand, well structured, and sufficiently detailed to allow for relatively direct application.

The similarity between the instruments mentioned above is not accidental: many of the texts were elaborated nearly at the same time, and there was considerable discussion among the drafters and a conscious effort of avoiding divergences or contradictions regarding, especially, human rights standards (covered by most instruments). One participant observed that the dialogue between the instruments is “completely virtuous,” another that the standards are “totally coherent.”

Practical Tools

In practice, an important lesson shared by stakeholders present at the seminar was that it is essential to know what social responsibility really means, and that it is not just about publicity or marketing. One way to define this term is to use the standards together with the Global Reporting Initiative, which allows companies to make internal assessments of social responsibility risk, to discover gaps of compliance and to work on improvements. It is also very important, as one participant noted, to address the new standards without fear, in order to get good results for business and for society. The standards are not a threat to business, but rather an opportunity to control risk in an ever more complex world.

Several tools are available to make social responsibility work in an enterprise or business organization. Usually, they achieve their greatest impact if they are combined. For example, the Human Rights Impact Assessment is a useful tool to evaluate human rights risk and apply human rights standards in an enterprise,¹³ while reporting guidelines such as GRI are helpful tools to standardize reporting among competitors and permit a unified discourse in which competitors do not need to fear negative consequences after being transparent, due to the level playing field. In addition, if such reporting guidelines are adopted by law, as in Denmark, this should enhance the level playing field among competitors.

The Guiding Principles provide a roadmap for addressing business' human rights responsibilities; former Special Representative John Ruggie established that companies have to respect human rights, especially through prevention, and must remedy possible human rights damage. With respect to the tools that allow companies to achieve this aim, he specified:

“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;

¹³ For a list of available tools, see www.humanrightsimpact.org/.

- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”¹⁴

It seems that these elements, explained further in Principles 16-24 of the Guiding Principles, can also be useful for other policy areas in the context of social responsibility, particularly environmental issues. Most importantly, however, such tools and more broadly respect for human rights have to be made transparent to all stakeholders to a company or project. In that sense, companies must “know and show” that they respect human rights.

Social dialogue and sustainability

The seminar showed what one participant put in the following words: all instruments promoting sustainability only function appropriately if there is a virtuous relationship between sustainable businesses and sustainable societies.¹⁵

For the implementation of the OECD Guidelines, communities and society are key actors, as communities and society possess very real expectations about how a business enterprise should operate. Without dialogue among the different stakeholders, implementation is not possible. In that sense social responsibility is about trust – an issue in which, according to several participants, Chile fails badly, since there is no trust among key interest groups in this field. If there is no dialogue, the standards will not be useful to achieve social responsibility.

For example, ISO 26000 has important provisions regarding citizen participation; in that sense, the society is a stakeholder and will notice if a company is not complying with the norm. This obviously implies that society is well-informed; that formal and informal channels of participation exist; and that there is minimum trust by all actors and acknowledgment of the importance of accountability towards the society for the

¹⁴ UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in resolution 17/4, adopted on June 16, 2011.

¹⁵ See for conditions for such a process, for example, ILO, The Promotion of Sustainable Enterprise, 96th sesión 2007, available at http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_093969.pdf.

performance of enterprises and other social actors. The OECD Guidelines also have important provisions on stakeholder engagement.

More concretely regarding the salmon industry in Chile, the proposal was made to conceive of the relationship between business and communities as one that aims at identification with salmon as a value that is useful both for company and community. If this goal is to be reached, social dialogue is the only way forward. However, care should be taken that traditional identities and especially indigenous cultures are not replaced against the will of the communities, a norm enshrined in ILO Convention 169. Economic need may not have the consequence, therefore, that communities could be living in dependency from an industry that some question or reject pursuant to their rights enshrined in the ILO Convention 169.

Information and empowerment as a pre-condition for social dialogue

For several reasons, mediation in specific instances occurs under unequal conditions, both financially and with respect to expertise. First, despite the support of international NGOs, grass-root organizations, social movements and trade unions usually lack the financial means to prepare reports, measure the impacts of business activity, and sometimes even to travel to the Chilean capital where the NCP is located. It is an important challenge for the NCP to service all of the country's regions, many of them far away from the capital, and ensure that either the NCP itself or other government institutions provide necessary funding to make "access to mediation" possible in equal circumstances.

Furthermore, the OECD Guidelines are technically complex. Procedurally, mediation by a state organ, as mandated by an international agreement and in the framework of an international organization, is difficult for non-experts to understand. This makes the Guidelines less accessible for trade unions and communities. All actors – companies, NGOs, and especially the State through its agencies and in particular the NCP, should take on the task of training and providing simplified information.

