



## **Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure**

### ***Lessons from Past NGO Complaints***

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#### **About OECD Watch**

OECD Watch is an international network of civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about the policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises. For more information, send an e-mail to [info@oecdwatch.org](mailto:info@oecdwatch.org) or visit [www.oecdwatch.org](http://www.oecdwatch.org).

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## **Note concerning this guide**

This guide will be updated periodically as new information and experiences are learned. We will also post interim updates online, which should be appended to the current version of the guide.

We welcome your comments and recommendations. Please send feedback to: [info@oecdwatch.org](mailto:info@oecdwatch.org).

Please check OECD Watch's website to confirm you are reading the most recent version and for further updates at: [www.oecdwatch.org](http://www.oecdwatch.org).

You are reading Version 1 (June 2006).

## Acronyms and abbreviations

BIAC.....	Business and Industry Advisory Committee to the OECD
BTC.....	Baku-Tbilisi-Ceyhan oil pipeline
DRC .....	Democratic Republic of the Congo
GSL.....	Global Solutions Limited (Australia) Pty Ltd
Guidelines .....	OECD Guidelines for Multinational Enterprises
NCP.....	National Contact Point
NGO .....	Non-governmental organization
OECD.....	Organisation for Economic Co-operation and Development
TUAC.....	Trade Union Advisory Committee to the OECD

## Introduction

The Organisation for Economic Co-operation and Development's (OECD) "Guidelines for Multinational Enterprises" (Guidelines) embody what OECD governments<sup>1</sup> have agreed are the basic components of responsible corporate conduct. They cover a range of issues such as labour and human rights, the environment, bribery and corruption and information disclosure. Though voluntary for companies, governments<sup>2</sup> that have endorsed the Guidelines are essentially conveying that they expect multinational companies to follow these principles and standards of good conduct in their operations worldwide.

In 2000, as part of the most recent revision of the Guidelines, a new complaint procedure was agreed. Non-governmental organisations (NGOs) are now able to submit a "specific instance" or a "complaint" about alleged breaches of the Guidelines to a government's "National Contact Point" (NCP). Before the revision in 2000, only trade unions could submit complaints. As of March 2006, the Trade Union Advisory Committee to the OECD (TUAC) has recorded 63 trade union complaints. As of June 2006, about 50 complaints have been filed by NGOs.

NCPs have deviated wildly in how they have handled NGO complaints and many have been mishandled. For example, less than 10 of the 45 NGO complaints submitted as of September 2005 concluded in a manner that reasonably satisfied the complainants. Despite the low number of positive outcomes, there can be benefits to filing a complaint provided that NGOs enter into the process properly prepared and with a clear view of what outcome they hope to achieve.

In addition, largely because of NGOs and trade unions' efforts, some progress has been made to compel governments to start implementing the Guidelines more effectively. For example, as of May 2006, in Canada, the Netherlands and the United Kingdom, parliamentary processes to examine how to improve implementation were underway.

After five years and nearly 50 NGO complaints, OECD Watch members understand how to construct a complaint, issues NGOs should consider before submitting a complaint, how the complaint process has been typically handled by NCPs and what roadblocks NGOs could encounter. This guide was designed with these experiences and lessons in mind. A number of guides and reports exist to advise NGOs on the Guidelines. These earlier publications continue to be important resources for NGOs that are considering filing complaints (see Box 1). This guide is meant to supplement the existing NGO resources.

- Chapter 1 contains questions to: 1) consider when contemplating a complaint; 2) help identify information to collect; and 3) get started.
- Chapter 2 explains what to expect after a complaint is filed.
- Chapter 3 covers NCPs' statements.
- Chapter 4 provides instructions for writing a complaint.
- Chapter 5 is the complaint against First Quantum Minerals to demonstrate how the Guidelines can be used in a preventive manner.
- Chapter 6 is a case study of the Global Solutions Limited (Australia) Pty Ltd complaint to demonstrate a positive outcome in a case.
- Chapter 7 is a summary of the OECD Guidelines.

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<sup>1</sup> As of March 2005, governments that have endorsed the Guidelines include all 30-member states of the OECD plus Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania, and Slovenia.

<sup>2</sup> The Guidelines are one part of the *OECD Declaration on International Investment*, which is a broad political commitment adopted in 1976 to promote investment.

### **Box 1: Key resources**

(All resources are available at [www.oecdwatch.org](http://www.oecdwatch.org) except where noted otherwise.)

1. **The OECD Guidelines for Multinational Enterprises.** To download the OECD Guidelines, go to: [www.oecd.org/investment](http://www.oecd.org/investment). Click “Guidelines for Multinational Enterprises” on the left-hand side of the web page.
2. **Five Years On: A Review of the OECD Guidelines and National Contact Points** by OECD Watch: This report is a comprehensive assessment of how NCPs in 22 countries have implemented the Guidelines.
3. **The Confidentiality Principle, Transparency and the Specific Instance Procedure** by OECD Watch: This paper explains the Guidelines’ “confidentiality principle”, including what it is, when it is applicable and when an interpretation of the principle is inconsistent with the Guidelines’ Procedural Guidance. It also explains NCPs’ obligations with respect to transparency.
4. **The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility** by OECD Watch: This paper explains the “investment nexus” and presents the views of OECD Watch on companies’ supply chain responsibilities.
5. **A Guide to the Guidelines** by Friends of the Earth-United States: This guide clarifies opportunities and obstacles in the Guidelines, describes hypothetical examples of activities that could be considered violations, provides listings of similar or reinforcing provisions in the official text and the international laws, standards and principles noted in the Guidelines. (Available in English, Russian and Portuguese)
6. **A Critical Starter Kit for NGOs** by Friends of the Earth-Netherlands: This is the first civil society guide written on the Guidelines. It provides a concise introduction on what the Guidelines are, including explaining what an NCP is; some of the pros and cons of the Guidelines; how to file a complaint; and what the general procedures are after a complaint is submitted. (Available in English, French, German and Spanish)
7. **Multinational Research Manual** by SOMO (Centre for Research on Multinational Corporations): This manual provides recommendations for conducting research on companies. The manual is available to NGOs and trade unions only. To request a copy, send an email to [info@somo.nl](mailto:info@somo.nl).
8. **The Trade Union Advisory Committee’s (TUAC) User’s Guide on OECD Guidelines for Multinational for Multinational Enterprises:** TUAC’s guide has been translated into 21 languages as of June 2006. To receive a printed version of TUAC’s guide, contact the TUAC Secretariat at [tuac@tuac.org](mailto:tuac@tuac.org) or go to [www.tuac.org](http://www.tuac.org).
9. **OECD Watch’s on-line case database:** OECD Watch maintains a password-protected database of NGO complaints that includes companies’ reactions to and governments’ handling of these cases. OECD Watch members have free, unlimited access to the database.

