MEETING REPORT: OECD National Contact Points and the Finance Sector, with a focus on financing projects in the Extractives Sector

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Introduction

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the "OECD Guidelines")[1] are the most comprehensive set of government-backed recommendations on responsible business conduct. Adhering governments make the commitment to establish a National Contact Point ("NCP"), which play a unique role of providing a grievance and mediation mechanism, contributing to the resolution of issues that arise from the alleged non-observance of the OECD Guidelines in specific instances. The NCPs also further the effectiveness of the OECD Guidelines by undertaking promotional activities and handling enquiries about the Guidelines. The Guidelines aim to encourage the positive contributions businesses can make to sustainable development while minimising the negative impacts of their operations and their business relationships. The 2011 revision to the OECD Guidelines includes an entirely new chapter on human rights that builds on the United Nations Guiding Principles on Business and Human Rights[2] and strengthens the possibility of bringing cases for mediation to NCPs established pursuant to the OECD Guidelines.

On 28 March 2014, the Institute for Human Rights and Business (IHRB) together with the UK NCP based in the Department for Business, Innovation & Skills (BIS) brought together a range of OECD National Contact Points (NCPs), businesses within the finance and extractive sectors, and trade union and civil society organisations focused on NCP "specific instances" for a third meeting of stakeholders since the establishment of the updated OECD Guidelines for Multinational Enterprises (the Guidelines) in 2011. The event was facilitated by IHRB and discussed the OECD's "proactive agenda" on applying the Guidelines to the finance sector. Four of among the most active NCPs in the subject area over the past two-years participated in the meeting. This follows similar 2012[3] and 2013[4] workshops in London focused on the extractive sector, and more recently in Brazil,[5] focused on the finance sector.

Opening and Overview of the Latest Developments in 2013

Mr Jeremy Carver, a member of the Steering Board for the UK NCP, opened the workshop with some brief words of welcome before introducing Kristen Genovese of Stichting Onderzoek Multinationale Ondernemingen (SOMO), speaking on behalf of OECD Watch.

Ms Genovese provided an **overview of the 30 specific instances in 2013/2014** (to March 2014) – the highest number of cases filed in one year under the OECD Guidelines to date:

- The Extractives and ICT sectors tied in 2013 for the sectors with the most specific instances with 9 cases, followed by the Financial sector with 7, and 5 focused on Supply Chains. These four sectors were predicted to be the most active sectors for 2014 cases. The question of a potential rise in agribusiness- and land-focused cases in the mix was also raised, given that these issues represent nearly a quarter (24%) of the International Finance Corporation's (IFC) Compliance Advisor Ombudsman (CAO) caseload.
- After the General Policies chapter, the most invoked chapter of the OECD Guidelines was the Employment chapter, followed closely by the Disclosure, Environment and

[1] http://mneguidelines.oecd.org/
[2] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[3] http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector-FINAL.pdf
[4] http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf
[5] http://www.ihrb.org/pdf/2014-03-24-Brazil-Norway-UK-NCP-Meetings-27-28-Jan-2014.pdf

Human Rights chapters respectively.

- The UK was the NCP receiving and handling the most cases, followed by New Zealand, Germany, Italy/USA/Canada jointly, and then Sweden. The top 5 countries where alleged violations occurred were: New Zealand, Bahrain, Bangladesh, Kazakhstan and Thailand.
- As of March 2014, 91 of the 184 (50%) OECD Guidelines cases filed by NGOs related to the Extractives sector: 42 regarding metals and other minerals; 33 regarding oil and gas; 5 regarding coal; and 3 regarding timber.
- The current status of all 183 specific instances under the OECD Guidelines to date was reported as: 55 rejected (30%); 54 concluded (29%); 20 pending (11%); 19 filed (10%); 16 closed (9%); 12 withdrawn (7%); and 7 blocked (4%).

Ms Genovese closed by offering some initial thinking from SOMO and OECD Watch about their on-going work to develop **criteria to assess** whether a specific instance has led to a **successful outcome**. The current suggested criteria examine whether:

1. the outcome was **rights-compatible**, using this to judge both the processing of the case and also the outcome (e.g. whether the human rights abuse had stopped, whether the complainant was restored to the situation experienced prior to the alleged abuse, whether they were compensated for any injury, etc.);
2. the **lessons learned were incorporated** (e.g. human rights impacts of a similar nature were prevented or a pattern of abuses was continuing, a formal change in policy was made at the institution/corporation, etc.);
3. the **complainant was satisfied** with the outcome (e.g. the injury suffered had ceased, they had been compensated, they would not bring the case again, etc.).