In this context, it is worth noting that Chile does not have an efficient mechanism to provide access to funding for civil society and social movements. State funding or funding from national sources has traditionally been very low. This potentially affects access to the NCP as well, and may complicate the task of providing equal conditions among parties seeking mediation.

Role of the State

The OECD Guidelines represent a voluntary framework for companies. For States that adhere to the Guidelines, however, international obligations arise from this act of adherence. States must create an NCP, which promotes the Guidelines and resolves arising controversies about the application of the Guidelines through mediation. Here, only two challenges shall be mentioned: first, promotion necessarily involves creating new regulatory processes, and cannot be relegated to the NCP alone. Rather, the NCP must actively involve agencies and State services in this task. The commitment to the OECD Guidelines is of *all* government agencies, not just the NCP.

Second, promotion of the Guidelines within the government and among companies cannot replace other crucial state functions: the Guidelines are no substitute for legislation and regulation, especially in the environmental and labor sectors, but also in the protection of fundamental rights generally. During the seminar, a proposal was made that complex crises such as the ISA virus crisis need public-private partnerships to implement obligatory measures for prevention and rapid reaction.

This should involve, at least, research about environmental risks, more restrictive regulation, and major control by state entities. The State can thus show that a country's image around the world continues to be favorable to exports. This export-oriented view, however, may not outweigh the State's human rights and environmental obligations. Ideally, they are mutually reinforcing, but in case of conflict, human rights and environmental obligations prevail.¹⁶ For example, the right to free, prior and informed

¹⁶ See for example, Leader, Sheldon / Ong, David, *Global Project Finance, Human Rights and Sustainable Development*, Cambridge University Press, Cambridge 2011.

consultation over issues that directly affect indigenous communities, as well as the right to culture for non-indigenous groups. These obligations must be respected by all state organs, including the NCP.

The opportunities of mediation: how should the NCP work?

Mediation and dialogue are oriented towards a more-aligned construction of society; mediation is perceived – and rightly so – as less adversarial than judicial claims. It therefore has important advantages for trust-building, as well as quick and relatively cheap conflict resolution. Mediation allows the inclusion of a variety of stakeholders, permitting them to make constructive proposals for reaching a solution. The mechanism empowers the parties because the solution comes directly from them, rather than be imposed by a third party. Mediation may reduce the risk of social unrest if it is possible to convene all relevant actors around the table, and if discussions are undertaken in good faith with a real will to resolve the controversy at hand. However, if there is a perception that a company or an actor from civil society is not completely committed or honest about the procedure, participating in a mediation process might eventually fuel further conflict. In that sense, being prepared to engage in real dialogue and commitment to improve alongside revisions to the OECD Guidelines, and communicating this readiness, is crucial for the mediation process to be successful. In that sense, discourse is the first level at which real commitment becomes visible.

During the seminar, an example from the ISO 26000 Guidance was mentioned which illustrates how much discourse about commitment matters. Because ISO 26000 is not certifiable and does not provide a tool for business administration, it is not associated with any institution or process of implementation. Nevertheless, the standard now *does* have a checklist of recommendations, and a practice of self-declarations has developed in recent years regarding the application of ISO 26000.¹⁷ One panelist insisted that a clear difference

¹⁷ See on a mechanism to that effect, the Dutch regulation of self-declarations on ISO 26000, information available at <http://www.nen.nl/web/MVO-ISO-26000/Home/Selfdeclaration-NPR-9026-2.htm>. The International Organization of Employers has dismissed the proposal of self-declarations in September 2012, see http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/2012-09-25_G-114_Outcome_of_ISO_Proposals_for_26000_and_CMS_web_.pdf. Information in Spanish:

can be shown between a company declaring that its CSR policies “are *inspired* by the ISO 26000,” or that “it has *implemented* the ISO 26000 standard.” Promoting clarity through discourse is crucial for establishing commitment, the credibility of the company, and legitimacy of the instruments invoked. This is also true for a company’s commitment to other international standards; the more precisely the discourse reflects the reality of the commitment, the more credible the company’s CSR policy will be.

A second point concerns financial resources for the NCP. As the creation of the NCP is an obligation the State owes to the OECD, a functioning, continuous structure must be created, and sufficient financial and human resources have to be provided in order for the NCP to fulfill its mandate. Without this financial support the international commitment will not seem fully credible to the public, especially to stakeholders that are more directly involved.

Third, with regard to human resources and expertise for the office of an NCP, it emerged from the discussion that NCPs are very aware that they are not experts in all topics covered by the Guidelines, and that therefore they will need additional support. For example, the Chilean NCP has been asked to engage in mediation regarding intellectual property issues, however it would be very difficult to assess the complexity of the case without the advice of governmental experts in this specific field. Therefore, the Chilean NCP is creating a Advisory Council formed by government agencies to assist in specific instances like IP mediation that require transversal expertise.