## Chapter 1: Issues to consider before filing a complaint

Before starting a complaint, it is highly advantageous to do some preliminary planning and research. There can be benefits to filing a complaint provided that NGOs enter into the process properly prepared and with a clear view of what outcome they hope to achieve. To assist in this preparation process, this chapter contains questions to: 1) consider when contemplating a complaint; 2) help identify information to collect; and 3) get started.

### Box 2: Key terms to know

**Organisation for Economic Co-operation and Development (OECD):** Headquartered in Paris, the OECD is a forum made up of 30 “like-minded” member countries created over 40 years ago to discuss and promote free market policies and trade. OECD member governments negotiate common approaches on a vast array of policy issues, and they accept political, and sometimes legal, obligations to implement these agreements.<sup>3</sup>

**OECD Investment Committee:** The committee with oversight for the Guidelines for Multinational Enterprises (Guidelines).

**National Contact Point (NCP):** Governments that have endorsed the Guidelines are obligated to create an NCP that will implement the Guidelines.

**Specific instance:** A specific instance is a complaint that is submitted to an NCP concerning a company’s alleged breaches of the OECD Guidelines.

**Procedural Guidance:** The Procedural Guidance is the section in the OECD Guidelines that contains instructions on the responsibilities of NCPs and the Investment Committee.

**Commentary on the Implementation Procedures:** The part of the Guidelines contains additional information to better explain the Procedural Guidance.

**Commentaries and Clarifications:** Each chapter is followed by Commentaries, which provide further instruction on the official text. Some chapters are also followed by Clarifications made by the Investment Committee on the Guidelines prior to 2000.

**Investment nexus:** When a complaint deals with supply chain issues, NCPs will look for an “investment nexus”, which means the company named in the complaint needs to exercise a degree of influence with their business partners or have investment-like relationships with its suppliers.

**Parallel proceedings:** “Parallel proceedings” or “parallel legal proceedings” are the terms NCPs use when a complaint deals with business behaviours that are also the subject of other proceedings at the sub-national, national or international level.

<sup>3</sup> Canada’s Voice in Global Governance: A Civil Society Handbook: <http://www.foecanada.org/intl/OECD.htm>

## **1.1 Questions to consider when contemplating a complaint**

- 1.1.1 Do you have adequate resources and capacity to follow the complaint process through to completion?** While a complaint is considerably less costly than a lawsuit, seeing the process through to completion could still require significant resources (e.g., staffing, funding and time).
- 1.1.2 Is the company violating the law?** An important first step is to find out if any laws are applicable. The fact that the company is complying with the law does not guarantee it is adhering to the Guidelines and observing the Guidelines does not guarantee the company is complying with the law. An additional complication can arise if the company is complying with the law, but the law violates international laws, treaties or standards. Exploring whether there are legal violations could also yield other options to change the company's behaviour.
- 1.1.3 Are there parallel proceedings concerning the company?** "Parallel proceedings" or "parallel legal proceedings" are the terms NCPs use when a complaint deals with business behaviours that are also "the subject of other proceedings at the sub-national, national or international level, which may be of the following types: 1) criminal, administrative, or civil; 2) alternative dispute settlement proceedings (arbitration, conciliation or mediation); 3) public consultations; or 4) other enquires (e.g. by United Nations; agencies)".<sup>4</sup>

NGOs should determine if there are any pending lawsuits or other proceedings concerning the company. If there are parallel legal proceedings, are the claims in the lawsuit similar to the issues in your complaint. Similarly, are there pending complaints with other institutions such as with the World Bank? If a public financier is involved, has the due diligence been completed?

While the existence of parallel proceedings does not and should not prohibit you from filing a complaint, some NCPs have rejected complaints or used the pretext of parallel proceedings to avoid handling cases properly. There may be sequencing considerations where the NCP awaits the outcome of the parallel proceedings, as information or evidence may emerge that could assist the NCP in handling the complaint.

NCPs differ on whether they should refuse complaints when there are parallel proceedings. OECD Watch's position is there is no reason why parallel proceedings should preclude the consideration of a complaint. The only exception is the NCP should ensure it does not prejudice criminal proceedings. Otherwise, the NCP should handle the case in parallel.

- 1.1.4 Is the company being contracted by the national government?** A complaint becomes more complex if the government has contracted with the company to deliver services, for example, the management and operation of a prison or detention centre. NCPs may be reluctant to consider aspects of a complaint that it interprets as questioning government policy.
- 1.1.5 Will an NCP-facilitated mediation help you reach the desired outcome?** Have you considered all the possible downsides of mediation? Filing a complaint tells the NCP and company you are willing to engage in "conciliation or mediation, to assist in dealing with the issues".<sup>5</sup> If you are not willing to engage in a dialogue with the company, what is the aim of the complaint?

If the NCP-facilitated mediation fails, the Procedural Guidance for the Guidelines states the NCP should issue a statement as to whether the company has breached the Guidelines and make recommendations about future behaviour.

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<sup>4</sup> "Specific Instances and Parallel Proceedings -- Draft Summary of Discussions", March 2006.

<sup>5</sup> OECD Guidelines' Procedural Guidance, Section 1, Sub-section C: "Implementation in Specific Instances".

For information on the Guidelines' confidentiality principle, see "The Confidentiality Principle, Transparency and the Specific Instance Procedure" by OECD Watch. Also, see No. 2.7 below and Chapter 3 on NCPs' statements.

## **1.2 Questions to help identify information to collect**

**1.2.1 Do you have evidence that shows the Guidelines are being violated?** NGOs should ensure their evidence is substantial, credible and demonstrates the complainants have expertise and knowledge of the issue(s). If some breaches cannot be fully backed up, not only is it likely these will be rejected by the NCP as unsubstantiated, but it could damage the case. If the matter is urgent and you are lodging a complaint as a preventive measure, as in the Zambia case (see Chapter 5), all that may be needed is a clear and accurate account of the problem and an indication of which provisions of the Guidelines are at risk of being breached.

**1.2.2 Do you need to create a company profile?** The scope of the company profile will vary, but some basic information to know is where the company is headquartered, the ownership structure (e.g., is the company listed on one or more stock exchanges or is it privately held?), the company's social and environmental policies/code of conduct and the identity of the local entity or actors (e.g., is it a subsidiary, a joint venture, a supplier or sub-contractor?).

For instructions and sources of information for developing a company profile, see "Multinational Research Manual" by SOMO.

**1.2.3 Will you raise issues concerning the company's supply chain?** When a complaint deals with supply chain issues, NCPs will look for an "investment nexus", which means the company named in the complaint needs to exercise a degree of influence with their business partners or have investment-like relationships with its suppliers. However, the Investment Committee has not agreed to any basic criteria to determine when an investment nexus exists and NCPs should consider complaints on a case-by-case basis. NGOs should therefore map the company's supply chain and assess the level of influence the multinational enterprise exercises over the supplier, sub-contractor, licensee or trading house. In such cases, it can also be useful to document the major brands that the multinational sources and/or produces.

