

Minutes TSC Meeting Washington DC – 28-30 November 2012

Attending:

Sylvia White, Aegis (Chair)
Josh Dorosin, US Department of State
Jason Pielemeier, US Department of State
Margaret Belof, UK Foreign Commonwealth Office
David Dutton, Australian Dept of Foreign Affairs and Trade
Mark DeWitt, Triple Canopy
Rémy Friedmann, Swiss Federal Department of Foreign Affairs
Meg Roggensack, Human Rights First
Chris Mayer, US Department of Defense
Brent Wegner, GardaWorld
James Cockayne, independent
Ian McKay, US Department of State
Andrew Nicholson, Drum Cussac

Anne-Marie Buzatu, DCAF
Thomas Haueter, DCAF

Process towards a drafting conference

1. The TSC discussed options for preparing a second draft Charter for the proposed oversight mechanism.
2. The TSC decided that a drafting conference would be convened in or near Geneva, commencing on the afternoon of Tuesday, 19 February 2013 and continuing until the afternoon of Friday, 22 February 2013. The Swiss Government and DCAF undertook to determine an appropriate venue. The TSC agreed the aim of the conference would be to seek a consensus on a final charter text and that it would further consider the working methods for the conference.
3. The TSC established a subgroup consisting of Mark, Meg, Josh and David to work on a second draft of the Charter.
4. The TSC agreed that it would aim to provide the drafting conference with a second draft Charter and an accompanying explanatory note. The draft Charter would include as much clean text as possible, but it would be necessary to include options in some areas to enable effective discussions at the drafting conference. The draft Charter should be prepared in such a way as to enable constructive discussions aimed at reaching consensus on the oversight mechanism (OM).
5. The TSC agreed to meet on the days 16-18 January by video and/or teleconference to finalise the draft Charter that would be circulated to all stakeholders in the following week. The meeting would also consider the steps that would be required between the drafting conference (assuming its success) and the launch of the oversight mechanism later in 2013.
6. The TSC decided to reserve slots for teleconferences on 11 and 18 December.
7. It was agreed that an update would be issued to all interested stakeholders setting out the steps above and encouraging participation in the drafting conference.

Implications of Swiss Law for the proposed oversight mechanism

8. The TSC discussed the question of immunities under Swiss Law for the oversight mechanism, and the possible implications of incorporation in Switzerland for the structure of the oversight mechanism and its foundational legal documents. It was agreed that Sylvia as chair would write to the Swiss Government to seek formal answers on several points.

Gap analysis

9. The TSC discussed the relationship between the Code of Conduct and the ANSI PSC 1 and 2 standards. The Committee agreed that the working paper on certification contained a promising construct for certification by the oversight mechanism which would be the basis for preparing a second draft Charter and further discussions with all stakeholders. The working paper envisaged that the oversight mechanism would determine its own requirements and process for certification by the OM. The OM would operate in a manner which was complementary with relevant national and industry standards, including ANSI PSC.1, and would not duplicate the audit of management systems required under such standards. . The OM would need to specify what information companies needed to provide as evidence of compliance with the Code and readiness to participate in the OM, such as evidence of certification under a relevant industry standard or evidence of equivalent implementation arrangements within the company.
10. Given this construct and the TSC's mandate, it was agreed that it was neither necessary nor appropriate at this stage for the TSC to draw specific conclusions on the information that would be required by the mechanism or any particular gaps between PSC. 1 and the Code. This work would need to be undertaken by the OM once it was established and decisions on it would need to be taken by agreement among all three stakeholder groups (assuming agreement on the governance construct in the relevant working paper).

Content of a second draft Charter

11. The TSC reviewed the working papers with a view to giving advice to the drafting sub-group on the substance of the second draft Charter with the aim being to provide a reasonable consensus on which to base a draft. The TSC agreed that the working papers would be the basis for re-drafting the Charter, along with the comments which the Committee heard during the four meetings it held in an expanded format. To ensure all interested stakeholders had access to the working papers it was decided to attach them to these minutes and post them on the website.
12. It was agreed that the second draft Charter should be as short and simple as possible, while still capturing the necessary level of detail to allow agreement among stakeholders and to enable the mechanism to function effectively. The TSC agreed that for each of the three major functions of the OM (see below) detailed procedures should be adopted by the Board and ratified by the membership, once the OM was in operation.
13. The TSC reiterated its view that the OM should be designed so as to maximize the value from the limited resources likely to be available. The TSC would therefore continue to: focus on identifying

the value proposition for each of the functions (certification, monitoring and third party complaints); prioritize areas where the OM could create value for all stakeholders; and seek simple and cost effective means of implementing the OM's functions. There was discussion under several elements of how to phase in the functions of the OM over time, starting with priority areas and building the functions out with as the OM grew.