In addition, NCPs are usually not trained in mediation and might need to have recourse to mediation experts or engage in appropriate capacity building, in order to adequately fulfill their functions.¹⁸ Together with the challenge of follow-ups regarding specific instances, this point seems of utmost importance to the author of this report.

http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/2012-09-25_G-114_Outcome_of_ISO_Proposals_for_26000_and_CMS_web.pdf.

¹⁸ Currently the Chilean NCP is developing a entire new structure that will make it possible to receive the advice from different governmental experts, if necessary, depending on the complexity of the specific instances presented before it. The Chilean NCP is developing the creation of an Advisory Council with representatives of different ministries and governmental agencies.

As was explained in the seminar, there are also structural challenges to the functioning of the NCP, not only practical ones. The Chilean NCP actually plays two roles at the same time, serving as both investigator and mediator. At least in the Chilean context, where these two functions are generally assigned to different institutions, it is important to show that the two functions are kept sufficiently separate. While the Chilean NCP has handled these issues carefully and successfully in the past, it is necessary to reflect about institutional responses to this question in the future. The reason is that investigating and later mediating the same dispute may generate a fear among companies of voluntarily sharing information during an investigation that might harm them later when the same NCP elaborates a final statement.

While the concern seems to stem from experience and must be taken seriously, it is necessary to think of all possible institutional solutions before deciding to implement the one that is most manageable and which best achieves the goal of the OECD Guidelines and, in the human rights field, the UN Guiding Principles. In that sense, separating investigation and mediation could also create the false impression that the NCP is assimilating – even if not consciously – with the role of a judge. To avoid creating such a false impression, it seems worthwhile to think about delegating the investigation to the parties themselves (with corresponding resources for financially weak stakeholders), or creating two separate departments within the NCP's office: one for mediation and one for investigation, thus keeping the two functions of the NCP more clearly separate.

One way to conveniently separate tasks in the interim is to outsource the mediation itself to experts in mediation techniques. According to voices at the seminar, NCPs usually feel least prepared for this task. Managing the negotiation process according to techniques used by professional mediators, who are expected to enhance the chances of success for mediation, would free the NCP and allow it to better evaluate the process of investigation and mediation in the final statement. In that sense, documentation for investigation and mediation would be the same – allowing the company to be simply transparent about facts – but the NCP would only be engaged in investigation and in issuing a final statement. Obviously, its role in investigation would be based upon the adversarial principle of

common law systems and not the investigative principle of civil law jurisdictions. The NCP would then delegate the negotiation phase to an independent expert, or a special unit at the NCP, and re-join the process when issuing a determination or endorsing a joint declaration by the parties.

Another crucial point is that the NCP must be perceived by all actors as independent and impartial. This does not only require that the NCP indeed displays these qualities; its institutional structure must be such as to foster the view that the NCP is independent and impartial. For example, the Norwegian NCP reacted convincingly to a change in perception of independence when it moved from the Ministry of Foreign Affairs— where it was previously perceived to be insufficiently independent from the country’s investment strategy for state-owned companies— and transformed itself into an independent expert body, even though it continued to be financed by government sources.¹⁹ The reform was carried out after the government issued a CSR report to the parliament, followed by a broad consultation process with civil society, trade unions and the business community, as well as other NCPs and former UN Special Representative for Business and Human Rights, professor John Ruggie.²⁰ Every country should decide on the structure of their NCP according to national perceptions; one model will not fit all. However, it seems probable that the inclusion of independent experts – at least not directly depending on any ministry – could be a good way forward for many countries.

In addition, trust in any institution or organization – NCPs, companies, or civil society organizations – depends on the persons representing them. This factor should not be underestimated. When the Norwegian NCP was reformed and entered into office, one of the expert panel members was also in the Cermaq board. This expert panel member reported the conflict of interest and did not take any part in the Cermaq process. This was crucial in achieving the trust of the complainants, and contributed to reaching a joint statement after mediation by the Norwegian NCP in June 2011.²¹

¹⁹ See http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ncp_norway/ncp_norway.html?id=669910.

²⁰ Information provided by the Norwegian NCP.

²¹ Information provided by the Norwegian NCP.

Some thoughts on implementation

A topic that was discussed prominently in the seminar is the question of implementation or follow-up of an NCP's determinations and of joint declarations by the parties. Dialogue and mediation can allow for a sustainable solution, but only if implementation is conceived as an integral part of the agreement and if the whole process is undergone in good faith. NCPs should thus strive towards providing incentives for good faith implementation of agreements.

The question is therefore: when does a specific instance conclude? There are basically two options: the first that the specific instance ends when the NCP pronounces itself, i.e., when it issues a determination or endorses a joint declaration. The second option is to include the implementation period of the agreements reached, possibly with the NCP or another body in a supervisory role that examines compliance of both parties with the agreement. This section provides some further arguments for discussion of these concerns.