For instructions and sources of information for mapping a company's supply chain, see "Multinational Research Manual" by SOMO. Also, see "The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility" by OECD Watch.

**1.2.4 Are there partners that can support your efforts?** Partners such as other NGOs can support complainants' efforts in a number of ways such as helping to gather and verify information about the company, the NCP or attending meetings. NGOs in non-OECD countries may want to submit their complaint jointly with groups in the company's home country and/or the country where the complaint is submitted.

### **1.3 Questions to consider when getting started**

**1.3.1 Have you determined the goals of your complaint?** NGOs should determine what they want to achieve by filing a complaint. NGOs may need to identify the issues they can and cannot mediate with the company. Also, both before and after a complaint is submitted, NGOs should evaluate (and continually re-evaluate) how they will achieve their goals, including taking into account how the process is proceeding. As stated above, there can be benefits to filing a complaint provided that NGOs enter into the process properly prepared and with a clear view of what outcome they hope to achieve.

**1.3.2 Have you identified the relevant paragraphs in the Guidelines to cite?** To determine which parts of the Guidelines the company is breaching, NGOs should carefully review the Preface, Chapters I-X, the Commentary and Clarifications (see Box 2).

For guidance on identifying breaches to the Guidelines, see “A Guide to the Guidelines” by Friends of the Earth-United States.

**1.3.3 If there are multiple breaches to the Guidelines, will you include all of them in your complaint?** Are certain issues more urgent and would it be more effective to keep the complaint focused to hopefully achieve a quick resolution? Would it be better to include some issues and use other methods to address others? If you wish to demonstrate a company’s extensive failure to adhere to the Guidelines, then a comprehensive approach may be the best way. Another point to keep in mind is it could be difficult to add new elements to your complaint after it has been accepted by the NCP. When considering whether to include some or all the breaches in complaint, NGOs should think about the pros and cons of including each breach in their complaint.

**1.3.4 Have all complainants agreed to a set of shared expectations for the process and for each other?** Do all complainants fully understand the Guidelines and the complaint procedure? Have you agreed which NGO(s) or individual(s) are the primary contact(s) for the complaint? From the outset, agree on a process for decision-making and collaboration. While NGOs in the company’s home country (or where the complaint is submitted) may be the ones meeting with the NCP, the process should always be driven by the needs and views of the affected individuals or communities.

**1.3.5 If the problem is labour-related, are you collaborating with the relevant trade unions?** The Trade Union Advisory Committee (TUAC) recommends that NGOs notify TUAC and the relevant trade unions when filing a complaint involving labour issues. TUAC can assist individuals, communities and NGOs in making contact with the relevant trade unions. TUAC has also published a User’s Guide on the Guidelines (see Box 1).

**1.3.6 Can you explain your interest in the case?** According to the Guidelines, any “interested party” can file a complaint, for example, a community impacted by the company’s activities, employees or an NGO. A complainant does not necessarily have to be an organisation, although individuals planning to raise a complaint are advised to seek assistance from one or more organisations. When complainants do not represent an affected group, the complainant should be able to show its interest in the matter through, for example, its organisation’s mission.

**1.3.7 Have you decided whether to publicize your complaint?** Some NCPs claim that publicizing a complaint undermines the process. However, it has been the experience of OECD Watch members that any positive outcome in a case is, at least partly, the result of publicity. NGOs should nevertheless give thought to whether publicizing their case is advantageous or disadvantageous to their efforts.

For further explanation on the debate on publicizing complaints, see “The Confidentiality Principle, Transparency and the Specific Instance Procedure” by OECD Watch.

**1.3.8 Have you decided where to file the complaint, including whether to file with more than one NCP?** A complaint should be handled by the host country’s NCP, if one exists. Otherwise, the complaint should be submitted to the NCP in the company’s home country. In past cases, NGOs have deviated from this rule for a variety of reasons. In the complaint concerning the Baku-Tbilisi-Ceyhan oil pipeline, NGOs filed their case in five countries, because of the involvement of several multinational oil companies. In another case concerning Shell oil company, NGOs filed their case with the Dutch and the Brazilian NCPs at the same time because the Brazilian NCP is known to be inactive.

**1.3.9 Have you decided when to file the complaint?** When to file a complaint is another important strategic decision. Is there a particular time that might be more advantageous to generate publicity? For example, a complaint that is submitted during the company’s annual meeting could result in more shareholder awareness of the problems. The GSL complaint (described in Chapter 6) was submitted to coincide with increased public scrutiny of the company’s operations in Australia.

**1.3.10 Have you obtained approval from your sources to cite the evidence they provided or should it be submitted anonymously?** If some evidence (or the source of evidence) cannot be shared with the company, NGOs should note this in their complaint.

## Chapter 2: What to expect after filing a complaint

The process after submitting a complaint appears quite simple on paper. If the NCP decides the issues merit further examination, it will seek to facilitate a resolution between the complainant and the company. If the process ends in a manner that satisfies all parties, the NCP should issue a public statement on the outcome unless there is a good reason for not doing so that all parties understand. Should mediation fail, the Procedural Guidance states the NCP is required to reach a determination: “If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines”. (See Box 3).

### **Box 3: Text of the OECD Guidelines’ “Procedural Guidance”**

The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
  - (a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts;
  - (b) Consult the National Contact Point in the other country or countries concerned;
  - (c) Seek the guidance of the [Investment Committee] if it has doubt about the interpretation of the Guidelines in particular circumstances;
  - (d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.
4.
  - (a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.
  - (b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.
5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

In practice, the Guidelines' complaint procedure has been more complicated and uncertain. NGOs have often found themselves drawn into lengthy debates on procedural matters instead of discussing the substance of their complaint. Furthermore, few NCPs are prepared to issue statements, especially when mediation fails to produce a satisfactory outcome.

In many cases, NCPs have been passive observers while companies and complainants exchange correspondence back and forth for months (and even years) on end. Most NCPs could be much more proactive in resolving complaints by, for example, coming up with a process and timeline, encouraging a reticent company to engage, organizing joint meetings, taking the lead in seeking common ground in discussions, obtaining information from other institutions and actors, and visiting the host country.

