

Joint Working Group: Statement on the OECD Guidelines Process

Introduction

1. • The Joint Working Group was established under the aegis of the All Party Parliamentary Group on the Great Lakes Region of Africa (the APPG) to explore the scope for common ground between businesses and NGOs on frameworks for business conduct in areas of conflict and weak governance. The first four meetings were held between March 9 and May 23, 2006, and focused largely on the workings of the OECD Guidelines mechanism in the UK. Among other aims the discussions were intended to contribute to the DTI's concurrent consultation on the promotion and implementation of the Guidelines in the UK.

2. • The Guidelines set out voluntary principles and standards of responsible business conduct and include implementation procedures which provide that a National Contact Point (NCP) in each adhering country will contribute to the resolution of issues relating to the implementation of the Guidelines in specific instances, and will issue a statement and make recommendations as appropriate. In previous APPG consultations,¹ companies and NGOs alike expressed serious dissatisfaction with the way the OECD process functioned in the UK.

3. • The members of the Joint Working Group are as follows:

Anglo American (Edward Bickham, Executive Vice-President for External Affairs)

Shell International (Mike Wilkinson, Vice-President, Policy and Issues)

De Beers (Simon Gilbert, Public Affairs Manager)

Standard Chartered (Jonathan Angliss, Manager, Group Corporate Affairs)

The International Council on Mining and Metals (Paul Mitchell, General Secretary)

Human Rights Watch (Anneke van Woudenberg, Senior Researcher, Africa)

Amnesty International (Tom Fyans, Business and Human Rights Campaigner)

RAID (Tricia Feeney, Executive Director)

Christian Aid (Sharon McClenaghan, Senior Policy Officer, Private Sector)

Global Witness (Carina Tertsakian, Lead Campaigner, DRC)

¹ In response to the UN panel structure on the illegal exploitation of natural resources in the Democratic Republic of the Congo, the APPG has undertaken a process of consultation and round-table meetings on issues of corporate accountability, including a study on the functioning of the OECD process to which a number of cases raised by the UN were referred. Both this study and full terms of reference for the Working Group are available on the APPG website – www.appggreatlakes.org The Working Group statement does not necessarily reflect the views of individual members of the APPG.

Richard Hermer (Doughty Street Chambers)

Dan Leader (36 Bedford Row/RAID)

Muzong Kodi (Chatham House)

Stephen Carter (Coordinator, APPG on the Great Lakes Region of Africa)

Benedetta Lacey (Former independent advisor to the APPG)

The JWG met under the neutral chairmanship of *Lord Mance*.

4. • On the basis of its discussions to date, the JWG offers the following joint statement.² The statement is a collective expression of views on action to improve the functioning of the OECD process. It is not a binding document, and the members of the Group are of course free to refine their stance in light of the practical experience. But it does represent a considered position agreed to by participants, which it is hoped the DTI will take fully into account in its review of the workings of the Guidelines. The JWG also strongly urges the DTI to consult stakeholders when establishing detailed procedural rules.

General Principles

5. • A guidelines-based mechanism like the OECD process has the potential to play a useful and appropriate role in underpinning responsible corporate conduct, so long as it is properly implemented. In particular, to command the confidence of stakeholders, it must be credible, effective, fair, and timely, operating in accordance with due process and with proper safeguards against malicious, vexatious or insubstantial complaints. The process should aim to assist companies in need of clarity and guidance on the application of the Guidelines, and to be a tool to facilitate responsible business operations and investment.

6. • It is right that the primary focus of the OECD process should be on mediation between the parties. Nevertheless, if mediation is unsuccessful the NCP should reach a clear and reasoned finding on the substance of allegations and whether they represent a breach of the Guidelines, based on an assessment of the available facts, and offer practical recommendations to help improve compliance.