Terminology and basic principles

The most common confusion regarding terminology in the area of implementation does not take into account the following distinction. The term 'implementation' refers to two related, but separate issues. First, it indicates application of the OECD Guidelines by adhering states, and, on a voluntary basis, by all multinational companies that have activities in those adhering states.²² Second, it refers to compliance with the commitments agreed upon in specific instances between the parties involved. When discussing the OECD Guidelines, the first meaning is currently applied more frequently when using the term 'implementation.'

The distinction might seem of little significance, but it becomes useful when discussing the functionality of different follow-up models for specific instances, as it allows dealing separately with more general initiatives of promoting the Guidelines (an issue not addressed in this report). Certainly, there will always be a link between a successfully implemented

²² Used in this sense, for example, in the Annual Submission of OECD Watch to the OECD 2011, see http://oecdwatch.org/publications-en/Publication_3693.

agreement that arose from a specific instance of mediation and the overall promotion of the OECD Guidelines, with each factor enhancing the other.

Some words about the importance of implementation are pertinent at this point. There is a fundamental principle of legal certainty that applies to both voluntary agreements and judicial or administrative decisions. Once a solution to a conflict is found, this solution needs to be implemented; otherwise the agreement or decision would not have “*effet util*,” which could be translated as practical relevance or practical effect. It was this point that the moderator of the fourth panel, Ricardo Bosnic from the Chilean NCP, referred to when speaking of the “duty” to follow up on signed agreements.

There are additional mechanisms that might enhance implementation. For example, national regulation of false advertisements – independent of the OECD Guidelines - might come into play if companies sell their products announcing that they comply with the Guidelines but do not effectively do so, or do not collaborate in good faith with the NCP to resolve specific instances. As another example, some argue that voluntary agreements may eventually take on the characteristics of contracts, with the consequence that incompliance could be challenged in the courts. This is not currently the case with agreements or joint statements in the non-judicial grievance mechanisms of NCPs,²³ and such an interpretation could possibly alter the voluntary character of the Guidelines. In addition, it might well be conceivable that a *determination* issued by an NCP – for example, stating the unwillingness of one of the parties to engage in dialogue – be used as evidence in judicial cases that are brought against the company in relation to a similar sets of facts. This report will not dwell on these discussions, but merely mention them while highlighting that good faith and the principle of *effet util* require that agreements be honored.

²³ The Norwegian NCP in the Final Statement on the *Cermaq* case observed the following: “Since the Guidelines are not legally binding, the agreement between the parties is not appropriate for litigation purposes.”

Implementation and legitimacy

If implementation of agreements reached through mediation is not effective, the institution that provides the framework for conflict solution loses credibility and legitimacy. This is true for NCPs, too. NCPs lose credibility and legitimacy if the agreements are not implemented; or if the agreements are “overimplemented,” thus generating the impression that business has to “put more than what was agreed to” in the specific instance.

Therefore, NCPs as well as the OECD, as the international organization sponsoring the Guidelines, should take a heightened interest in assuring that the mediation process is complete while at the same time is not conceived as an instance to resolve “all problems in one go.” In that sense, it would be helpful if agreements were specific, and if the mediation process also encompassed implementation of the commitments agreed to by the parties. In that sense, NCPs should think about how to best foster this implementation.

Practical obstacles to implementation

According to the experience of NCPs around the world, a couple of situations seem to make effective implementation more difficult than necessary (assuming that both parties are willing to comply with the agreement). On the one hand, if commitments related to a specific instance are not clearly defined, they may lead to the complaining party continuing to make demands beyond the agreement itself. This is especially the case if there is no real possibility of determining compliance with the agreement because indicators in that respect are missing, or if no precise framework for compliance and follow-up has been agreed upon. Also, there should be a clear distinction in how the common understanding of facts is worded, and how commitments are phrased. On the other hand, imprecision in agreements may allow evading implementation altogether, when a company perceives that there is nothing concrete it can / has to do regarding the agreement.

Therefore, it is crucial that NCPs motivate the parties in the following direction: towards a clear separation of facts and commitments in the agreements; towards precise and verifiable commitments, establishing if possible indicators for compliance; and towards the inclusion

of a supervision mechanism in the agreement, if such a mechanism were not created generally for all instances.

Of special interest for the participants of the seminar was the implementation phase of the Cermaq-Friends of the Earth-ForUM joint statement. As announced in the NCP final statement about the implementation process,²⁴ the NCP invited all parties to a follow-up meeting in May 2012 where the parties reported on the progress of the implementation of the joint statement.²⁵ Friends of the Earth Norway and ForUM asked for an independent verification of whether the joint statement was being implemented. The company was critical towards such an assessment, and referred to a number of results and plans published in the company's integrated sustainability report verified by KPMG²⁶. The NCP, finally, underscored that the case was closed after the said meeting and that it would not be under the mandate of the NCP to monitor the joint statement beyond what had already been declared in the NCP final statement about the case or agreed between the parties in the joint statement.