By understanding how NCPs have handled cases to date, NGOs that are considering filing a complaint will be better equipped to anticipate and overcome any obstacles they may face. Keeping in mind that NCPs can suddenly decide to do something groundbreaking, there are a number of procedural issues and/or potential difficulties NGOs should understand when filing a complaint:

- 2.1 There are two phases to the complaint process after it is submitted.** The first phase – the 'initial assessment' phase – is the point from submission up until the NCP accepts or rejects the complaint. During the second phase – the 'dialogue' or 'mediation' phase - the NCP will act as a mediator between the complainants and the company to find a solution to the problems raised.
- 2.2 There are no rules or timelines NCPs must follow after a complaint has been filed.** The Investment Committee has not created basic administrative procedures NCPs must follow when complaints are filed. In fact, NCPs have a great deal of flexibility in how they handle complaints – so much that some NCPs have been able to avoid ever formally accepting a complaint. However, there are procedures that can be seen as best practice: the Australian NCP has developed timelines that recommend 30 days for the initial assessment phase and 90 days for the second (mediation) phase. OECD Watch recommends that NGOs should try to establish a reasonable timetable with the NCP and the company at the start of mediation.
- 2.3 Writing the complaint is only the first step in the writing process.** NGOs should anticipate having to write responses to counter the company's written or verbal claims and/or to provide information to the NCP throughout the process. This can take considerable time and require a sustained knowledge of the case – an important consideration if there is a lot of staff turnover. NGOs need to be able to provide this information, often within a short period.
- 2.4 The process will likely take months and possibly more than a year, to conclude.** Many complaints have lingered for an excessive amount of time, which means NGOs should proactively follow-up to ensure their case is being handled in a timely manner. In addition, NGOs might have to build alliances with other NGOs and recruit the support policy-makers (e.g. members of Parliament) in cases where the NCP is not handling their complaint properly.

Typically, the NCP will acknowledge receipt of the complaint, possibly by calling or e-mailing, but it can take weeks or even months. OECD Watch recommends following-up after 14 days to confirm receipt of your complaint.

- 2.5 The company is not required to participate if a complaint is accepted by the NCP.** While governments have obligations to implement the Guidelines, they are voluntary for companies. There is nothing that compels companies to engage in the NCP complaint procedure. To date, NCPs seem to accept these refusals without impressing on companies that they should participate. In 13 of the 45 NGO complaints submitted as of September 2005, companies refused the NCP's

offer of a dialogue. In one complaint filed with the US NCP, several companies never responded to correspondence offering to facilitate an informal dialogue.

OECD Watch's position is the NCP should encourage the company to participate and if that fails, the NCP should still issue a statement on the case. NCPs should also issue a statement if the company engages, but then decides to pull out.

**2.6 During the initial assessment phase, NCPs might not actually assess the company's alleged breaches.** The Procedural Guidance states the NCP should “[m]ake an initial assessment of whether the issues raised merit further examination”. In other words, the NCP will decide whether to accept the case because the allegations appear to reflect a breach of the Guidelines or the issues are serious enough to pursue the case, even if there is uncertainty on whether a breach may have occurred. Some NCPs, however, will offer to facilitate a dialogue without ever making any kind of judgement on whether the company has breached the Guidelines at any point in the process.

OECD Watch's position is 1) the initial assessment should be carried out within a specified time scale and according to clear rules on process; 2) the acceptance or rejection of each part of a complaint should be made against a set of transparent criteria, including reasons for the NCP's decision and that initial assessment should be published.

In addition, the NCP could take weeks or months to conduct the initial assessment. There have been cases where the NCP has taken a year or more to notify complainants of its decision to accept or reject their case. In two instances, the complainants discovered the NCP had rejected their case by reading the OECD Investment Committee's Annual Report. OECD Watch recommends following-up after 30-45 days to confirm whether the case has been accepted or rejected. If the NCP has not made a decision, continue to follow-up.

**2.7 After a complaint has been accepted, complainants are obligated to adhere to the Guidelines' "confidentiality principle".** The confidentiality principle means the parties to a complaint cannot reveal: 1) information learned; or 2) correspondence or documentation received from the other party after a complaint has been accepted by the NCP, except if the party agrees otherwise. It is meant to protect sensitive business information and other information such as the identity of individuals involved in the case, if necessary.

NGOs may face the problem of unfair treatment, for example, the NCP may not share information or documents it has received from the company. There are cases where documents have been shared freely among the parties to a complaint and instances where they have not. Companies are known to have provided information to the NCP, but have asked for it to be kept confidential, claiming confidential business information. In other instances, documents have been withheld from complainants even though it was unlikely they contained confidential business information.

In OECD Watch's view, all documents received from any party to a complaint should be made available to the other parties, unless there are strong reasons otherwise and the reasons for withholding information should be explained in writing. It is not acceptable for NCPs to clear a company based on evidence/documentation the complainant has not been allowed to see.

For information on the Guidelines' confidentiality principle, see “The Confidentiality Principle, Transparency and the Specific Instance Procedure” (2006).

**2.8 NCPs may seek information from other institutions/actors or possibly visit the host country.** NCPs have stated repeatedly that their role is to facilitate resolutions, not to investigate companies' compliance with the Guidelines. However, several NCPs have sought additional information when handling complaints.

When the NCP proposes a field visit, some issues to consider include ensuring the time spent carrying out interviews should be equitable and fair. Also, arrangements for the visit should be independent of both parties. OECD Watch recommends that a "Terms of Reference" for the trip should be: 1) negotiated and agreed to by all parties; 2) translated, if necessary; and 3) made available to all interviewees prior to the NCP's visit.

**2.9 Complaints that involve a company's suppliers could be rejected for the lack of an "investment nexus".** After the Guidelines were revised in 2000, a statement on companies' supply chain responsibilities was included in Chapter 2, Paragraph 9: "Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines".

However, in 2003, the Investment Committee issued a statement on supply chain cases that greatly reduced the Guidelines' scope. The statement argued that since the Guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises*, the Guidelines only apply to investments or when an "investment nexus" exists. According to a June 2003 statement, an investment nexus exists when the multinational enterprise has some degree of influence with their business partners or has an investment-like relationship with its suppliers. However, the Investment Committee has not provided any basic criteria to determine when an investment nexus exists.

NCPs are supposed to consider supply chain complaints on a case-by-case basis, though in practice, NCPs have cited the lack of an investment nexus to reject many complaints. OECD Watch is challenging this practice and is calling for a broad and flexible interpretation of companies' supply chain responsibilities.

See "The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility" by OECD Watch.

**2.10 NGOs cannot appeal to the OECD's Investment Committee if their complaint is rejected or if they are unsatisfied with the outcome.** Only NCPs, the Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC) can request the Investment Committee to provide further clarification on issues raised in a complaint or on how the NCP handled a complaint. Several NGOs have sought clarification from the Investment Committee, but these requests have been rejected.

**2.11 NCPs do not have a formal monitoring role.** In a couple of cases, NCPs have taken into consideration the need for monitoring, but NCPs do not have a formal monitoring role. For example, in the final statement concerning the Nam Theun II dam project in Laos, the French NCP offered to hold annual meetings with the company. The NCP's statement on the GSL (Australia) case also assisted with external monitoring of agreed commitments, because the statement and agreed outcomes were forwarded to the relevant organisations and individuals with an ongoing interest in monitoring the company's operations (see Chapter 6).