There was a **robust discussion of judging case outcomes**, prompting various perspectives:

- Some suggested additional criteria should focus on relevance of the Guidelines to affected communities, noting the thousands of stories reported on the Business and Human Rights Resource Centre compared to the 183 total NCP cases.
- There was a difference of opinions among NCPs on the core purpose of the specific instance process. Some asserted that the NCP system is not a remedy in and of itself, but the start of access to remedy, and that the main function of NCPs is to assist companies to implement the OECD Guidelines. Others added that NCPs are not only mandated to implement the Guidelines, but also provide a forum for mediation that is the key function.
- Others participants noted that NCPs are cited under Pillar III of the UN Guiding Principles' "Protect, Respect, Remedy" Framework and it would be a missed opportunity not to consider them as a mechanism to assist communities and workers to find remedy.
- One participant noted that many NGOs block specific instances and prefer to highlight their cases in the media to push for firmer legal responses.
- Another added that communities are not picking or choosing from multiple possible remedial options, but are often faced with no other option but the NCP system, meaning regardless of mandate, NCPs would be a continuing focal point for remedy.
- Another participant brought up examples of what were considered very concrete outcomes from NCPs, citing cases in Cameroon and India that involved action plans resulting from the mediation that are being implemented and monitored on the ground.

Reflections on Developments around the application of the OECD Guidelines to the Finance Sector

Margaret Wachenfeld of the Institute for Human Rights and Business (IHRB) introduced the session, highlighting **examples of human rights engagement on the finance sector to date:**

- A number of financial institutions (FI) were members of the Business Leaders Initiative on Human Rights (BLIHR) from the early 2000's.
- The IFC integrated human rights into its initial and revised Performance Standards for project finance.
- The social responsible investment (SRI) community has long been addressing human rights issues, and within the wider investment community there is a clear move toward the mainstreaming of environmental, social and governance (ESG) issues.
- The Thun Group of banks recently issued a discussion paper on human rights.[6]
- There is a soon to be launched new UN Principles for Responsible Investment (PRI) engagement initiative on extractives and human rights.[7]
- The UK, Norwegian and Brazilian NCPs recently held a workshop on the application of the OECD Guidelines to the finance sector, hosted by the Brazilian Central Bank.[8]
- The Nigerian Central Bank's Nigerian Sustainable Banking Principles contains a chapter on human rights.[9]
- The UN Environment Program Finance Initiative (UNEP FI) is preparing a report on banking and human rights.[10]

The OECD Financial Sector Project

Tyler Gillard, of the OECD Secretariat then provided an overview of the OECD Investment Committee's work on the finance sector to date and its forthcoming work on the sector under its "proactive agenda." Mr Gillard noted that the work on the finance sector started with a Dutch-funded research report to map financial services and products vis-à-vis responsible business conduct (see box below). He then described the ***levels of involvement*** in a human rights impact identified in the OECD Guidelines, contextualizing them with example scenarios relevant to financial institutions (FI):

- ***Causing an adverse impact***: a) FI impedes the creation of a trade union; b) FI discriminates financial services to clients on the basis of gender or race.
- ***Contributing to an adverse impact***: a) FI sets an unrealistic timetable for a construction firm to build its offices, resulting in labour abuses; b) FI limits resource allocations for stakeholder engagement as financier of extractive project, resulting in displacement of local communities

The OECD Guidelines state that: Enterprises should:[1]

- Carry out **risk-based due diligence**, (…), to identify, prevent and mitigate actual and potential adverse impacts (…), and account for how these impacts are addressed.
- **Avoid causing or contributing to adverse impacts** on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- **Seek to prevent or mitigate an adverse impact** where they have not contributed to that impact, when the impact is nevertheless **directly linked to their operations, products or services by a business relationship.**

6 https://www.credit-suisse.com/responsibility/doc/thun_group_discussion_paper.pdf
7 http://www.unpri.org/areas-of-work/clearinghouse/coordinated-collaborative-engagements/
8 http://www.ihrb.org/pdf/2014-03-24-Brazil-Norway-UK-NCP-Meetings-27-28-Jan-2014.pdf
9 http://cenbank.org/out/2013/ccd/sustainable%20banking.pdf
10 http://www.unepfi.org/work_streams/social_issues/

- without meaningful engagement.
- *Adverse impacts **directly linked** to operations, products or services through a business relationship*: a) Syndicated finance for an extractive projects that displaces populations without meaningful stakeholder engagement; b) Minority shares in a company that sources from conflict-affected areas without appropriate supply chain due diligence.