Structure of the process

7. • The first phase of the OECD process should be an initial assessment to determine if a complaint should be considered by the NCP. The second phase should consist of a mediation

² Richard Hermer, Dan Leader and Muzong Kodi endorsed the statement in a personal capacity rather than on behalf of any institution. Paul Mitchell endorsed the statement on behalf of the ICMM, but not of its member companies. Shell International was unable formally to endorse the final statement.

process with the aim of reaching a resolution of the complaint between the parties. Where mediation fails, the NCP should, unless both parties agree otherwise, appoint a suitable individual to assess the available material, consider arguments and produce a report, on the basis of which the NCP would make a determination and issue a final statement on the substance of the allegations and application of the Guidelines, with appropriate recommendations to promote good practice and improve compliance. (See detailed paragraphs below)

Nature and status of the NCP

8. • The OECD mechanism must function and be seen to function impartially. The JWG suggests the following as one structure that could satisfy this requirement:

9. • The NCP should be a suitably qualified and senior civil servant: the JWG recommends he or she be at director level or above. This individual would carry out the initial assessment and conduct (or engage an expert mediator to conduct) the mediation process. If mediation failed, the NCP would, unless both parties agree otherwise, appoint a suitably qualified impartial individual to assess the material available, hear arguments from both sides, and resolve issues of fact as far as possible. The assessor would issue a report to the NCP on the substance of allegations and whether in his or her view they represented a breach of the Guidelines, along with a summary of the information and arguments presented and appropriate comments and practical recommendations. The parties should have the opportunity to view the report at the draft stage and make comments within a limited time for the assessor to include in his or her consideration. The NCP would then review the report and use it to make a final determination and statement, which would be made public. Where these differed materially from the assessor's report, the NCP would provide written justification in confidence to the parties.

10. • Where appointed, the assessor should have suitable experience and be impartial and able to command the confidence of the parties, with no previous involvement in the complaint or links to either side. Where the parties are unable to agree upon an individual, the assessor should be chosen from a list of suitable candidates previously agreed by stakeholders including businesses and NGOs. The assessor would have no contact with the press and would play no public part in the process, which would remain focused on the NCP.

11. • The NCP (and any mediator or assessor) should be given adequate funding and support for their work. At the same time, there was no desire within the JWG for an excessively expensive or cumbersome mechanism. While the relevant department should fund the functions of the NCP, the parties should be responsible for their own costs.

Admissibility

12. • The initial stage of the OECD process should effectively exclude insubstantial, misconceived, malicious, or vexatious allegations, while allowing those with sufficient substance to proceed to mediation. The proper threshold for the consideration of a complaint is that it should be worthy of further investigation; e.g. that there should be some prima facie prospect that a material breach in the Guidelines may have occurred. Complaints about past as well as ongoing breaches should be admissible, though concern was expressed that this not be interpreted to allow any complaint no matter how old. Complaints should not in any case concern events taking place before the adoption of the Guidelines in 1976.

13. • Any of the persons or bodies identified in paragraph 12 of the Commentary to the OECD Guidelines should be entitled to initiate a complaint, and to be involved in its pursuit and investigation – always bearing in mind the need to exclude complaints with insufficient substance to proceed. Any party identified in paragraph 12 should be able to act as a complainant in a situation where allegations have been made by another organisation or individual which is unable to pursue a complaint itself.

14. • At the initial stage of the process the complainant should a) specify which part of the Guidelines is alleged to have been breached b) explain why they believe a breach has occurred and c) refer to the evidence on which they base their complaint. As specified in the DTI's current flowchart for the OECD process, the NCP should acknowledge the submission of a complaint in writing within three working days and forward it for the consideration of the company or companies concerned within five working days. In order to facilitate the initial assessment, a written response by the company to the complaint should be filed as soon as possible, but in any event within two months of the receipt of the complaint.

15. • At this stage the NCP should also seek timely input from other relevant Whitehall departments. The JWG welcomes the DTI's commitment to formalise the current ad-hoc group of Government departments who assist the NCP at the various stages of the process.

16. • If either party is dissatisfied with an initial decision on admissibility (and gives notice within a reasonable time), the NCP should engage an impartial individual (chosen in similar manner to that set out in paragraph 10), to assess the material available and make a report, in light of which the NCP would then review its initial decision.

17. • The NCP should set out in writing the reasons behind its decision to allow or not allow a complaint to proceed, as specified in the OECD's own guidance. Any decision should be issued to all the parties simultaneously, and made public shortly after the time limit for requesting a review has expired or, where there is such a review, after the final decision has been issued.