## Chapter 3: NCPs' statements

At the conclusion of the NCP complaint procedure, the NCP should issue a statement on the outcome. However, the substance, quality and whether an NCP statement is produced has been one of the most controversial aspects of the complaint process for NGOs. While most NCPs currently refuse to state whether the Guidelines have been breached, some useful recommendations have been made in NCP statements, but these are exemptions. Some NCPs have adopted a *de facto* policy of never issuing statements. Others have produced final statements, but did so without consulting the complainants, which is clearly unacceptable.

According to the Procedural Guidance, if mediation fails, the NCP is required to reach a determination: "If the parties involved do not reach agreement on the issues raised, [the NCP will] issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines".<sup>6</sup> Few NCPs are prepared to do so, however.

NCPs can also choose to withhold some or all information about the complaint from the public, including the name of the company, without explaining why or what information is being withheld. They can do all these things by claiming their secrecy in a case is in "the best interests of effective implementation of the Guidelines".

OECD Watch's position is when mediation fails to produce a mutually agreeable outcome, the NCP statement should record a breach of specific provisions of the Guidelines or clear companies where there is no breach. When mediation has been successful, OECD Watch's position is the NCP should publish a statement that is drafted in consultation with all parties, which includes the following components:

- State where a breach of the Guidelines has occurred or exonerate the company when there is no breach.
- The allegations of the complainant and the response of the company to each allegation.
- Issues to be determined.
- Information gathered by the NCP.
- Relevant information the NCP has been unable to obtain and the reason why it could not be obtained.
- Reprimand of any party who has failed to cooperate in any way.
- Findings as to which allegations are substantiated and which are not. In some complaints, there are factual disputes between the parties that remain unresolved. It is only once it is clear which allegations have been substantiated, if any, that the NCP can move onto the next stage of applying the Guidelines to the facts.
- If any allegations are substantiated, the statement must then set out which conduct or activities amount to a breach of the Guidelines and which do not and why.
- Clear, specific recommendations, which relate to each allegation that amounts to a breach.<sup>7</sup>

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<sup>6</sup> Procedural Guidance, C. Implementation in Specific Instances, 3.

<sup>7</sup> RAID and The Corner House, "The UK National Contact Point's Promotion and Implementation of the [Guidelines]: Response to the Stakeholder Consultation", January 2006, p. 15.

## Chapter 4: Instructions for writing a complaint

The Guidelines do not provide any instructions on how to write a complaint. However, the Commentary for the Procedural Guidance<sup>8</sup> does note the following issues NCP will take into account when a complaint is received:

- The identity of the party concerned and its interest in the matter (the NCP will not determine the validity of an issue based solely on the identity of the party raising the complaint);
- Whether the information provided supports the claim of a breach of the Guidelines;
- The relevance of applicable law and procedures;
- How similar issues have been or are being treated in other domestic or international proceedings; and
- Whether the consideration of the issue would contribute to the purposes and effectiveness of the Guidelines.

Keep in mind there is no set formula to follow, but there are core components that should be included in a complaint. This chapter provides guidance on what to include. Some sections include template sentences to assist you in drafting your complaint. The following should be included:

1. **Your identity, including a contact person, name of organisation, address, phone number, fax number and e-mail.**
2. **The name and location of the NCP.** To locate information about a particular NCP, go to [www.oecd.org/investment](http://www.oecd.org/investment). Click “Guidelines for Multinational Enterprises” on the left-hand side of the web page to find a listing of NCPs. After you locate the NCP’s details, OECD Watch recommends that you cross-reference this information with the NCP’s website to confirm accuracy. Also, look for additional instructions for submitting complaints to that particular NCP. The Australian NCP, for example, recommends complainants complete a form it has developed.

For example: Mr. Vernon McKay, Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises, Department of Foreign Affairs, 125 Sussex Drive, Room C6-273, Ottawa, Ontario, K1A 0G2

3. **Open by identifying yourself and your purpose for writing.**

For example: “Ecuador-based Defensa y Conservacion Ecologica de Intag (DECOIN) and Canada-based Friends of the Earth/Les Amie(e)s de la Terre and MiningWatch Canada (the “Complainants”) request that the Canadian National Contact Point ascertain whether Ascendant Copper Corporation is adhering to the following sections in the OECD’s *Guidelines for Multinational Enterprises* and facilitate a resolution with respect to the company’s “Junin” project located in Cotacachi County, Imbabura Province, Ecuador.”

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<sup>8</sup> OECD Guidelines (2000), Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 14.

4. **List the chapter(s) and paragraph(s) in the Guidelines the company is breaching.** Also, be sure to read the Commentary and Clarifications to ensure your understanding of the official text is accurate.

For example: “Chapter III, §4e, §4f, and §5c for failing to disclose or disclosing misleading information to the public and potential shareholders regarding 1) material foreseeable risk factors, 2) issues regarding stakeholders, and 3) relationships with stakeholders.

5. **Provide relevant background information about yourself and explain your interest in the case.** Any ‘interested party’ can file a complaint, such as a community impacted by the company’s activities, employees or an NGO in the company’s home country that is representing those affected by the company’s activities in the host country. NCPs do not accept or reject a case solely on the identity of the party raising the complaint, but it is one aspect they consider.

For example: “NGO works with communities impacted by *company’s* activities since *date*” or “NGO is engaged in promoting *what* on behalf of *whom*”.

6. **Provide relevant background information on the company’s corporate structure and location.**

For example: “The *company* is headquartered *where* and operating *where*. *Company* is *percent* owned/controlled by *company*.”

7. **Provide detailed information on the alleged breaches and developments to date.** Explain the details of the company’s alleged violations (what, when, where, who is involved and/or affected). NGOs should make sure that the information (and supporting evidence) in the complaint is substantial, credible and demonstrates the complainants have expertise and knowledge of the issue(s). As much as possible, be concise when explaining the issues. Provide the necessary information so readers understand the problem and append supporting documentation (e.g., studies, newspaper articles, letters, etc.) rather than duplicating everything in the complaint.

If there are supply chain issues, explain these in detail, especially the relationship between the companies. For example, what percentage of the supplier’s output is for the company? Is there a long-term contract between the company and the supplier? What is the company’s market position and how is this relevant to the supplier’s production? It may not always be possible for NGOs to outline the exact nature of the supply chain. For example, the number of suppliers and share of volume purchased from a supplier. The more information you can provide, the better. However, lack of information should not stop NGOs from filing a complaint, as some information about a company’s supply chain may be impossible to locate. The relevant supply chain provision in the Guidelines is Chapter II, § 10.

8. **Describe any previous contact with the company, other relevant actors and/or institutions.** Also, include information on the company’s response(s). For example, explain how earlier attempts to deal with the company directly have failed. NGOs are advised to keep a log with information on key developments, copies of letters or e-mails received or sent, meetings (including participants), etc. and their outcomes. This information could be very helpful in developing or supporting a complaint.