According to the reflections presented above, this decision was validly taken, and indeed, the NCP is not obliged to provide any further follow-up. Nevertheless, the situation raises a question about legal certainty: if one of the parties to the mediation – in this case the NGO – trusts that the agreement will be implemented, renouncing maybe even their right to pursue judicial remedies, it might be problematic if there were no instance to receive help in monitoring or otherwise ensuring effective implementation.

The question is how NCPs should react, in general, to requests to follow the implementation process in particular, and to a possible rejection of such good offices by one of the parties to the specific instance. It seems important to bear in mind that the NCP is responsible for the promotion of the Guidelines; it can therefore be expected that successful implementation of a specific instance should reduce future violations of the

²⁴ Final Statement, Norwegian Society for the Conservation of Nature / Friends of the Earth Norway and Forum for Environment and Development vs Cermaq ASA (Mainstream Chile and Mainstream Canada), July 27, 2011.

²⁵ Minutes available on the Norwegian NCP website (in Norwegian)

²⁶ Classified as B+ according to the Global Reporting Initiative standard

instrument, and that the lack of effective implementation could/ lead to questions about the legitimacy of the mechanism.

Implementation and legislation: what NCP mediation can and can not achieve

Specific instances are about specific facts; while they may reveal underlying structural problems in a certain industry sector or even country – for example, widespread corruption or insufficient environmental regulation, or low standards in legislation on health and safety or collective bargaining – the parties to a specific instance are usually not in a position to change these structural issues. Even the NCP will have limited faculties to address repetitive or structural problems, as the NCP cannot for example achieve legislative change. The NCP's competences do not encompass public policy or law-making. While it can use the facts of a specific instance – insofar as the facts are public – to illustrate a certain dilemma, the specific instance itself will not allow the addressing of structural problems.

The *Cermaq* case and the crisis of the ISA virus in the salmon industry are a good example. As participants of the seminar explained, the crisis showed a failure of the environmental and sanitary regulation of aquaculture industry in Chile, but it also revealed deficiencies in the institutional oversight mechanism. It became clear that a neoliberal, hands-off State that does not regulate the overall fish population in aquaculture was a dysfunctional assumption to start from. In that sense the former Fisheries Law was deficient, as the functioning of the aquaculture industry depends on the sustainability of both neighboring companies and the overall industry. There has to be some additional degree of regulation so that business can develop adequately without exhausting the resource.

Such lack of regulation is a problem for the investor as well, as he / she will be operating under conditions of legal uncertainty, which leads to higher risk associated to an investment. If the Chilean State – both Congress and executive – do not adopt stricter and more complete regulation for the fishing and aquaculture industry, then there is no guarantee of legal certainty for all actors involved and the implementation of any sustainability standards would be more difficult.

While the line between obligatory and voluntary commitment to the environment, human rights and labor rights is difficult to draw, and will sometimes be blurred, the State has a crucial role in assuring sustainability through the adoption of legislation that allows the effective coordination among different investors in ensuring sustainability. This role cannot be substituted; a specific instance can, however, demonstrate such difficulties to investors, citizens and workers alike, through highlighting facts that show the State is not in conformity with the OECD Guidelines.

Models of implementation in international institutions

If it is accepted that effective implementation makes the OECD Guidelines more respectable, creates trust, and reinforces the esteem in which the NCPs are held, the question arises how effective implementation can be guaranteed.

For this purpose we will examine several models of supervision of agreements in public international law (the OECD Guidelines being an international instrument), and some models regarding international CSR commitments. The following overview allows parties who negotiate under mediation of an NCP, as well as the NCP, to evaluate which mechanism would be the best in the specific instance under review.

What should be clearly avoided is the adoption of a joint declaration or final statement without identifying any mechanism for implementation and supervision / evaluation that all parties commit to as part of the agreement. This forces the complainant to limit his / her pretensions to solve general problems, especially regarding deficient legislation, through a specific instance. It will also force businesses to think about and commit to planning certain activities in light of the OECD Guidelines.