Mr. Gillard confirmed the OECD Guidelines do apply to the financial sector, noting that this was first clarified in the 2006 version and again in the 2011 update of the Guidelines. He also confirmed they apply to Central Banks and sovereign wealth funds when the activity in question is of a "commercial nature". He noted the challenge lies in understanding *how* financial institutions should apply the OECD Guidelines, given the diversity of business models, financial products and services.

The Working Party on Responsible Business Conduct's **Proactive Agenda work on the finance sector** includes on-going discussions of how FI's can cause, contribute to or be directly linked to adverse impacts of their clients (March – June 2014). Mr Gillard reported on a **number of important points that have already been clarified in the discussions:**

Examples of factors affecting leverage within financial sector business relationships:

- Amount of funds, size of holdings;
- Duration or tenor of the relationship;
- Nature and strength of relationship;
- Potential for negative impact on client/investee performance;
- Potential for negative impact on own institution;
- Contextual issues, regardless of the best practice that can be applied
- Multiple financiers/business relationships with similar ESG objectives.

- An FI can be directly linked to a negative impact caused or contributed to by a client or investee company because the FI has provided products or services to the client or made an investment in the investee company. This is the concept in the OECD Guidelines of an impact being directly linked to their operations, products or services by a business relationship. There is **no need for the FI to cause the negative impact itself**; the linkage to the impact is created through the business relationship. In other words, a direct causal link between the FI and the negative impact is not a factor in determining whether the FI has some responsibility to take action under the Guidelines.
- Many FIs use the concept of "indirect impacts" to refer to their relationship to their client's impacts. The **OECD Guidelines do not use the concept of "indirect impacts" and instead consider impacts of a client on human rights that are "directly linked" to the FIs products or services** and therefore within the scope of application of the Guidelines for the FI. In other words, there is no concept of "indirect impacts" that excludes a client's impacts from the scope of the Guidelines; either there is direct linkage to impacts through a business relationship, or no linkage (and therefore no responsibility to take action) at all.
- **FIs will therefore need to make adjustments in their approaches and terminology** to ensure that they are understanding and applying the Guidelines correctly to their business relationships with their clients or investments.
- **"Business relationships"** should be interpreted widely, i.e. employees, suppliers, clients, customers, and investee companies. As such, the Guidelines **apply to minority shareholdings.**
- **Responsibility is determined by linkage to an adverse impact, not by leverage or influence**. In other words, it is first necessary to determine whether responsibility to

take action exists under the Guidelines and if so, then it is important to look at the leverage that may exist to take action.

- The OECD Guidelines are based on the concept of **differentiated responsibility** for responding to (actual or potential) impacts. The client that causes or contributes to the harm has the primary responsibility to remedy those harms while an FI that has a business relationship with that client and provides products or services that are directly linked to the harm has a complementary responsibility to take action. The Guidelines do not take an approach of simply shifting the entire responsibility to address the harm from one party to another.
- Impacts may be "directly linked" **beyond first tier relationships**.
- Due diligence should be flexible, tailored and risk-based to allow **prioritisation** so that management of impacts can be practical and achievable and focused on clients and operations that potentially pose the highest risk of the kinds of negative impacts covered by the Guidelines.

Key findings from Dutch-led study mapping different business models of FIs and the mix of financial products and services driving different E&S due diligence approaches:

- Asset-based and Project Finance: The highest levels of due diligence observed – on the asset and the company;
- Capital Markets: The least defined and most variable approaches observed;
- Corporate Lending and Credit: if no asset, then due diligence was limited to company-level risk assessments;
- Insurance: Largest variability observed – early stages of understanding due diligence;
- Investment: Different strategies observed, adapted to each asset class.

Lastly, Mr Gillard presented a brief overview of the next steps planned for the OECD financial sector project between June 2014 – 2015, including:

- Constituting a diverse and representative **multi-stakeholder Advisory Group** of governments, FIs, civil society, trade unions and other experts.
- **Examining due diligence approaches**, building on initial clarifications of key terminology from the Working Party on Responsible Business Conduct.
- **Devising case studies and real-life scenarios** that explore the application of the Guidelines in light of the complexities of FIs operations, products and services.
- **Developing broadly-supported guidance** on how FIs should undertake due diligence in the various cases, considering practical limitations.

UK Export Finance

Helen Russell then presented an overview of **UK Export Finance's (UKEF) experience in responding to the OECD "Common Approaches"**[11] for OECD export credit agencies (ECA) to address environmental and social issues relating to exports of capital goods and services and the destination locations. The "common approaches" concept was initiated by small group of countries in 2001, with the first practitioner group created in 2003 and 1st version published the same year. The current version is the 4th iteration, revised to reflect amongst other things, the 2011 endorsement of the UN Guiding Principles, changes in IFC Performance Standards, and other discussions including greenhouse gas emissions.

