

## Third BIAC Survey of Member Companies' Experiences with NCPs and Specific Instance Procedures

### Discussion Paper for the 2015 Annual Meeting of NCPs

#### Introduction

The OECD Guidelines for Multinational Enterprises (MNEs) are a comprehensive set of multilaterally agreed norms and standards on responsible business conduct. The Guidelines are of voluntary nature for business. Governments adhering to the Guidelines have committed to promoting them. The Guidelines also include the obligation of adhering governments to set up a National Contact Point (NCP) that promotes the Guidelines and provides a non-judicial grievance mechanism for stakeholders in case of alleged non-observance of the Guidelines by companies. Stakeholders can then initiate a 'specific instance'. In such instances, NCPs can offer their assistance to parties with a view to resolving the issue. They can also issue a statement and make recommendations.

BIAC supports the effective implementation of the Guidelines and a common understanding of the nature of the NCP specific instance procedure. To that end, BIAC conducted a business survey to gather information about the experiences of individual companies with NCP specific instances.

This third edition of the BIAC survey among its member companies seeks to give an impression of how the NCPs perform in practice in light of their core criteria<sup>1</sup> and experiences with notifying parties. The over 20 responses represent a good sample of companies from different sectors and countries all over the OECD that have been involved in recent specific instances. BIAC has also received additional feedback regarding the visibility and importance of the MNE Guidelines from companies that have not had a specific instance. On the basis of the responses, BIAC makes a number of recommendations to adhering governments, their NCPs, the OECD and the institutional stakeholders to promote a clear understanding of the Guidelines, their relation to the OECD's work on investment policy, and the effectiveness of NCP specific instance procedures.

BIAC looks forward to continuing its active involvement in the deliberations at the OECD to further the effectiveness of the Guidelines and the NCPs and welcomes any comments on this discussion paper.

---

<sup>1</sup> Visibility, accessibility, transparency and accountability

## **Key findings of the survey**

The survey focused on three themes:

- Awareness of the Guidelines and the NCPs and their functioning against the background of the four core criteria,
- Experiences with NCPs in specific instance procedures,
- Experiences with notifying parties.

On the basis of the responses to this survey, the NCPs appear to score well on accessibility and transparency, and, to a lesser extent, on accountability. However, real improvement could be made on the visibility of NCPs. Although all companies are faced with many of the norms and standards of the Guidelines in the domestic regulatory framework of adhering countries in which they operate, the visibility of the Guidelines as such, including the NCPs and the specific instance procedure, appears to be very low. For example, very few respondents were aware of domestic or international promotional activities.

In the earlier two editions of this survey, BIAC stressed that the NCP specific instance facility is a continuous learning process for business, NCPs and notifying parties from civil society. While recognizing the constructive dialogues that have taken place in several specific instances and good offices provided by several NCPs, companies have too often felt that notifying parties are not constructively engaging in the NCP procedure and are acting in disregard of the nature of the specific instance procedure, which is to assist parties in coming to a resolution of the issue that was raised. Unfortunately, this experience has not changed over the past two years when the last survey was conducted, and the experiences are still mixed.

### **Awareness of the Guidelines and NCPs: the four core criteria in practice**

#### *Findings on visibility of the Guidelines and the NCPs*

From the overwhelming majority of responses, it seems clear that the Guidelines and NCPs still lack sufficient visibility. Visible NCPs are the exception among adhering countries and the Guidelines are often not known beyond CSR practitioners or business and human rights experts, who are directly involved in the policy debates about them. On the business side, major listed multinationals may be familiar with the Guidelines, but this does not hold for SMEs and privately-held, internationally active companies. Some respondents only became aware of the Guidelines after a specific instance was raised in relation to their operations. Other companies had learned about the MNE Guidelines through their respective national business organization.

### *Findings on accessibility, transparency and accountability*

Once the NCP is known by companies, they mostly score well on accessibility and transparency. While it should be recognized that there are vast differences among NCPs, NCP staff often appears competent and willing to engage, but not always well equipped to fulfil their tasks. As for transparency, most NCPs provide ample information on what they do and how they operate. The survey responses produce a less clear view on the extent to which NCPs can be and are held to account for their functioning. Many respondents left the relevant question on accountability vis-à-vis government and stakeholders open or were unsure, which may relate to the perceived lack of visibility of NCPs or a company's own unfamiliarity with NCPs. An NCP whose existence is not well-known or which is inactive may prove difficult to gauge in terms of accountability. One respondent noted that accountability is ensured by the fact that the NCP in its home country is part of the relevant government department.