Parallel Procedures

18. • There are clearly circumstances in which the OECD Guidelines process should give precedence to other criminal or civil proceedings. However, this should only be where there is a real likelihood the OECD process could result in significant prejudice to the parallel procedures; there should be no automatic assumption that other proceedings should take precedence. Where the NCP rules that they should, the NCP should provide justification for that decision, which should be reviewable in the same way as other admissibility decisions.

Mediation

19. • The aim of the OECD mechanism should be to resolve the majority of cases through mediation, and every appropriate effort should be made to ensure this part of the process is effective. The JWG would expect that the parties would as a minimum be brought together for a properly managed face-to-face dialogue under the auspices of a suitably trained mediator. This may be the NCP, although he or she should have the option of bringing in an outside mediator if it were thought useful. The NCP should be trained in mediation techniques, for example at CEDR³.

20. • The NCP (or mediator) should take any other suitable measures that might help facilitate an agreement at this stage, such as attempting to resolve disagreements over factual issues, or identifying areas of dispute and possible solutions.

21. • Where mediation is successful the NCP should issue a final statement in consultation with the parties setting out the agreement and any practical lessons or recommendations flowing from the specific instance.

³ The Centre for Effective Dispute Resolution is an independent non-profit organisation supported by multinational business and leading professional bodies and public-sector organisations, launched in 1990 with the support of The Confederation of British Industry.

Information

22. • The OECD process should operate with the best available information about the circumstances of an alleged breach. Given the voluntary and non-judicial status of the process, the main source of information will be the submissions and material provided by the parties. However, the NCP should make whatever efforts it properly can to resolve questions of fact. The NCP and any assessor engaged at the post-mediation stage should for example be able to call on experts to provide advice on particular issues and to request information from persons or organisations outside the process, so long as this is shared with the parties.

23. • The JWG is of the view that the NCP (and any mediator or assessor) should be able make requests to parties to provide information relevant to the specific instance. Parties should also be able to make proportionate and reasonable requests for information, which the NCP (and any mediator or assessor) would formally submit to the other party. Failure at the post-mediation stage to cooperate without good reason could be commented on by the NCP in its final statement. The NCP and assessor should also consider requests from either party to use the NCP's fact-finding role to clarify factual issues (for example by seeking information from UK foreign missions), and should give reasons for any decision not to do so. The JWG emphasises that a complainant must still show some prima facie prospect of a material breach in the Guidelines at the initial assessment stage, to guard against the misuse of the mechanism as a speculative 'fishing expedition' for incriminating material.

24. • The NCP (and any mediator or assessor) should act in a transparent and open manner and take care to keep the parties informed of their actions throughout the OECD process. Should a complaint proceed beyond the initial assessment, they should set out a) the further information they will seek to obtain and b) the further information that is required from each party. Any information they receive should be obtained transparently and made available to the parties.

25. • The NCP has in the past undertaken fact-finding field visits. Such visits (whether by the NCP, or at post-mediation stage, by the assessor) should be undertaken where they may bring a benefit to the process proportionate to their costs. Any such field visits must also be considered according to clear criteria and take place within clear terms of reference. Clear rules must be established to ensure they are conducted in a neutral, transparent and fair manner, which does not endanger the confidentiality of legitimately sensitive information or unfairly advantage one party over another. The assessor should maximise transparency for the parties as far as possible, for example by providing transcripts of interviews where representatives of the parties have not been present.

Confidentiality

26. • The principle of transparency should underlie the OECD process as far as possible, but must be balanced against the need for confidentiality where sensitive information may be involved.

27. • Mediation and post-mediation proceedings should take place in private unless all parties agree otherwise. Due process clearly demands that material presented by a party in the course of the OECD process be available to the other parties, and the JWG welcomes the recent statement of the DTI to this effect. However, where parties introduce commercially or otherwise legitimately sensitive material into proceedings they should be able to specify the condition that its confidentiality be respected, and expect other parties to bind themselves not to release that information without permission even after the conclusion of the OECD process. Where material is particularly sensitive, the parties should be able to request that the NCP not refer to it in the final statement in a way which could undermine its confidentiality, though the final statement itself would still be made public.