9. **Note if any information provided is confidential such as the names of individuals, sources of evidence or any documentation that cannot be shared with the company.** In some cases, it may be important to keep the names of the people affected or workers confidential in order to avoid reprisals. Confidential information should be clearly noted and accepted by the NCP before handing over this information.
10. **If it makes strategic sense, explain your demands, including what you think the company needs to do to resolve the problem.** In some cases, it may be worthwhile to explain what you think the company needs to do to resolve the problem in the complaint. If so, be as specific as possible. In other cases, it may be better to wait to have this discussion with the NCP and company after the case has been accepted. There could be scenarios, for example, where it would be better to wait to see how the company reacts to the breaches you have alleged in your complaint.
11. **Explain your expectations of the NCP.** Explain how the NCP can handle your case in a way that is procedurally fair, timely and transparent.

For example: “The Complainants request that the Dutch National Contact Point ascertain whether Royal Dutch/Shell’s (Shell) has violated the above mentioned sections in the OECD Guidelines for Multinational Enterprises with respect to the Sakhalin Energy Investment Company’s “Sakhalin II” project and facilitate a resolution to the issues raised in this complaint.”

12. **Provide a list of appendices.** Number or letter each attachment for ease of reference.

For example: “Appendix A” or “Appendix 1”. As each appendix is referenced in the complaint, make the relevant notation. For example, “(see Appendix A).”

13. **Note any other recipients of the complaint.** Other recipients could include host country officials, home country officials, OECD Watch, other NGOs, and/or the Trade Union Advisory Committee. OECD Watch recommends that NGOs forward a copy of their complaint to OECD Watch at [info@oecdwatch.org](mailto:info@oecdwatch.org). It is also recommended that complaints dealing with labour issues be copied to the Trade Union Advisory Committee to the OECD at [tuac@tuac.org](mailto:tuac@tuac.org).

Lastly, a note concerning language and translation of documents: The complaint should be written in the national language of the NCP receiving the case. If the complaint will be filed with several governments, consider writing it in a language that is understood by all NCPs. However, if it is too burdensome to write the complaint in another language (or to provide evidence in another language), submit the complaint and evidence in your own language. Keep in mind, however, not translating the complaint could result in additional delays. In addition, complainants should ask the NCP and company to translate their written documentation, though there is nothing procedurally that compels either to accommodate this request.

## Chapter 5: Complaint concerning First Quantum Minerals in Zambia

National Office  
294 Albert St., Suite 300  
Ottawa, Ontario, Canada K1P 6E6  
613-237-5236 Fax 613-237-0524  
www.oxfam.ca



July 16, 2001

Mr. Vernon McKay  
Department of Foreign Affairs and International Trade  
125 Sussex Drive, Rm. C6-273  
Ottawa, Ontario K1A 0G2

Dear Mr. McKay,

I am writing to you in your capacity as Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises. Oxfam and its partners are concerned that the company Mopani Copper Mines, owned by the Canadian company First Quantum, may have violated these Guidelines. In March 2000, First Quantum and the Swiss-based Glencore International AG acquired a 90 percent interest in Mopani, with Zambian Consolidated Copper Mines (ZCCM) retaining a 10 percent stake.

Attached are two short reports: an extract from Oxfam's 1998 *Report on Land Tenure Insecurity on Zambia's Copperbelt*, which gives some explanation of the background to the current dispute; and portions of a recent confidential briefing by the Zambian National Land Alliance concerning the tense situation of "squatters" on mine land in Mufulira, Copperbelt Province. The squatters, most of whom are ex-miners and have been long-term tenants of ZCCM, have been threatened with evictions by Mopani.

The company has refused to meet local community representatives and NGOs to discuss the situation and claims that the matter is to be left to a senior government official, the Permanent Secretary of Copperbelt Province. Oxfam and its partner NGOs on the Copperbelt believe that Mopani is failing to adhere to the OECD Guidelines in a number of critical areas.

Mopani, unlike Konkola Copper Mines (owned by Anglo American), is not adhering to World Bank Resettlement Operational Directive 4:30. As such it can be said to be in breach of paragraph 2 of the General Policies Chapter of the OECD Guidelines which calls upon companies, "to respect the human rights of those affected by their activities" in a manner "consistent with the host government's international obligations and commitments.

By refusing to dialogue with the affected communities, NGOs and other local representatives, Mopani is also failing "to foster a relationship of confidence and mutual trust between the enterprise and the society in which it operates" (Chapter II General Policies paragraph 7).

Mopani also appears to be in breach of the recommendations in Chapter III on Disclosure in that it has failed to disclose material information that affects the lives and livelihoods of the communities in question. Mopani has yet "to engage in adequate and timely communication and

consultation with the communities directly affected by the environmental health and safety policies of the enterprise and by their implementation” (Chapter V).

Inequitable distribution of land is a highly explosive issue in many parts of Africa. We are most concerned at the allegation that Mopani had threatened to call in the Zambian Army to evict the squatters. There are fears that once the elections are over, there may be a resort to violence.

We believe that effective action now by the Canadian and Swiss National Contact Points may help to bring Mopani to the negotiating table and achieve a peaceful and equitable solution to a longstanding problem.

I look forward to hearing from you about your efforts to remind First Quantum of their obligations, and to assist in resolving this matter peacefully.

Sincerely,

Joan Summers  
Manager of Programmes

## **Chapter 6: Global Solutions Limited (Australia) Pty Ltd case study**

### **Setting the scene**

This case study reviews the complaint against Global Solutions Limited (Australia) Pty Ltd (GSL) to assess the effectiveness of the OECD Guidelines complaint process as a tool to ensure companies understand and apply international human rights standards to their policies and practices. Submitted in June 2005, the complaint was the first complaint raised in Australia since the 2000 review of the Guidelines. It was lodged to coincide with increased public scrutiny of GSL operations, Australia's policy of mandatory detention, and the release of several independent reports that were critical of current practices.

### **The parties**

Five NGOs ('the Complainants') from three countries formed a partnership to bring the complaint against GSL. The groups include Australian-based Human Rights Council of Australia (HRCA), Children Out of Detention (ChilOut) and the Brotherhood of St Laurence (BSL); UK-based Rights and Accountability in Development (RAID); and Switzerland-based International Commission of Jurists (ICJ). Throughout the process, the Complainants also sought expert information and advice from approximately 20 individuals.

The multinational at the heart of the complaint – Global Solutions Limited (Australia) Pty Ltd (GSL) – is a wholly owned and incorporated Australian subsidiary of the UK parent company, Global Solutions Limited. The Australian headquarters of GSL are in Melbourne. GSL actively participates in Public Private Partnerships. In this context, GSL operates immigration detention facilities through a contract with the Australian Government Department of Immigration and Multicultural Affairs (DIMA). Many of these detention centres are in remote locations in Australia.

The Australian NCP holds the position of General Manager, Foreign Investment and Trade Policy Division, The Treasury, based in Canberra.

