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ECCHR Evaluation - Update

The OECD procedures against cotton traders regarding forced child labor

How effective is the implementation of agreements and recommendations?

Berlin, October 2014

Introduction

In 2011, ECCHR had filed seven OECD complaints in Germany, Switzerland, France and UK. The complaints were addressed against trade houses which sourced cotton from Uzbekistan, which had been harvested through state organized forced labor of children and adults. The parallel submission of mostly congruent complaints in four European countries has enabled ECCHR to compare the functioning of the respective NCPs. In November 2011, after the procedures were terminated, ECCHR has published the lessons learnt from this comparison in a report (“A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures”).

But the work with the cotton traders continued: in six cases, we reached agreements with traders that they pursue with concrete measures to influence the Uzbek government to end forced and child labor. We have closely monitored the implementation of these measures over a period of about one and a half years. We have found that the traders were not willing to take truly effective means and that they did not fully meet the obligations they had committed to.

Now, after this implementation phase, there are additional lessons learnt from the OECD procedure that we would like to share. In particular, we want to address the question of how to ensure that the agreements reached in mediation are implemented sustainably and over the long-term. These considerations apply to agreements made during mediation, but equally to the recommendations made by the NCPs in case mediation has failed.

In this paper, we outline how the respective issues are regulated through the OECD Guidelines as well as through the procedural rules that are formulated by every single NCP for the handling of complaints in their country. In a second step, we confront these provisions with the implementation in practice.

Terminology

- National Contact Point (NCP) – Government office responsible for promoting adherence to the OECD Guidelines and for dealings with complaints;
- Initial Assessment – NCPs decision on the acceptance/rejection on the complaint;
- Final Agreement – Agreed concluding statement of the parties of the procedure;
- Final Statement – Concluding statement of the NCP;

Summary of the 2011 findings

The comparison of the four NCPs had indicated that all NCPs involved had attributed a high degree of importance to the complaints. In addition, all four NCPs had consulted each other during the procedure. The UK's NCP could be highlighted as a good example for others, as it relied on a very transparent communication with the relevant parties, engaged an external mediator, and publicized all relevant decisions. By engaging with an external mediator for the first time, the Swiss NCP had strengthened the mediation process. Nevertheless, the procedure lacked transparency in some points. While the proceedings before the German NCP could be improved in several areas, it should be stressed that the NCP handled the procedure from the beginning with great interest and sought a goal-oriented procedure.

The good functioning of the British NCP can be attributed to its structure. Like the other three NCPs, the British NCP is based in one single ministry, the Department for Business, Innovation and Skills (BIS). However, since 2007 it is monitored by a steering committee which consists of representatives of five ministries, as well as four external members who represent companies, trade unions and NGOs. In addition, the new structure provides a review process for procedural issues. For this reason it is appropriate that recommendations addressing the NCPs should not only cover the individual measures listed below, but also ensure that they take structural measures to generate the implementation of procedural principles in the long run. To ensure adherence with the principles impartiality, predictability and transparency the following recommendations were suggested to the NCPs:

❖ Recommendations to ensure predictability

- NCPs should submit an initial assessment outlining the upcoming procedural steps;
- The NCPs must ensure that parties are regularly informed about the upcoming steps of the procedure throughout the procedure;
- Specified time frames should be set up by the NCPs and be adhered to; this should be guaranteed through adequate staffing of NCPs;

❖ Recommendations to ensure transparency:

- Publication of the Initial Assessments;
- Publication of pertinent Final Agreements and Final Statements;
- Transparency towards the participants concerning information exchanged between the parties;
- Transparency towards the participants with reference to the content and participants in forthcoming discussions;

❖ **Recommendations to ensure impartiality and fair and effective mediation:**

- Mediation led by external mediators;
- External mediators should have to be endorsed by both parties. Parties should have the possibility to reject the mediator in justified cases;
- Establishment of terms of reference for the procedures including binding rules how to treat the contentious points and how to follow up and monitor their elimination;
- Outline of the agreement solely by the parties - no content-derived statement on the part of the NCP regarding the complaint before or during the mediation;
- Mediation proceedings to be held under conditions of ‘limited access’ with the parties, a mediator and, at the most, a representative of the NCP only;

