GLOBAL FORUM ON RESPONSIBLE BUSINESS CONDUCT

Background Note

Opening Plenary

Making an impact through responsible business

10:00 – 13:00, 8 June 2016
Room CC1, OECD

The opening plenary of the 4th Global Forum will discuss concrete measures that governments and others are taking to promote responsible business conduct (RBC) principles and standards and ensure that they make an impact. This includes a range of innovations, from policies aimed at addressing impacts throughout the supply chains, enhanced disclosure, voluntary agreements between governments and businesses to new engagement models in the financial sector to promote responsible business conduct among investee companies.

Making an impact through innovative policies

The first panel will highlight recent innovative efforts by governments to promote and enable RBC at home and abroad. Since the 2011 update of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the endorsement of the UN Guiding Principles for Business and Human Rights (UN Guiding Principles), there has been a significant increase in policies and initiatives addressing RBC and environmental and social impacts in global supply chains.

High-level commitments and policy coherence

Notably, in June 2015, G7 leaders pledged[i] to lead by example to promote international labour, social and environmental standards in global supply chains; to encourage enterprises active or headquartered in the G7 to implement due diligence; and to strengthen access to remedy, including the National Contact Points (NCPs) for the OECD Guidelines. Similar support was expressed by OECD Ministers[ii] who called on strengthening the NCPs and who encouraged wider adherence to the OECD Guidelines. References to RBC were also included in several OECD instruments[iii] in order to promote policy coherence and procedures for candidate countries interested in joining the OECD[iv] or adhering[v] to the OECD Declaration on International Investment and Multinational Enterprises were revised to consider RBC in a more comphrehensive way. Finally, Sustainable Development Goals (SDGs) and the Paris Climate Change agreement have underscored the importance of a more active role of the private sector in their implementation.

Economic instruments and trade and investment agreements

RBC criteria has also been included in economic instruments. OECD has updated the Recommendation of the Council on Officially Supported Export Credits and Environmental and Social Due Diligence,[vi] which promotes awareness of the OECD Guidelines and NCP statements. Canada updated its enhanced strategy on corporate social responsibility,[vii] which allows for withdrawal of government support in foreign markets for companies that do not embody RBC practices and refuse to participate in the dispute resolution processes available through the Canadian government. This option was used in 2015 with a company that refused to engage in dialogue with the Canadian NCP.

As related to trade and investment agreements, OECD research[viii] from 2014 showed that more than three fourths of international investment agreements concluded between 2008 and 2013 contain language on sustainable development or RBC and that virtually all treaties concluded in 2012 and 2013 include such language. This trend has continued over the past year. Notably, EU Commission is proposing a new trade and investment strategy for the EU which will encourage trading partners to comply with international principles, in particular the OECD Guidelines.[ix] References to RBC and/or the OECD Guidelines are included in the concluded EU agreements with Singapore, Georgia, Ukraine, and Vietnam. References have also been included in multilateral agreements, for example, Trans-Pacific Partnership.

National Legislative Developments

There have also been several important national developments over the past year. The UK enacted the Modern Slavery Act[x] in March 2015 which mandates that commercial organisations prepare an annual statement on slavery and human trafficking and report on their due diligence processes to manage risks within their operations and supply chains. France is recently introduced a proposal[xi] to mandate supply chain due diligence in accordance with the OECD Guidelines, which, if enacted, would require all French companies with 5000+ employees domestically or 10 000+ employees internationally to publish a due diligence plan for human rights and environmental and social risks or face fines of up to 10 million EUR. A similar proposal[xii] was put forth in Switzerland and narrowly voted down in the Parliament; however, NGOs have launched a popular initiative to re-animate it through a binding public referendum if enough signatures are collected by October. The EU has set out a directive[xiii] on non-financial reports that applies across sectors to companies over a certain size incorporated in EU member states and listed on regulated EU exchanges; first reports are expected in early 2018. The EU is also considering a regulation on supply chain due diligence for products containing tin, tantalum, tungsten or gold, based on OECD instruments. The European Parliament has also introduced a resolution addressed to the EU Council stating that new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries.[xiv]

In the United States, in addition to the existing reporting requirements for minerals supply chains under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, federal regulations have been revised on the basis of an executive order that President Obama signed to combat human trafficking in supply chains, establishing a number of new safeguards to strengthen protections against trafficking in persons in federal contracts.[xv] Additionally, the 2015 Trade Facilitation and Trade Enforcement Act eliminated the exceptions to the prohibition on import of goods made with convict labour, forced labour, or indentured labour. In March 2016 US border agents seized goods tied to forced labour for the first time since 2001 on the basis of the new Act.[xvi] Many countries are also developing or have developed national action plans on RBC and business and human rights following the recommendation by the UN. The comprehensive US draft plan on RBC, for example, is expected to address ways in which the US government can promote and encourage established RBC norms, not limited to human rights, labour rights, land tenure, anti-corruption, and transparency.[xvii]

Using leverage to advance responsible business

The second panel will focus on how financial institutions and financial service providers are using their leverage to promote responsible business conduct among their clients and in their own operations. The OECD Guidelines and the UN Guiding Principles apply to all sectors, including the financial sector. There has been significant discussion over the past two years on what this means in practice, ways in which financial institutions can identify risks throughout their business relationships, and what they should do when their due diligence processes reveal a direct link to real or potential adverse impacts.