[11] OECD, "Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence", as adopted by the OECD Council on Thursday 28 June 2012: TAD/ECG(2012)5. Available at: http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/ECG(2012)5&doclanguage=en

Ms Russell described **the due diligence approach followed by UKEF**, starting with the scope of the OECD Common Approaches, disregarding applications that are specifically excluded from the Common Approaches by answering:

- Is the repayment term less than two years?
- Does it relate to military or agricultural products?
- Does the export relate to risk on exporters, i.e. bonds or export working capital?

UN Guiding Principles on Business and Human Rights, Principle 4:
"States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."

If the answer to any of those three questions is yes, then no further action is taken. If the answer is no and the application relates to capital goods or services the application goes onto be screened according to a number of criteria including whether it relates to a project or existing operation with an identified location and then, if it is a project, whether it is in or near a sensitive area. Those projects which are not screened out are then classified as either Category A, B or C – with category C projects not receiving further action. Category A and B projects are reviewed against international environmental and social standards (normally those of the World Bank Group, i.e. the IFC Performance Standards; World Bank Safeguard Policies; and, World Bank Environmental, Health & Safety (EHS) Guidelines).

Category A projects are further subjected to a 30 day public disclosure period and an environmental and social impact assessment (ESIA) must be provided. UKEF's review process will evaluate the ESIA and supporting mitigation and management plans and systems to determine whether they are appropriate and robust and that monitoring will take place. If these are found to be in alignment with the international standards, a recommendation will be made to support the application on environmental and social grounds. From there, contractual conditions are defined, funds are released by the lending bank, and then the monitoring phase begins.

Ms Russell then provided **two case illustrations** to demonstrate the different approaches to identifying key issues through human rights due diligence and building leverage:

- One multibillion-dollar refinery project in Asia involved multiple export credit agencies. The project started in 2008, was within a designated strategic economic zone, and involved resettlement. UKEF became involved in 2010. By then, around

What the OECD "Common Approaches" say about human rights:

- Recognising that Members have existing obligations to protect human rights and fundamental freedoms, and that business enterprises have the responsibility to respect human rights, as outlined in the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' endorsed unanimously by the United Nations Human Rights Council on 16 June 2011 (*preamble, pg 2*)
- Promote awareness of the OECD Guidelines for Multinational Enterprises among appropriate parties involved in applications *(para 4 objectives, pg 6)*
- When undertaking a review, Members should, where appropriate: consider any statements or reports made publicly available by their National Contact Points (NCPs) *(para 15 review, pg 8)*

6,000 people had already been resettled, and tensions were high following the shooting of a protestor by local authorities. UKEF worked in partnership with the other ECAs involved to ensure consistent messaging across the ECAs. An environmental and social consultant was engaged on behalf of the ECA group and assisted in acting as the single channel for coordination and responses. Another specialist was brought by the project developer to assist with the management of the outstanding resettlement process and with retrospective resettlement issues, which provided 4,000 affected parties access to livelihoods restoration packages. Annual site visits are undertaken to ensure follow through.

> ***Common Approaches, para 10***
> "Potential social impacts may include, but are not limited to,
> - labour and working conditions,
> - community health, safety, and security,
> - land acquisition and involuntary resettlement,
> - indigenous peoples,
> - cultural heritage, and
> - project-related human rights impacts, including forced labour, child labour, and life-threatening occupational health and safety situations."

- A large oil and gas refinery also involved multiple ECAs. UKEF represented a very small (5%) proportion of the financial group, but an initial evaluation identified a long list of potential impacts and risks, for example, caused by the government security forces guarding the strategic industrial zone in which the refinery was positioned. Documentation provided by the project developer was at a high-level, lacked detail, which meant assurances could not be given that impacts were being managed effectively. UKEF built relationships with the project developer, visiting the site three times over a six-month period. Eventually the documentation needed was shared, and activities on the ground confirmed that international standards were being met, including under the Voluntary Principles on Security and Human Rights.

The cases **confirm the complexity that ECAs face** with numerous other funders and actors involved in any one project, making determination of the *cause/contribute/directly linked* levels of involvement a challenge. Ms Russell noted that ECAs have to put a great deal of effort in up front to understand the parties and relationships involved and undertake the necessary due diligence to be assured environmental and social risks are being managed. Key to an ECA's work is obtaining a robust understanding of environmental and social impacts and related mitigation measures and their implementation for any project.