14. **Certification.** The Committee agreed that there appeared to be potential for consensus around a framework for certification as contained in the working paper. Further, arising from the discussion on the gap analysis (above), the Committee discussed whether it would be helpful for any additional information requirements that were found to be needed (beyond ANSI PSC 1 certification) to be phased in over several years, starting with areas of greatest human rights risk. There was interest in this concept.
15. **Reporting, Monitoring and Assessing Company Performance.** The TSC agreed that the working paper provided a good basis to advance discussions among stakeholders on this issue. The TSC was supportive of an approach in which the OM gathered information from a range of sources and was empowered to engage with companies on specific issues in confidence. There would also be provision for the Board to consider serious performance problems and to make recommendations to companies. The TSC envisaged the function as a means of identifying problems and creating dialogue aimed at improving practices in complex environments. The Board could also ultimately sanction a company. The function would not have an ability to compel co-operation or access, but there should be a presumption that companies co-operate in good faith consistent with their legal obligations. It was agreed that confidentiality and conflict of interest provisions would be best developed by the Board as part of the procedures for this function.
16. **Third Party Complaint.** The TSC discussed how to proceed on this function. It was noted that there was general support at the Expanded Meetings with the elements of the working paper. There was debate as to whether the function should be augmented with an alternative dispute resolution mechanism which had an ability to make findings. There was discussion on the relevance of the Guiding Principles, whether elements of the complaints process should be compulsory, and the question of how findings would be reached. These issues were not resolved and the drafting group was tasked to prepare a clean version which identified options for further discussion at the next TSC meeting.
17. **Governance.** The TSC agreed that the working paper provided a good basis for preparing the governance and affiliation sections of the second draft Charter, and that the Expanded Meetings had helped refine the options.
18. The TSC agreed that the second draft Charter should continue to include a Board, as the principal decision-making body in the OM. The Board should be comprised equally of representatives of the three stakeholder groups, with a provision for alternate members. It would have powers to create advisory and committee structures as necessary. It was agreed that the proceedings of the Board would be open wherever possible, but with provision for confidentiality according to procedures decided by the Board. An independent chair should be an option.
19. The plenary (or annual meeting / general assembly) should consist of the three stakeholder groups, with decisions taken by a majority or a super-majority in all three groups. The draft

Charter should include an option for the plenary to ratify the procedures which the Board will adopt for the three main functions, thereby giving all affiliated members more meaningful opportunities to participate in the development of the OM's operations.

20. It was agreed that the second draft Charter would not contain a separate fourth pillar for non-state clients. But there was support for ensuring effective participation of non-state clients and further potential to discuss the issue at the drafting conference, including both the possibility of providing an ability of non-state clients to join an existing pillar or being and the possibility that non-state clients could be eligible for observer status.
21. The TSC agreed there should be an observer/advisory category which was broadly open to interested groups and individuals.
22. **Industry Affiliation.** The TSC discussed the need for a transitional mechanism by which current Signatory Companies would be able to seek full membership and under-go certification, and options for the terms to describe a company's status at different points. Full membership would require certification and evidence of a company's commitment to participate in OM monitoring and third-party complaints mechanisms. For the first few years, the OM might need to extend voting rights to companies that had applied for full membership, but not yet been certified, given it would take some time to certify all companies. It was agreed that after a reasonable period of time the designation Signatory Company should cease to exist, because the balance of industry opinion was that companies should not be able to claim Code endorsement without moving forward to participation in the OM (as in fact the Code provides).
23. **Government Affiliation.** It was agreed that the role of governments should be expanded in the second draft Charter. There were inconclusive discussions on whether or not international organizations should be eligible for membership of this pillar.
24. **Civil Society Affiliation.** The TSC agreed to prepare a shorter text in the second draft Charter, and also to set out thinking on how a foundation group of civil society participants (and indeed industry and government participants) would become members at the launch of the OM, rather than applying later through the affiliation process. It was agreed these issues should be further discussed at the drafting conference.
25. **Maritime.** It was agreed that the second draft Charter would contain provisions that could allow maritime companies to seek certification and full membership, but the TSC recognized that this was a rapidly evolving area and it would also depend on the wishes of maritime companies and processes underway elsewhere. The issue would require further discussion at the drafting conference.

Draft SCEG paper

26. UK industry representatives tabled a draft SCEG paper containing industry views on the way forward for the oversight mechanism. The TSC discussed views contained in the paper, including during deliberations on the points above. The TSC agreed that it would remain in regular contact with SCEG members and discuss the issues further. The TSC reiterated that it welcomed views from all stakeholders at any time, and would seek to engage as many stakeholders as possible when the second draft Charter was published in January 2013.