It should be noted that the term *leverage* in the context of the OECD Guidelines differs from how it is traditionally used in the sector, which generally is tied to the use of various financial instruments or borrowed capital to increase the potential return of an investment or the debt used to finance a firm's assets. Leverage, in the context of the OECD Guidelines, refers to the ability to effect change in the practices of another party that is causing or contributing to negative impacts on the ground. There is an expectation that parties will use their leverage to influence the party that is causing the adverse impact to prevent or mitigate that impact, acting alone or in co-operation with other entities. The word leverage is also used in the more colloquial way to indicate influence.

When evaluating whether and how to respond to identified adverse impacts, several types of engagement and response strategies are possible, including engagement or divestment. Businesses are encouraged not to disengage at the first sign of potential environmental or social risks among their business relationships under the OECD Guidelines, but rather to engage in risk mitigation efforts and to take into account the potential social and economic adverse impacts related to a decision to disengage. However, divestment and disengagement remains an option, even if it is the last resort. Deciding where to draw the line in practice may be challenging for financial institutions.

Exerting leverage through engagement can include, for example, contact with the company by letter, email and/or telephone; face-to-face meetings at operational, senior management or board level; using voting rights to express views on ESG matters; attendance and speaking at annual meetings; collaboration with other investors. Exclusion or divestment from companies can occur, for example, as a prohibition on investment under any circumstances (e.g. for controversial weapons) or as a result of specific business conduct (e.g. environmental damage). For active investment strategies, reducing the investment position could influence company behaviour if the reason is communicated clearly. Other ways of influencing companies can include investment in ESG indices in order to direct capital away from companies with poor ESG practices or participation in industry or multi-stakeholder initiatives with ESG objectives.

It goes without saying that potential challenges can exist in exercising leverage and may be affected by a number of factors. These can include lack of leverage (e.g. even the largest investors may be only small minority shareholders in many companies or characteristic of an asset class can influence the extent of leverage), corporate governance requirements and practices (e.g. rules related to minority shareholders or inability to direct the board to take specific action), and resource constraints (e.g. in-house resources for engagement with companies vary widely).

A recent case considered by the Dutch National Contact Point for the OECD Guidelines can shed a light on how a mix of investors divesting and investors engaging helped solve the issue at hand. Severals investors engaged with a Dutch pharmaceutical company to persuade it to ensure that its medicines are not used to infringe on human rights, in particular as related to capital punishment and carrying out lethal injection executions. After more than a year of dialogue, one investor (a pension fund for the government and education sectors), decided to sell its shares in the company after it found that the request to alter the company distribution systems were met with an inadequate response. Other shareholders decided to continue the dialogue. Shareholder pressure, in combination with the active involvement of the Dutch government and the good offices provided by the Dutch National Contact Point, led to the institution of new control measures and processes by the company.[xviii]

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[i] G7, Leaders' Declaration G7 Summit, 7–8 June 2015, available at https://www.g7germany.de/Content/EN/_Anlagen/G7/2015-06-08-g7-abschluss-eng_en.pdf?__blob=publicationFile&v=3

[ii] Unlocking Investment for Sustainable Growth and Jobs - 2015 Ministerial Council Statement, (2015) available at http://www.oecd.org/mcm/documents/ministerial-council-statement-2015.htm

[iii] Policy Framework for Investment; G20/OECD Principles of Corporate Governance; Guidelines on Corporate Governance of State-Owned Enterprises; Guidelines for Fighting Bid Rigging in Public Procurement; G20/OECD High-Level Principles of Long-Term Investment Financing by Institutional Investors; Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence

[iv] To the OECD Convention

[v] To the OECD Declaration on International Investment and Multinational Enterprises. The OECD Guidelines are a part of the Declaration.

[vi] http://www.oecd.org/tad/xcred/oecd-recommendations.htm

[vii] Canada's Enhanced Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad. (November 14, 2014) available at: http://www.international.gc.ca/TRADE-AGREEMENTS-ACCORDS-COMMERCIAUX/TOPICS-DOMAINES/OTHER-AUTRE/CSR-STRAT-RSE.ASPX?LANG=ENG

[viii] Kathryn Gordon, Investment treaty law, sustainable development and responsible business conduct: a fact finding survey (OECD, 2014), available at: http://www.oecd-ilibrary.org/finance-and-investment/investment-treaty-law-sustainable-development-and-responsible-business-conduct-a-fact-finding-survey_5jz0xvgx1zlt-en

[ix] European Commission, Trade for all: Towards a more responsible trade and investment policy (2015), p. 25 available at: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

[x] UK Modern Slavery Act (2015), www.legislation.gov.uk/ukpga/2015/30/contents/enacted

[xi] Proposition de Loi 1897 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, www.assemblee-nationale.fr/14/propositions/pion1897.asp.

[xii] Parliament Motion 14.3671 *Umsetzung des rechtsvergleichenden Berichtes des Bundesrates über die Verantwortung von Unternehmen bezüglich Menschenrechten und Umwelt,* www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20143671

[xiii] European Commission, Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups (2014), http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm (last accessed, 9 October 2015)

[xiv] European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact, April 28. 2015. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2015-0363&language=EN

[xv] Final Rule - Federal Acquisition Regulation; Ending Trafficking in Persons; https://www.federalregister.gov/articles/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons

[xvi] CBP Commissioner Issues Detention Order on Chemical, Fiber Products Produced by Forced Labor in China; https://www.cbp.gov/newsroom/national-media-release/2016-03-29-000000/cbp-commissioner-issues-detention-order-chemical

[xvii] U.S. Department of State, USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions, 12 February 2015. http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/

[xviii] For more information, see the Final Statement of the Dutch National Contact Point on this case.