28. • Where a breach of confidentiality occurs, the NCP may comment on it in the final statement. The possibility of legal action of course exists where information given on the understanding of its confidentiality is subsequently publicised.

Post-mediation

29. • If mediation fails, the NCP should (unless both parties agree otherwise) reach a clear finding on the substance of the allegations and the application of the Guidelines, based on a thorough assessment of the available facts. If there is insufficient information to substantiate the allegation the complaint should be declared unproven.

30. • At the post-mediation stage the parties should have the opportunity to make fresh written submissions, and to present their arguments and any material that might support their case to the assessor according to the principles of natural justice. The parties should be able to ask questions and challenge the arguments, witnesses and any other material presented. Where one of the parties wishes to present material in person before the assessor the other party should have the opportunity to participate. The standard of proof of any non-compliance should be high, but appropriate to the non-judicial nature of the proceedings; i.e. a civil standard. The JWG asks that detailed post-mediation procedures be issued in consultation with all stakeholders.

31. • There may be circumstances where one party declines to participate in all or part of the Guidelines process. In these circumstances the NCP should issue a final statement based on the information available. The complainant must of course still establish their case to the same standard.

Contents of the final statement (post-mediation)

32. • The final statement should set out a clear and reasoned finding on a) the substance of the allegations made in the complaint and b) whether they represent a breach in the Guidelines, taking due account of all the available information.

33. • In addition to the clear technical finding on the application of the Guidelines, the NCP may include comments to set its decision in context. They could for example note where a company has acted in good faith or where there are legitimate mitigating circumstances. Similarly, the NCP should comment where either party has acted in bad faith (for example by breaching confidentiality) or failed to cooperate without good cause, or where a breach is particularly egregious.

34. • The finding should summarise the complaint, the response of the company, the relevant issues under consideration, and the information available to the NCP; it should also set out relevant questions of fact the NCP has been unable to resolve, and why.

35. • The final statement of the NCP should aim to provide detailed and specific guidance to businesses to enable them to operate in a manner consistent with the Guidelines. Where there is found to have been a breach, the NCP should make recommendations on action to address the issue and avoid similar problems in future. Even where no breach has occurred, the NCP should where possible make practical and constructive recommendations, and draw attention to particular lessons, dangers, or examples of good or bad practice.

Timeframes

36. • The OECD process must take place in as timely and efficient a manner as is compatible with due process, and according to a clear and justifiable timetable. The NCP should, in consultation with the parties, set a timetable for each stage of the process according to the circumstances of each specific instance. They should be agreed in advance of each separate stage: e.g. shortly after the complaint has been submitted to a company, immediately prior to the mediation stage, and immediately prior to the post-mediation phase. As an indicative guide, the JWG suggests that the NCP should allow a maximum of three months for each of the three stages (i.e. initial assessment, mediation, determination).

37. • The NCP should allow these timeframes to be exceeded only where there is a compelling and legitimate justification, or if both parties consent to an extension. Due notice should be given of any changes. Either party could request extensions in this way of up to a total of 3 months: most cases would therefore be concluded within one year. Any further extension would require exceptional justification (for example where an issue needed to be referred to the OECD Committee on Investment and Multinational Enterprises).

Detailed procedures and further consultation

38. • The JWG believes that the operations of the OECD process should as an overarching rule spring from the basic principles of due process set out above. In addition to the preceding suggestions as to what this might mean in practice, the JWG strongly urges that stakeholders be consulted on detailed procedural rules.

39. • The JWG recommends that a board be established to review the work of the NCP at regular intervals (at least once a year) and to make improvements as necessary to maintain the general principles set out above. This board should be composed of senior staff from relevant ministries, and could also include members from outside government: it should be composed so as to command the confidence of all stakeholders as far as possible.

40. • The JWG expects in due course to produce a further joint statement relating to other issues, including the UN expert panel process and other mechanisms: many of the companies in particular felt that the panel did not always adequately follow the principles of due process and fairness. The JWG may also convene on an ad hoc basis in future if it is thought useful.