Learning from Recent NCP Activities Relating to the Finance Sector and Other Developments on Human Rights

The third session, with presentations from the NCPs from the UK, Netherlands, France and Norway, focused on several recent NCP cases involving various actors in the finance sector and other developments, including in the extractive sector, that will help to shape the scope and application of human rights due diligence under the OECD Guidelines Chapter on Human Rights. **A number of common issues, approaches and themes were highlighted across the range of cases highlighted.**

First, the attention NCPs should give to systematically receiving, assessing and handling cases is of clear priority. **An increasing number of cases are involving more than one NCP,** and NCP presenters discussed their efforts in maximizing their collaboration in such cases. Such collaboration starts from initially receiving a case and reviewing the range of issues

currently before NCPs to understand how similar issues are being handled. Where multi-NCP cases arise and one NCP has less capacity than others, it is clear efforts are being made to structure the scope of collaboration to enable each to lead on distinct areas of a particular case.

Second, relevant (but not unique) to the finance sector is the emphasis NCPs give to the **importance of genuine engagement by parties to a specific instance**, relying on trust, confidentiality and goodwill to make progress. NCPs highlighted the need for early engagement from those considering raising a specific instance, as well as the need for the full battery of evidence at their disposal to be submitted to NCPs. NCPs confirmed they are not mandated to go on "fishing trips" to unearth impacts by companies. It is clear that some civil society and NGO parties to cases have in the past considered a specific instance to be just one part of a wider strategy to raise public awareness of a particular issue of concern to them. One NCP noted that NGO's campaigning could severely undermine trust and good faith between parties. Thus conducting "good offices" or mediation can be very difficult to balance at the same time – notably for the enterprise but also to some extent to the NCP itself. In one case, NGOs have chosen to disengage publicly with a specific instance after they had been consulted by the NCP on its draft decision. In fact, NGOs withdrew the specific instance because they didn't agree with the NCP analysis. At the same time, cases of companies less than genuinely engaging the process were also heard, for example by "playing off" multiple NCPs involved in a complaint. NCPs confirmed the specific instance process is still at times viewed as a threat, rather than as a mechanism to support and assist with implementation of the OECD Guidelines.

Third, it is clear that the discourse on the UN Guiding Principles, OECD Guidelines, and NCP system is **new to much of the financial sector**. As a result, NCPs have had to dedicate a great deal of time over the past

Clarifying the OECD Guidelines Apply to the financial sector and institutional investors

After a long process of engaging an institutional investor (a passive investor in the particular specific instance being considered) on how and why the OECD Guidelines apply to them, the NCP published a final statement confirming the investor was not implementing the OECD Guidelines in part, due to their refusal to engage in the process.

The final statement also confirmed the OECD Guidelines *do* have expectations for institutional investors to establish systems to identify areas of heightened risk of potential human rights violations and integrate this into their overall screening and portfolio management. The NCP stated they were not able to determine the adequacy of the investor's due diligence systems because of their lack of disclosure in the process, as well as a lack of public transparency more generally around their approach to social, environmental and human rights due diligence. The statement recommended the investor be more open and transparent in their dealings to build public confidence in their operations. The NCP further recommended the investor use the resources and knowledge available to them to guide their engagement and disinvestment strategies.

Successful engagement

After two-years of non-engagement of one NCP to handle a case against a group of minority shareholders in a central African agricultural company, the company finally accepted the NCP's "good offices". The NCP then succeeded to engage in mediation with the parties (company and NGO) who agreed upon a two-year action plan to remediate the identified adverse impacts and improve CSR locally. Parties also selected an independent body to monitor the action plan implementation. Parties will report back to the NCP over the next two years.

two-years engaging financial sector companies – minority shareholders, institutional investors and asset managers in particular – involved in a case to firstly clarify that the OECD Guidelines do in fact apply to them (see boxes above). Cases were highlighted of two-year processes to change a company's position to accept the position to accept the competency of the NCP system, before actually proceeding to consider the particular facts of the case and possibilities for mediation.

Fourth, the issue of leverage was the final theme that arose in the discussion. NCPs highlighted the **particularities of the financial sector when it came to leverage**, and the importance that they carefully consider how the sector operates, when transactions and activities occur within the investment lifecycle, and what that practically means for an investor to reasonably be able to exert its leverage to seek to prevent or mitigate human rights impacts. Minority shareholders are presumed to have less leverage than owners, and yet their stature (e.g. reputation, association with a government-backed lender such as an ECA, or position as a Board member within a company they invest in) and timing within the investment process are all relevant factors challenging that presumption.

The Bangladesh textile and garment supply chain

The French NCP highlighted its Report on due diligence in the textile-garment industry (published on its website[12]) analyzing how the OECD Guidelines apply in the context of the Rana Plaza factory collapses. It maps both the supply chains and business relationships involved, as well as the risks at issue – among them human rights risks, environmental risks (e.g. toxicity, water pollution), social risks (e.g. ILO basics rights, corruption, etc).