### **Experiences with NCPs in specific instance procedures**

The survey responses from companies that have been involved in recent specific instance procedures covered several different business sectors and countries. Experiences are mixed, ranging from overall satisfaction with the NCP's impartiality and forthrightness to facilitate a non-adversarial mediation process, to frustration with perceived lack of impartiality, with eagerness to deal with any notification to show added value of the NCP facilities, with unwillingness from NCPs to recognize court decisions on the same matter as raised in the specific instance or unwillingness to take the necessary steps when the notifying party clearly misuses the procedure for public campaigning rather than engaging in the specific instance procedure in good faith.

While in some cases the NCP procedure has been of mutual benefit for all parties involved, other cases have been used primarily for campaigning, which, according to BIAC, is against the spirit of the MNE Guidelines. The Guidelines specifically mention that the effectiveness of the specific instance procedure depends on good faith behavior of all parties involved in the procedures.

Apart from the nature of companies' experiences, it is clear from all respondents that specific instance procedures are time-consuming and require significant in-house and often external human resources. In some cases, an NCP procedure can entail high legal costs for a company. This can be particularly challenging for smaller companies.

Most companies have received feedback or inquiries from core stakeholders regarding their involvement with the NCP specific instance procedure, mainly occurring immediately after the filing of a complaint or after the NCP published its report.

One respondent noted that the more active NCPs, even when fulfilling all the NCP criteria, could pose a potential reputational disadvantage for enterprises located in these countries compared to MNEs in countries that (continue to) lag behind in NCP performance. However, the respondent noted that any

potential reputational disadvantage tends to stem more from civil society campaigning, if any, than from media attention to the NCP reports themselves.

More specifically, respondents noted that:

- NCPs do not always enquire with the respective company when conducting the initial assessment of a notification. Consulting the company against which a specific instance is filed is absolutely necessary in this phase in order to enhance the impartiality of the NCP from the perspective of the business sector. In this phase and throughout the entire process, deadlines for a company to respond must be realistic. This is particularly warranted when the issues raised pertain to impacts of operations of a supplier or other business partner of the enterprise faced with the specific instance.
- In the majority of cases, NCPs ensure that the parties involved in a specific instance procedure engage on fair and equitable terms, with due consideration to the potential confidentiality of sensitive business or other information. However, when confidentiality is being violated or when the NCP procedure is being misused for political purposes, the NCP should intervene against the notifying party and ensure that the procedural guidance is being respected by all parties.
- NCPs should be very careful in accepting cases that have already been dealt with or are currently being addressed in court or other administrative proceedings. This especially pertains to issues relating to industrial and labor relations, because the norms and standards in the Guidelines invoked in this field in specific instances are mainly basic legal norms stemming from core ILO Conventions or other instruments, such as the Declaration on Fundamental Principles of Rights at Work, that any government member of the ILO has to enforce in its jurisdiction. The same would apply in a potential notification related to alleged bribery or anti-trust issues. The added value of an NCP procedure on such matters, especially given the likely reputational repercussions for the company involved, is often considered doubtful.
- NCPs should be equally careful in allowing a change of scope of an NCP procedure in defiance of the company's position. Although it is recognized that circumstances can change during the course of a procedure, a mediatory, future-oriented process cannot be successful when one of the parties disagrees with revising the scope midstream.
- Though this is only the case in a minority of situations, NCPs do not always stick to their own procedures, whether those included in the procedural guidance of the Guidelines or those as agreed to by the parties involved in a specific instance. Also, the motivation by NCPs of their decisions is not always adequate. Both types of (in)action impair the predictability and legitimacy of the NCP concerned.

- The extent to which NCPs are equipped to adequately deal with a specific instance and their ability to respect the indicated timelines differs, but seems to be improving. Clear communication to the parties involved on (potential) delays is recommended at all times.
- Impartiality of the NCP must always be ensured, also when the notifying party is publicly well-known. An independent and fair mediation process must be guaranteed.

### **Experiences with notifying parties in specific instance procedures**

The 2013 BIAC survey with member companies on experiences with NCP procedures showed a clear yet in many cases unsatisfactory picture of companies' experiences and views on notifying parties' performance throughout the specific instance procedure. The BIAC report raised a number of typical behaviors and recommendations to address them<sup>2</sup> and it is unfortunate that the outcome of this year's survey shows that these experiences, views and recommendations still stand. The following critical comments were received from BIAC member companies:

- The survey shows that there needs to be a clear recognition by the notifying parties of the particular nature of the NCP procedure; respect of confidentiality and procedural rules; and the willingness to enter into meaningful dialogue instead of public campaigning.
- Several BIAC member companies still feel that notifying parties often lack a genuine willingness to engage constructively in the NCP proceedings. In some cases, the notifying party abused the NCP procedure as part of larger campaigns against a company, for example to gain or retain a foothold in companies alleging infringement of employees' right to be represented by that party despite local courts' decision that the company is acting in accordance with national laws and regulations, which are derived from internationally recognized norms and standards also included in the Guidelines.
- There is an impression that some NGOs engage in forum-shopping to active NCPs whose country may have some link with the company, but not a sufficient link on the basis of the Guidelines to deal with the issue raised. This forum-shopping not only relates to the appropriate NCP, but also more broadly to the most appropriate grievance mechanism, whether legal or non-legal.