Few NCPs actually engage in follow-up on final statements (determinations) or mediated agreements. The Norwegian NCP procedures include the possibility that “[a]fter mediation,

the parties are, if relevant, invited to submit a progress report to the NCP.”²⁷ In fact, only the NCP in the UK has developed an institutionalized mechanism for implementation; thus, the UK Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises read:

“Where the Final Statement includes recommendations to the company, it will also specify a date by which both parties are asked to provide the NCP with a substantiated update on the company’s progress towards implementing these recommendations. The NCP will then prepare a Follow Up Statement reflecting the parties’ response and, where appropriate, the NCP’s conclusions thereon. The NCP will submit this statement to the Minister at the same time as it is sent to the parties. The NCP will ask the parties to send factual comments on the Follow Up Statement within 10 working days. The NCP will, in its discretion, then incorporate any necessary factual changes before sending the finalised Follow Up Statement to the parties and publishing the finalised Follow Up Statement on the NCP’s website.”²⁸

Such an implementation mechanism clearly differs from a review process, which the UK also created.²⁹ The latter is a process by which the fairness or due process with which the specific instance was carried out by the NCP can be challenged. The follow-up process, as emerges from the quote, is a process by which compliance with the agreement(s) can be determined. The Chilean NCP does not have a follow-up mechanism as of yet; however, as it is currently drafting its procedures, there is an opportunity to include a provision to that effect. Also, the Civil Society Committee (*Comité Espejo*) of the NCP, composed of experts, representatives of business, civil society, and trade unions, as well as the office of the NCP, might consider taking a role in this respect, offering its good offices.³⁰

²⁷ Norwegian NCP, Procedural Guidelines for Handling Complaints, at 3. See www.regjeringen.no/upload/UD/Vedlegg/ncp/ncp_prosedyrer_e.pdf.

²⁸ Procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises, adopted 2008, amended 2011, at para. 6, available at <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>.

²⁹ See for details, <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/t/11-654-review-procedure-uk-national-contact-point.pdf>.

³⁰ See Press note of the Human Rights Center of the Diego Portales University, April 29th 2013, available at <http://www.derechoshumanos.udp.cl/comite-espejo-lineas-directrices-ocde>, based on a press release from DIRECON, April 26th, 2013, available at <http://www.direcon.gob.cl/noticia/3978>.

Although there is only one NCP with an institutionalized follow-up mechanism, there are several, but few, specific instances where implementation was an issue. The following summarizes some of the specific instances in which implementation mechanisms are mentioned. In *Survival International vs Vedanta Resources plc*, a specific instance in which the company refused mediation services offered by the UK NCP and did not provide any evidence supporting its response to the complainants, the UK NCP asked the parties to provide an implementation report three months after the decision was issued.³¹ The follow-up report contained a summary of the arguments made by the parties regarding implementation, but no evaluation of compliance. The UK NCP urged the parties to comply;³² nevertheless, the company refused to do so. As OECD Watch explained, “[u]ltimately, the UK NCP could not compel Vedanta to comply or cooperate with the procedures and recommendations.”³³ However, and this is important, non-compliance became known and could be signaled to the NCP and to the public.³⁴ The UK NCP took up an important role in promotion of the Guidelines by making sure that the process was carried out according to established procedures, and through publishing the parties’ arguments in an accessible manner.

Another specific instance in which implementation played a role was *Germanwatch vs BayerCropScience*, which dealt with a child labor complaint. The German NCP decided to conclude the specific instance without commitment to a follow-up mechanism, accepting a unilateral commitment of the company as sufficient guarantee for compliance. The company had refused to engage in mediation with one of the complaints, which was why the NCP had to carry out a series of bilateral meetings instead of a mediation process. The complainants, who did not feel that the final statement by the NCP “appropriately reflect[ed] their views,” and “[i]n order to further assess the outcome of the case, (...) pledged to continue to monitor the situation on the ground and see how/whether the German NCP assumes the monitoring role that is foreseen in the final statement.”³⁵ The final statement mentions the commitment of the company to allow access to all interested

³¹ <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/43884129.pdf>.

³² <http://www.bis.gov.uk/feeds/~media/2383AC2391024835BD2A13FD0A90351E.ashx>.

³³ http://oecdwatch.org/cases/Case_165.

³⁴ See an example of another follow-up mechanism, BTC pipeline http://oecdwatch.org/cases/Case_36.

³⁵ See http://oecdwatch.org/cases/Case_50.

actors (excluding one of the complainants) to the company's child labor reduction programs.³⁶ Considering that honoring such a commitment is crucial evidence of good faith for the future, it would be a worthwhile consideration for the German NCP to not disengage completely from the specific instance. This would enhance credibility, both among civil society and business.

Another instance is *Nidera*, a specific instance regarding Argentina. The *Nidera* instance contains a clause regarding a form of follow-up; the provisions of follow-up are more elaborate in this case, setting forth details about joint reporting on implementation to the NCP in Argentina. Thus, the parties included explicit references to a follow-up mechanism into the agreement. As OECD Watch summarizes, "the complainants were allowed to monitor the implementation of the agreement (...). The complainants visited fields and campsites, interviewed workers, and documented working and environmental conditions photographically. In their report, the complainants confirmed that Nidera had complied with all of the conditions of the agreement. (...) The company and complainants are preparing a joint 1-year on report back to the Dutch NCP on the implementation of the agreement."³⁷ This example shows a continued and real joint commitment to honor the agreements, where both parties to the mediation put effort into its implementation. The specific instance also shows awareness that implementation is complex, needs to take into account viewpoints of different stakeholders, and can demonstrate credibility and transparency.