The Report is intended as guidance for the textile-garment sector to concretely apply the OECD Guidelines – not just for French companies, but for any company. The Report also provides observations to public authorities and insists on the necessity to share responsibilities among all stakeholders. The Report has been distributed to all NCPs, and a range of other Governments, companies and NGOs in advance of the global OECD Forum on Responsible Business Conduct in June 2014.

Financing of the Extractive Sector

The final panel, composed of various participants from the financial sector and an NGO, focused on the **implications of financing structures for meeting responsibilities under the OECD Guidelines, with a particular focus on the extractive sector.**

Panelists first reflected that **just a few years ago "human rights" was not even a term used in the financial sector**. While awareness is now starting to move beyond the socially responsible investor (SRI) community to more mainstream investors, panelists noted that human rights are still considered a very abstract concept when compared to corruption. "Flashpoint incidents" are acting as a catalyst. Conflict minerals were highlighted as an example of this, where the issue was first strongly advocated by NGOs and civil society followed by increasing media interest, further lobbying, and the OECD producing due diligence guidance,[13] before it became hard law in the U.S. in the form of s 1502 of the Dodd-Frank Act[14], now with a similar proposal in the EU.[15] Panelists reflected that the

[12] French NCP, "NCP Report on Implementation of the OECD Guidelines in The Textile and Clothing Sector", following a referral from Nicole Bricq, Minister of Foreign Trade (issued 2d Dec. 2013). Available at: https://www.pcn-france.fr or http://www.tresor.economie.gouv.fr/File/398811 (English version)

[13] http://www.oecd.org/investment/mne/mining.htm

[14] See: http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm

financial sector is seeing the common trajectory that concern for human rights shares with corruption (i.e. once not long ago bribes were actually tax deductible, but once awareness and campaigning started, it was not long before the international enforcement regime of today came into existence).

A key feature throughout the panel was discussion of **building leverage into different kinds of financing.** Panelists addressed how and when different tools available to financiers can be built into different types of transactions. For example:

- With **project finance**, for the Equator Banks that follow the Equator Principles: Projects are first screened and categorized as category A, B or C depending on the risk level and corresponding levels of risk assessments and information required (e.g. ESIAs), management systems and grievance mechanisms are reviewed or put in place; stakeholder engagement is undertaken throughout; and specific action plans (such as Environmental and Social Management Plans - ESMP) for risk prevention or mitigation are then drawn up and, post-deal, regularly reviewed (e.g. at least annually) to ensure management systems and grievance mechanisms are performing as intended. This process is reflected in loan documentation (through representations and warranties, covenants and other provisions), making it binding, enabling the bank to engage long-term where deficiencies are identified and give time-bound commitments to respond to issues. Loans are disbursed in stages to maintain leverage as long as possible, but once disbursements are completed ultimately the bank is left with the option of having to call the loan as a last resort. Crucially, leverage is built into the process from the start, and reflected in the documentation, with consistent due diligence underpinning the project throughout.

The framework one bank uses to assess environmental, social and governance (ESG) risk, including human rights, covers a client's:
1) **commitment** to identify and manage ESG risk within their business model;
2) **capacity** to address and manage ESG risks, ensuring there are i) skilled and experienced people at site and HQ level, ii) a systematic management system to record and monitor ESG issues, and iii) adequate training to all employees to implement that commitment "on the ground";
3) **track record** in implementation, in responding to major findings of impact and how they were addressed, if there are any current allegations or campaigns against them, how long the history of allegations are, and what actions have they taken or how they have responded; and
4) **disclosure** on ESG performance, including human rights, in terms of impacts identified and how they are addressed.

- In **credit lines** to fund on-going client operations, where the proceeds of the line is not designated to a specific project/asset, due diligence focuses on the Client's commitment to manage ESG risks, capacity to implement such commitment, and track record on ESG issues (ie material incidents, HR allegations etc). If findings from this assessment identify lack of commitment or capacity to manage EGS risks, or identify material or recurrent incidents, a bank would do further due diligence on the issue and the client, and discuss potential remedial plan with the company. If plans are not meeting the bank's expectation, the issue will be escalated to the bank's reputation risk committee and, ultimately, the bank might call the loan.
- **Capital market transactions**, such as debt or equity capital market transactions, do not present the same long-term opportunity to maintain some degree of leverage over a

[15] http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf

client in order to require improvement in management of human rights. Once an IPO has been brought to market, the opportunity to require or improve the company's due diligence is lost. Risks need to be identified upfront and potential mitigation agreed before the transaction is launched. In the example given, risk was identified early enough that an independent expert was brought in to make further assessments and recommendations. The company committed to implement such recommendations, and the risks were subsequently disclosed in the IPO Prospectus.