New findings: Implementation of the agreements and the recommendations

After completion of the implementation phase of the OECD proceedings against the cotton traders, it has become apparent that the initial goal to induce companies to take responsibility and stop violations of the OECD Guidelines could not be reached. In all six cases, ECCHR was unhappy with the implementation of the Joint Statements. After the traders had at first shown themselves engaged on the issue, cooperation deteriorated quickly after the conclusion of the procedures. ECCHR tried hard to arrange evaluation meetings with the traders in order to discuss the measures undertaken so far, but (most of) the traders rejected any sort of evaluation meeting. The NCPs did not support ECCHR in this matter.

The NCP’s procedural rules do not foresee any tools to influence the company in cases where they do not adhere to their commitments or the recommendations in the Final Statement (see below). Complainants who wanted to take action against non-compliance could only file a new OECD complaint. For this, it would not be sufficient to only address and substantiate the non-compliance with the Final Agreement/Final Statement; complainants would also have to submit new evidence for the persistence of violations of the OECD Guidelines. This would be time-consuming and expensive.

Regulation of Follow-up Procedures in the OECD Guidelines and in the NCP Procedural Guidance

Paragraph 34 of the Commentary of the OECD Guidelines on the Procedural Guidance for NCPs provides that the parties may agree to seek the assistance of the NCP in following-up on the implementation agreement, and that the NCP may do so on terms agreed between the parties and the NCP.

The UK NCP has responded to this regulation in its 2013 revised procedural rules and makes follow-up statements with respect to compliance with recommendations. For the question of the observance of agreements made in a joint agreement, the NCP advises parties to agree to have a follow-up statement at a set date. However, this provision is not binding.¹

The German NCP governs this point only very vaguely: in appropriate cases, the NCP will monitor the implementation of agreed steps or the implementation of its recommendations and can ask parties to report. The NCP can then inform about the progress made on its website.² The Swiss NCP does not foresee any provisions relating to a follow-up in its procedural guidance.³

In practice: Follow-up procedures with the NCPs of UK, Germany and Switzerland

In the two procedures with the UK NCP, it was agreed in the Joint Agreement to have an evaluation meeting facilitated by the NCP.⁴ One of the companies refused to meet and the NCP did not insist that the meetings were held. The NCP however acknowledged that in the future it would ensure that follow-up arrangements agreed by parties will be clear, and that parties and the NCP will share an understanding about what is required to deliver. The NCP also stated that their procedural guidelines shall encourage parties in the future to publish their agreed follow-up arrangements in the NCP's Final Statement.

The Final Statement in the case with the German NCP does not foresee a follow-up meeting or statement. Even though representatives of the NCP had announced that there would be some sort of evaluation meeting after one year's time, this meeting never was realized.

Although follow-up meetings were foreseen in individual Joint Agreements in Switzerland, these were rejected by the respective companies.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf, p. 19.

² <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/oecd-leitfaden-zum-beschwerdeverfahren.property=pdf.bereich=bmwi2012.sprache=de.rwb=true.pdf>, p. 4.

³ <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>.

⁴ <http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements>.

Conclusions

Under the current regulation, the only incentives for a company to make commitments within the mediation are media pressure and the influence of the NCP during the procedure. Once these factors subside, whether and how the negotiated measures are implemented depends merely on the goodwill of the company.

The main reason for the lack of bindingness of the procedure is that NCP refrain from imposing sanctions and to carry out an evaluation process including a publicized follow-up statement. However, both would be covered by the OECD Guidelines to a certain extent.

A mandatory evaluation process and a follow-up statement to be published by the NCP on the course of the implementation phase would contribute to bind companies to their commitments made in the Final Agreements and to provide an incentive for them to maintain this engagement.

❖ **Recommendations to ensure the implementation of Final Statements and Final Agreements:**

- Foresee monitoring overseen through the NCP;
- Introduce a mandatory evaluation process und publish results. The burden of proof to show compliance with the agreement is on the party that made the commitments;
- Inform relevant a government agencies of the NCP's decisions, in case they are relevant to a specific agency's policies and programmes.