In the *Cermaq* case, the parties agreed in their joint statement that in accordance with the Norwegian NCP procedure, the parties were invited to a meeting to report on the implementation of the agreement before the NCP closed the case. The follow-up meeting took place on May 16th, 2012. The Norwegian NCP stated in the report on the follow-up meeting that the case is closed as no further follow-up was described in either the NCP final statement about the mediation process or in the joint statement from the parties. In principle this is a very good mechanism to monitor compliance of both parties with their

³⁶ See <http://www.bmwi.de/BMWi/Redaktion/PDF/E/erklaerung-bayer-cropscience.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

³⁷ See http://oecdwatch.org/cases/Case_220.

commitments. However, the challenge is that such meetings should not be simply formalities, but instead instances of constructive dialogue on effective implementation. One could imagine that it was helpful to have a series of follow-up meetings, as implementation is usually complex and gradual and might require reiterative discussion. With regard to the *Cermaq* case, the OECD stated in its Annual Report: “all parties agreed that including more details on monitoring in the joint statement could have made the follow-up process more predictable, and enabled better co-ordination and a higher level of trust between the parties.”³⁸

The NCP also extended an invitation to the parties to talk about the case in Latin America, which they accepted. Therefore, the company, the complainants, Chilean and Norwegian NGOs, trade unions, companies, industry associations and government representatives from Chile and Norway were present during the seminar that took place in Santiago de Chile on November 16, 2012, exchanging their views on the case. The complainants acknowledged that improvements had taken place, but the parties do not agree upon how the joint statement should be implemented and monitored. Their dialogue now continues outside the NCP.

Looking at these experiences, it is possible to systematize different options for follow-up, adding to the discussion that was held at the seminar. Furthermore, there are experiences that can be gathered from outside the context of the OECD Guidelines which could enrich the discussion about implementation and follow-up of determinations and final statements.

Follow-up by the parties

The easiest form of follow-up is a supervisory process led by the parties themselves, which ideally is agreed upon as a common commitment in the joint declaration of the parties. The main difficulty with this solution is the imbalance of powers between complainant and company that might come into play fully if the figure of the mediator that had accompanied the process of negotiating the agreement is no longer present. Also, there might be problems with financing the follow-up process (if not resolved in the agreement itself),

³⁸ OECD, Annual Report on the Guidelines for Multinational Enterprises 2012, at 52.

particularly regarding the question of who should pay for studies and scientific assessments of, for example, improvements in the water, soil or air quality in polluted areas.

Supervision by the NCP or various NCPs

As the above-mentioned examples show, if there was a third party involved in the supervision process, this third party has always been – up until now – the appropriate NCP. The advantage is that the NCP should already have obtained the trust of the parties; furthermore, the NCP's knowledge of facts and context of the situation should allow it to play an important role in the follow-up mechanism. If the follow-up mechanism is not part of the NCP framework (contrary to what happens in the UK) and is not included in the agreement, it is the principle of *effet util* explained above that allows the NCP to participate and provide good offices in that stage of the proceedings. If the principle of legal certainty is observed, and if parties are told at the beginning of the proceedings about the implementation mechanism, there is no impediment that would prevent NCPs from establishing a procedure like the UK NCP, allowing the NCP to issue statements on follow-up and implementation.

An alternative is that NCPs join forces for supervision and follow-up, constituting a standing Committee in charge of the process that could collect best practices on the matter and then feed them back at the national level. When a case is handled by the home country NCP, a follow-up mechanism could also be related to the NCP in the country where the issues have arisen (the host country). However, there are other models that might be interesting to take into account and that the parties could agree upon alternatively. These are briefly presented in the following.

Joint follow-up by industry associations and NGOs

Another option – to our knowledge, one not yet used regarding the OECD Guidelines – consists of involving industry associations and a coalition or group of NGOs into the follow-up mechanism. The respective NCP might establish this mechanism as an alternative option in the procedure for specific instances, leaving it to the parties to determine the concrete integration of this “follow-up council.” The advantage could be that

users feel greater trust to their “supervisors”; and that the NCP’s workload remains more manageable by delegating functions to other actors. However, the difficulty of balancing power between complainant and enterprise is not necessarily overcome with this option. This is clearly a disadvantage. One solution might be to create an international supervisory mechanism, where industry is represented by BIAC, trade unions by TUAC and civil society by OECD Watch.

Furthermore, it might be detrimental for the NCPs legitimacy if the NCP withdraws completely from the process of implementation, thus losing any influence or impact on compliance. The NCP might remain involved by issuing a final statement on follow-up after the council declares the implementation complete. As transpired at the seminar, industry associations are unlikely to expel non-compliant members; rather, they are expected to include them “more strongly” by helping them to identify risks and opportunities in their operations.