- **Asset managers** will look at the transparency of companies, reviewing their policies and processes before investing. Asset managers create leverage in a number of ways: by engaging at the most senior level of the company, through coalitions on engagement and shareholder coalitions.

Participants offered a range of insights and approaches to increasing leverage to engage on human rights issues in **scenarios where long-term leverage is more difficult to build in**, given the nature of the transaction (e.g. one-off's, such as IPOs):

- First and foremost is the **need to understand the human rights risks from the outset.**
- This is aided by working across the FI, beyond the dedicated social specialists, to ensure the various functions understand how human rights can translate into financial and reputational risk. It can require **long-term internal engagement to change mind sets,** and participants noted broader understanding of human rights risks is often not properly triggered internally until an NGO campaign or other event prompts a response in the stock market – but once it does, there is an opening to engage in due diligence.
- There is a **great deal of intelligence gathering already taking place in banks**, such as country risk intelligence, meaning there is a lot of opportunity to harness existing processes as part of this internal change.
- Lenders historically interfaced with the treasury department at companies, but are now **increasingly interacting with a wider spectrum of colleagues responsible for ESG risks** in the company in order to get a better understanding of how a client is identifying and managing such risks.
- Banks with large international networks can often recommend or engage **independent experts** to assist the companies they are financing (who may be smaller and lacking the international network of subject experts the bank may be aware of/have access to).
- The **level of contact** made in any company can help determine the leverage that will be enjoyed, i.e. a CEO versus a manager.
- Joining forces with other lenders or investors through **collaborative approaches** on particular issues can be another effective means of increasing influence.

A **series of challenges** were also highlighted throughout the panel discussion:

- **Deficiencies in grievance mechanisms** provided by lenders have long been a point of advocacy by civil society, as few lenders, other than bilateral or multilateral development banks, have any kind of grievance mechanisms. It was noted that even these "gold standard" mechanisms (such as the CAO at the IFC) are struggling to ensure lessons learned from previous mediations and compliance investigations are effectively integrated into future financing.
- Identifying **what is missing from existing due diligence** that human rights risk and impact assessments require, i.e. as above, banks already undertake a great deal of intelligence gathering on political situations, market risks, etc., which are highly germane to understanding human rights risk. Part of the challenge is ensuring that information comes through the right channels to those with expertise within the organization. This ties back to earlier discussions around internal capacity building to ensure the same issues are looked at in the unique way required for human rights assessment. As one

- panelist noted, for some human rights challenges it is not about looking at different issues than what should already be covered in a robust environmental and social impact assessment, it is about "looking at the issues differently". Two examples of this are freedom of expression and discrimination, e.g. companies stigmatising community leaders speaking out against projects may be putting these leaders at risk of retribution from state security forces or non-state actors. Attention was drawn to the recent report of the UN Special Rapporteur on the Situation of Human Defenders reporting on risks faced by land and environmental activists around some extractive projects.[16]

"Coercive practice" under political risk insurance

The issue of "coercive practice" clauses within political risk insurance policies illustrates the direct link between human rights violations and financial consequences for a project. A question was raised whether the use of physical force and forced eviction to move people off land used for a project would be considered a "coercive practice" under an insurance policy, thereby invalidating the insurance cover and potentially seriously affecting the financial equilibrium of a project.

- There is an **inherent tension between compliance and outcomes**. Banks are and will continue to be faced with the challenge of deciding whether to finance clients where they can bring about an improvement in their E&S practices though may not achieve 100% compliance with bank requirements, *versus* rejecting funding for this compliance gap and running the risk that companies will go to less scrupulous lenders who will require far fewer safeguards. Several participants acknowledged that progress will be iterative and it was better to achieve a certain level of compliance and approve lending, though it may be below a lenders' usual comfort level, but be confident that when a company returns for a future project they will know what is expected of them and achieve continuously improved compliance with the lender's requirements.

Closing

Mr Jeremy Carver, a member of the UK NCP Steering Board, closed the workshop with some brief words about the role of the NCP system, noting debate has often centred around whether it serves a remediation function or whether it serves to assist company implementation of the OECD Guidelines. While the NCPs' work and final statements are not binding on participants, Governments commit to them and that commitment pervades the way the world expects Governments and companies to conduct themselves. If they fall short, a specific instance may be raised. Mr Carver reflected that with the right resourcing and approach by NCPs the system can trigger a dynamic response.