### **Details of the complaint**

The complaint was filed in June 2005 with the Australian NCP, the UK NCP, and was referred to at the OECD Investment Committee NCP Annual Meeting in Paris. The complaint alleged that GSL had breached the Human Rights and Consumer Interests Provisions of the Guidelines.<sup>9</sup> Specifically, GSL:

- In detaining children, was complicit in violations of the 1989 Convention on the Rights of the Child and the 1996 International Covenant on Civil and Political Rights, particularly where there is no legal limit on the length of the detention;
- Was acquiescing in the mandatory detention of asylum seekers and was therefore complicit in subjecting detainees to a regime of indefinite and arbitrary detention in contravention of Article 9 of the 1996 International Covenant on Civil and Political Rights and Article 9 of the

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<sup>9</sup> OECD Guidelines, Chapter II, §2 and Chapter VII, §4 of Chapter 7.

1948 Universal Declaration of Human Rights. Furthermore, this regime is allegedly punitive in nature and is thus in contravention of Article 31 of the 1951 Refugee Convention;

- Did not adequately respect the human rights of those detained in its operation of Australian immigration detention facilities; and
- Was misstating its operations in a way that was ‘deceptive, misleading, fraudulent, or unfair’ by claiming to be ‘committed to promoting best practice in human rights in its policies, procedures and practices’.<sup>10</sup>

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*“It is reasonable to conclude that GSL as the manager of the immigration facilities has perpetrated and/or participated in [these] human rights violations”.*<sup>11</sup> – The Complainants

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*“It is clear that GSL (Australia) knowingly entered into a contract when the Government of Australia’s policy of mandatory detention of asylum seekers and the detention of children had already been the subject of international public criticism by human rights bodies including the Human Rights and Equal Opportunity Commission and the United Nations Working Group on Arbitrary Detention”.*<sup>12</sup> – The Complainants

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## **Lodging the complaint**

When the complaint was submitted, the Complainants put out a press release, which generated considerable media attention and resulted in questions being raised in the Australian Parliament. The submission was substantial and contained supporting evidence from credible, independent reports, including:

- The Australian Human Rights and Equal Opportunity Commission report “The National Inquiry into Children in Immigration Detention Report”;
- The United Nations Working Group on Arbitrary Detention’s report; and
- A report by P.N Bhagwati, regional Adviser for Asia and the Pacific, the United Nations High Commission for Human Rights.

The NCP acknowledged receipt of the complaint, seven days after receiving it and indicated that an initial assessment would be made within 30 days. The procedures the NCP would undertake to make this assessment were clearly stated and understood by both parties. This was an important indicator, early in the complaint, that the NCP wanted to encourage a timely and transparent process.

During the initial assessment period, the Complainants (and NGO-nominated experts) met with the NCP to discuss the issues, provide clarification and convince the NCP that the OECD Guidelines complaint mechanism was not being used to question Australian Government policy on mandatory detention. At the invitation of the NCP, the Complainants were invited to provide supplementary evidence of alleged breaches of the Guidelines by GSL. The Complainants provided the following:

- Additional independent reports (Palmer Inquiry findings, Amnesty International report “The impact of indefinite detention-the case to change Australia’s mandatory detention regime” and the Auditor Generals report);

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<sup>10</sup> Submission to the ANCP concerning Global Solutions Limited (Australia) Pty Ltd, page 16, Brotherhood of St. Laurence (for the complainants), June 2005.

<sup>11</sup> Ibid, p. 9.

<sup>12</sup> Ibid, p. 11.

- First-hand experience and observations from refugee advocates and community visitors to detention centres; and
- Information on the GSL DIMA contract and service provision requirements.

The NCP's initial assessment confirmed that the evidence warranted further investigation of the complaint as a 'specific instance'. However, the NCP imposed limits on the procedure by determining that it would not deal with underlying issues about compliance with human rights standards by the State itself in determining the operating conditions of the enterprise.

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*"It would be inappropriate for the NCP to accept those parts of the submission that seek to address the Australian Government's mandatory detention policy...nevertheless, on the information contained in the supplementary material and public sources, I am prepared to consider further matters that can be shown to relate directly to the conduct of GSL and are within GSL's control, that allegedly breach the Guidelines... I invite the complainants to participate in the next stage of the specific instance procedure to ascertain in some depth those GSL practices that demonstrably fall short of the obligations imposed on enterprises by the Guidelines".<sup>13</sup> – Australian NCP*

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Throughout the duration of the complaint procedure, the Complainants maintained the responsibilities of GSL to understand, accept, and apply international laws and human rights standards in keeping with the supranational applicability of the OECD Guidelines. They also highlighted the issues of implementing the Guidelines that arise when public private partnerships form the basis of a multinational operation.

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*"The complainants reaffirm that as a Multi-National Enterprise, agreeing to operate in compliance with OECD Guidelines, GSL is obliged by the OECD Guidelines to comply with international human rights standards, whatever the position of the national government. It is neither sufficient nor consistent with the operation of the OECD Guidelines for GSL simply to rely on the views of a national government in relation to compliance with international human rights standards".<sup>14</sup> - The Complainants*

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*"This raises the issue of 'public private partnerships' and implementation of the OECD Guidelines. Implementation of DIMIA direction and policies by GSL does make GSL complicit where violations arise from that implementation. This case has identified, even at this stage, that 'blurred lines of responsibility' resulting from public private contractual arrangements can significantly impede the implementation of the Guidelines if enterprises choose to 'diffuse' their human rights operational responsibilities based on contractual arrangements with government and compliance with national laws".<sup>15</sup> – The Complainants*

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### **The case in progress- the specific instance**

Once the specific instance was agreed to by both parties (GSL considered, but chose not to seek legal advice), there was a considerable amount of information exchange between the parties (via the NCP). This included policies, protocols, guidelines and contractual agreements provided by GSL to contest the allegations raised in the complaint. What resulted was a lengthy process of verification and liaison between the Complainants and community experts across different countries and time zones.

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<sup>13</sup> ANCP letter to the Complainants, 1 August 2005.

<sup>14</sup> Complainants letter to the ANCP, 2 December 2005.

<sup>15</sup> Ibid.

This exchange of information was a precursor to the mediation session. While it was a time consuming process, it contributed to a successful mediation as both parties had already read and evaluated the complex, technical and lengthy material that was exchanged. From the outset, the Complainants considered mediation to be the most effective and time efficient forum for achieving their objectives. The willingness of GSL to participate and the facilitation of the NCP were critical in the overall outcomes of the case.

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*“Our objective is to promote adherence to international human rights standards and corporate social responsibility through the implementation of, and accountability to, the Guidelines and to contribute to GSL management practices that enhance the wellbeing and uphold the human rights of detainees”.*<sup>16</sup> - The Complainants

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From the outset the NCP made it clear he was seeking a mediation process that provided an opportunity for both parties to reach negotiated outcomes. The NCP developed an agreed list of issues (taken from the complaint and exchange of information between the parties) to form the basis of the mediation agenda and invited both parties to comment on the agenda and prioritise the issues for discussion.