Follow-up by an intergovernmental organ

A common but not always functioning mechanism to follow up on implementation is endowing this task to the intergovernmental body of the international organization that is sponsoring the conflict resolution mechanism, in this case, the OECD. Thus, the Council of Europe has had good experiences by delegating the supervision of judgments rendered by the European Court of Human Rights to the Committee of Ministers, a political body that is composed by delegates from all member states of the Council of Europe. It is commonly accepted that the mechanism works well in Europe because one of the entry conditions to the European Union is adherence to the European Convention on Human Rights and its adjudication mechanism.

A similar design was established in the American Convention on Human Rights, entrusting supervision of judgments of the Inter-American Court of Human Rights to the General Assembly of the Organization of American States. However, the General Assembly never took up its task, or coined a mechanism for this. Therefore, the Court in 2003 decided that it would establish its own supervision mechanism, which is based on periodic reporting in

writing by the parties and the Inter-American Commission of Human Rights. There is also the possibility to call for confidential implementation hearings. Overall, experiences with this mechanism are relatively good once a minimum willingness to implement exists. This mechanism is similar to follow-up by the NCP or a Committee of NCPs, assuming that they look not only at the formal requirement, such as the fact that parties actually meet, but also at the quality of implementation.

Supervision by financial institutions

Inspired by the logic of the IFC Performance Standards, the Equator Principles, and especially, the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”) of June 28, 2012, implementation could also be supervised by the creditors of companies. Banks and insurers usually have a credible interest in the sustainability of projects they put their money in, due to the risk that social conflict might represent to the viability of the project and to the capacity of the company to pay back the loan. As a first step, export credit agencies should look into whether the company they are considering granting a loan to has a negative record under the OECD Guidelines.

Nevertheless, there is no concrete experience as to how such a mechanism could work once a loan is granted or while it does not have to be renewed. Also, the implementation for a specific instance will only constitute one among many other factors – most probably overriding – when determining credit-worthiness. If it were possible that serious incompliance with a specific instance had the consequence of affecting the company’s credit-rating, effectiveness might nevertheless rise.

Supervision by national courts

Finally, supervision of specific instances could be handled in the courts. In theory, this seems to be the most efficient mechanism, guaranteeing the highest level of legal certainty for enterprises and complainants. However, there is a considerable risk that the advantages of a voluntary, dialogue-based mediation procedure are lost if the last stage of the procedure is, potentially, judicialization.

In that sense, it is commendable to keep the two systems – NCP mediation and decisions by the judiciary – clearly separate, to maintain the advantages of both. There does not seem to be an impediment that in case of necessity, parallel procedures are installed to solve a specific conflict.

Recommendations

1. Declarations on understanding of the facts should be distinguished clearly in wording from commitments.
2. No commitment that is too vague to be implemented (or supervised) should be included in an agreement between the parties.
3. NCPs should consider making it obligatory for the parties to include a clause on implementation and associated mechanisms in the joint declaration. Meanwhile, parties should consider including such clauses on a voluntary basis.
4. The NCPs should elaborate a catalogue of “workable options” and best practices for commitment clauses in agreements, explaining that concreteness is necessary for the evaluation of implementation and legal certainty.
5. NCPs should design, with involvement from BIAC, TUAC, and OECD Watch, a consistent implementation mechanism for specific instances which takes into account the typical differences in the power balance between NGOs and enterprises. It is recommendable that the mechanism includes a third party and a procedure to be followed.
6. The OECD Council should consider creating a system that incentivizes compliance with specific instances. This could be achieved through an annual award. The Council might also consider creating circumstances to receive biannually, in a special session, information about implementation from NCPs, enterprises and civil society members, adopting on each occasion a resolution on the advancement of the processes.
7. Export Credit agencies should consider a company’s compliance with the OECD Guidelines and the implementation of specific instances that the company has been involved in, before granting loans.

8. Enterprises should consider implementation of specific instances to constitute part of their commitment to the rule of law, and of their commitment to honor agreements.
9. NGOs and other complainants should make sure that the demands they address to the companies are not too vague or general to be implemented, and suggest how implementation of these agreements is to be measured.
10. OECD member states should make sure their legislation addresses structural problems that might underlie actions or omissions that are contrary to the OECD Guidelines, in order to foster non-repetition of the violations. The obligation to adopt such legislative changes usually stems from human rights treaties or environmental treaties the country has ratified, and therefore exists independently from the OECD Guidelines on Multinational Enterprises and independently from any implementation mechanism that might be designed.

Annexes

Seminar program

Joint statement – Cermaq case

Final statement by the Norwegian NCP – Cermaq case