[16] http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55_en.pdf

Agenda

09.30 – 09.50	**Opening** • Mr. Jeremy Carver - UK NCP Steering Board **Overview of the Latest Developments in 2013-2014 on NCP cases** • Ms. Kristen Genovese, Stichting Onderzoek Multinationale Ondernemingen (SOMO), on behalf of OECD Watch
09.50 – 10.30	**Reflections on the OECD Discussions on the Application of the OECD Guidelines on Multinational Enterprises Chapter on Human Rights to the Finance Sector** Moderator: Ms. Margaret Wachenfeld, IHRB • *This session will address the recent work of the OECD on the application of the OECD Guidelines on Multinational Enterprises to the financial sector and on the work of the OECD Export Credit Agencies on the work on human rights under the OECD Common Approaches* • Mr. Tyler Gillard, OECD Secretariat • Ms. Helen Russell, UK Export Credit Agency **Questions and Answers**
10.45 – 12.00	**Learning from Recent NCP Activities Relating to the Finance Sector & Other Developments on Human Rights** Moderator: Mr. John Morrison, IHRB *This session will discuss several recent NCP cases involving various actors in the finance sector and other developments, including developments in the extractive sector, that will help to shape the scope and application of human rights due diligence under the OECD Guidelines Chapter on Human Rights* • Mr. Danish Chopra – Head of Secretariat, UK NCP • Mr. Hans Peter Graver – Head of Secretariat, Norwegian NCP • Mr. Frans Evers – Chair, Dutch NCP • Ms. Maylis Souque – Secretary General, French NCP **Questions and Answers**
13:00 – 14.45	**Focus on Financing the Extractive Sector** Moderator: Mr. John Morrison, IHRB *As the majority of NCP cases have involved the extractive sector, this session will focus on how extractive projects are financed, and delve into a discussion of the implications of those financing structures for meeting responsibilities under the OECD Guidelines* • Ms. Giulia Guidi, J.P. Morgan • Ms. Helen Russell, UK Export Credit Agency • Ms. Kristen Genovese, (SOMO), on behalf of OECD Watch • Mr. Tim Bescoby, Royal Bank of Scotland • Mr. Sudip Hazra, Kepler Cheuvreux **Questions and Answers**

Participants

- Alana Lampitt – **Allen & Overy**
- Belinda Richards – **Allen & Overy**
- Peter Frankental – **Amnesty International UK**
- Cristina Bruce – **Anglo American**
- Claire Esbenshade – **ArcelorMittal**
- Stephanie Maier – **Aviva Investors**
- Philippa Birtwell – **Barclays**
- Nick Allen – **BP**
- Mark Eckstein – **CDC**
- Rae Lindsay – **Clifford Chance**
- Kathryn Mintoft – **Credit Suisse**
- Karin Buhmann – **Danish Mediation and Complaints-Handling Institution for Responsible Business Conduct, Member**
- Christina Skagen – **Danish Mediation & Complaints-Handling Institution for Responsible Business Conduct, Member**
- Steve Gibbons – **Ergon Associates**
- Sarah Ruck – **European Bank for Reconstruction & Development (EBRD)**
- Maylis Souque – **French NCP, Secretary General**
- Eva Kirsch – **International Council on Mining & Metals (ICMM)**
- Andrew Wilson – **International Chamber of Commerce UK**
- Dorothee Heinze – **International Chamber of Commerce UK**
- Sudip Hazra – **Kepler Cheuvreux**
- Andrea Saldariaga – **London School of Economics (LSE)**
- Frans Evers – **NCP Netherlands, Chairman**
- Hans Peter Graver – **Norwegian NCP, Head of Secretariat**
- Tyler Gillard – **OECD, Investment Division**
- Saskia van den Dool – **PGGM Investments**
- Melody Benavidez – **RBS**
- Lisa Stewart – **RBS**
- Vanessa Zimmerman – **Rio Tinto**
- Kristen Genovese – **SOMO, on behalf of OECD Watch**
- Ed O'Keefe – **Synergy Global**
- Sophie Pierson – **Total**
- Sean Bamford – **TUC**
- Kirstine Drew – **TUAC**
- Alex Marshall – **UK Department for International Development**
- Ruth Willis – **UK Foreign & Commonwealth Office**
- Jeremy Carver – **UK NCP Steering Board**
- Alison Biscoe – **UN Principles for Responsible Investment (PRI)**
- Felicitas Weber – **UN Principles for Responsible Investment (PRI)**
- Saskia Verbunt – **Vereniging van Beleggers voor Duurzame Ontwikkeling (VBDO)**
- Ray Dhirani – **WWF UK**
- Niall Watson – **WWF UK**
- Zach Abraham – **WWF UK**