### **Recommendations**

With regard to **awareness raising** activities, respondents made the following suggestions to NCPs:

- Engage with CEOs and directors to raise top-level awareness of the Guidelines.

---

<sup>2</sup> See Annex 1

- Provide trainings or seminars, either face-to-face or online, for in-house lawyers, who will almost always be involved when a company is faced with a specific instance.
- Engage more with (print) media to increase awareness and visibility of the Guidelines.
- Engage with business schools.
- In their promotional activities, NCPs should seek to avoid duplication of other responsible business conduct initiatives, of which there are many, for various supply chain issues in a number of business sectors.

Concerning the **NCP specific instance procedure**, many of the recommendations from our previous surveys remain valid, including the following:

- All parties involved have to communicate accurately about the nature of the NCP procedure. There continue to be examples where the start of an NCP procedure results in negative reputational consequences for companies, which demonstrate that the nature of the NCP procedure is not always well presented and understood.
- The OECD and NCPs should clearly underline that public campaigning during the NCP procedure is not compatible with the nature of the procedure and infringes the principle of good faith, which is an important element of the Guidelines. The sometimes inflated media campaigns are counter-productive in the mediation process.
- If a party does not respect the confidentiality of the proceedings, the NCP should communicate this in an appropriate manner or even consider discontinuing the process. The parties involved must maintain confidentiality of the proceedings, including oral statements and all written materials shared throughout the duration of the process.
- NCPs should clearly communicate at the outset of an instance that all parties must approach the process in good faith with a willingness to move towards mediation, dialogue and problem solving and with a view to work constructively towards a future-oriented solution that is in the interest of all parties involved. Good faith is a precondition for the whole process and an essential element to build trust in the NCP procedure.
- NCPs should engage in a dialogue with the notifying parties and MNEs to create awareness and a clear understanding of the character of the mediation process. NCPs should also clearly express their views when they do not agree with the approach of the notifiers or the MNE. If a specific instance is being misused or made part of a campaign, the NCP must consider termination of the process in the initial assessment or at least encourage the issue to be rectified. The possibility for companies to file

complaints in case of improper behavior of the notifying party should be further explored.

- In addition, when conducting the initial assessment of a notification of issues outside its country's jurisdiction, the NCP should not only consider the interests of the parties concerned, the allegations, facts and how they relate to the Guidelines, but also whether a mediatory process outside the local context is the most appropriate way forward, especially when local remedies may still be available. Contributing to sustainable development also entails fostering countries' rule of law and, therefore, the (immediate) outsourcing of local disputes, often centered on human and labor rights, to home country grievance mechanisms may not always be the best solution in the long run.
- Two respondents of the survey noted that the application of the Guidelines be more carefully investigated. One respondent noted that the NCP mechanism was originally not only construed to facilitate investor-stakeholder dispute settlement, as has been the case for the past 15 years, but in the first place to resolve issues between a foreign investor and the host state concerning the latter's implementation in national law of the norms and standards in the Guidelines.
- BIAC sees a continued and important role for the OECD to clearly highlight the specific nature of the NCP procedure in its publications, outreach activities and at meetings organized with the participation of NCPs. We also encourage the OECD to approach third parties who misinterpret the nature of the NCP procedures, to explain the problem resolving character.

Concluding, we would like to underline again that the NCP procedure has in a number of cases led to a meaningful stakeholder dialogue and a solution to the issue raised, while in other cases, companies have been faced with specific challenges. BIAC expresses its confidence in working constructively with the countries adhering to the OECD Declaration on Investment, their NCPs and the institutional stakeholders to continuously improve the understanding and functioning of the Guidelines and the NCPs. In that regard, BIAC recognizes the importance of responsible supply chain management and of the work of the OECD and the NCPs in this field. BIAC calls upon the OECD and NCPs to ensure that the spirit of the MNE Guidelines and the NCP process are maintained as a mediation platform where all involved parties work on the basis of trust towards a future-oriented solution that is in the interest of all parties.