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*“While the complainants may see that some of the issues have a higher priority than others, I do not believe that this is an appropriate exercise for GSL to be involved in. All the issues [raised] are important to us. It is unlikely that we will dispute any suggestions they [the complainants] make for prioritising the issues”.*<sup>17</sup> – GSL

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Once mediation was agreed to, the Complainants began their strategic planning. Practical recommendations were developed that would address GSL operations and promote understanding and implementation of international human rights standards. An opening statement was prepared that reiterated concerns held by the Complainants regarding the narrowing of the scope of the complaint, as well as confirming the “engagement in the process in good faith” and a “commitment to seek both acknowledgement of problems, but also solutions based on international standards”.<sup>18</sup>

## **Mediation**

The mediation was facilitated by the NCP and held in Canberra, over a four and half hour period. GSL was represented by their Managing Director and Director, Public Affairs. The Complainants were represented by the Brotherhood of St Laurence, The Human Rights Council of Australia and the International Commission of Jurists (an Australian based ICJ Commissioner). No lawyers were involved for either party. The agreed agenda provided the framework for discussion; however, there was adequate flexibility to allow frank and robust discussion of related issues. The mediation session was successful, in part, as written information had been exchanged allowing maximum focus on exploring areas of agreement and documenting negotiated outcomes. Valuable discussion time was not wasted in coming to grips with new material and issues.

## **Outcomes and lessons learnt**

This complaint achieved useful outcomes and clearly demonstrates the benefits that can be gained by filing a complaint using the OECD Guidelines’ complaint mechanism. In this instance, despite the

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<sup>16</sup> Ibid.

<sup>17</sup> Letter from GSL to the ANCP, 14 October 2005.

<sup>18</sup> Complainants opening statement at the GSL mediation, 28 February 2005.

limitations imposed on the scope of the complaint, it was possible to conduct a successful mediation and engage in discussion to explore areas where GSL could exercise discretion, make choices, and look at ways they could ensure operations were carried out within a framework of human rights. From an early stage, the process was facilitated by the NCP to ensure that the complaint mechanism did not result in ‘winners’ and ‘losers’. A process of non-adversarial dialogue and engagement was encouraged and embraced by both parties.

Practical solutions (based on the complainant’s recommendations) were agreed on and documented. Of particular significance was the willingness of GSL to ensure a greater role for external human rights experts and community representatives in areas such as staff training, monitoring and auditing and on the community advisory committee. This will improve transparency and accountability, assist in monitoring compliance with a human rights framework, and ultimately improve conditions for detainees. The complainants adopted a pragmatic view on a range of issues, without compromising their core principles and objectives.

A further significant outcome was the willingness of the NCP to disseminate draft copies of its final statement and seek comment and suggestions from both parties. In addition, all ‘agreed outcomes’ reached at mediation were included in the final statement. A copy of the statement was distributed to organisations with an interest in GSL’s management of immigration detention centres. This will provide some opportunity for monitoring implementation of the agreed outcomes, but it did not meet the Complainants’ interest in the NCP participating in this function.

The success of the complaint process was partly due to willingness of GSL, to engage in good faith in an attempt to define those areas where it could exercise choice and try to ensure its operations are compatible with human rights. The Complainants also contributed to the success through their willingness to comply with agreed procedures, to articulate a clear objective in raising the complaint, in developing practical recommendations, and in demonstrating the benefits of engagement. In this instance, the NCP showed a genuine commitment to the purposes of the complaint mechanism and actively promoted a timely and transparent process.

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*“Both parties wish to thank the office of the NCP for the process to date, and in particular the mediation. This has created new opportunities for GSL to engage with the non-government sector and for enhanced understanding between the parties. Further, it has identified processes for the future to assist in the ongoing engagement between GSL and the community”<sup>19</sup> - GSL and the Complainants*

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All documents relevant to this complaint, including the complaint, supplementary evidence, mediation opening statement and the NCP’s final statement, are available on the Brotherhood of St. Laurence’s website at [www.bsl.org.au](http://www.bsl.org.au).

To view the complaint:

[http://www.bsl.org.au/pdfs/Subm\\_to\\_AustnNCP\\_re\\_OECD\\_MNE\\_guidelines\\_and\\_GSL.pdf](http://www.bsl.org.au/pdfs/Subm_to_AustnNCP_re_OECD_MNE_guidelines_and_GSL.pdf)

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<sup>19</sup> Letter to ANCP from GSL and the Complainants, 6 April 2006.

## **Chapter 7: Summary of the OECD Guidelines**

The following summary of Chapters I-X is provided for reference purposes only and should not be relied upon for developing complaints. NGOs that are considering filing a complaint are strongly advised to read all sections of the Guidelines, including the Preface, Chapters I-X, the Commentary and Clarifications and the Procedural Guidance. To download the OECD Guidelines, go to: [www.oecd.org/investment](http://www.oecd.org/investment). Click “Guidelines for Multinational Enterprises” on the left-hand side of the web page.

### **Chapter I – Concepts and Principles**

- Global applicability of the Guidelines
- Voluntary and non-legal nature of the Guidelines
- Definition of multinational enterprise and applicability of the Guidelines to all parts
- Guidelines apply equally to foreign and domestic enterprises and reflect good practice for all
- Expectations of small and medium-sized enterprises
- Government protectionism and questioning a country’s comparative advantage
- Obeying the domestic laws of host countries
- Equal treatment of foreign and domestic enterprises by governments
- Dispute resolution between enterprises and governments
- Governments’ obligations to create a National Contact Point to promote adherence to the Guidelines

### **Chapter II – General Policies**

- Obeying policies of the host country and considering views of stakeholders
- Contributing to the achievement of sustainable development
- Respecting human rights consistent with host governments’ obligations and commitments
- Encouraging local capacity building
- Encouraging human capital formation
- Refraining from seeking or accepting exemptions to regulatory requirements
- Upholding good corporate governance principles and applying good corporate governance practices
- Adopting self-regulatory practices and management systems that foster trust
- Promoting employee awareness of, and compliance with, company policies
- Protecting “whistle-blowers”
- Abstaining from improper involvement in local political activities

### **Chapter III – Disclosure**

- Disclosing information on activities, structure, financial situation and performance
- Applying high-quality standards for disclosure, accounting and auditing practices
- Applying high-quality standards for non-financial information including environmental and social reporting
- Disclosing basic company information
- Disclosing material information
- Disclosing information on value statements or codes of conduct including information on social, ethical and environmental policies
- Disclosing information on systems for managing risks and complying with laws and on statements or codes of conduct
- Disclosing information on relationships with employees and other stakeholders

## **Chapter IV – Employment and Industrial Relations**

- Respecting employees' right to organize and engaging in constructive negotiations
- Abolishing child labour
- Eliminating forced or compulsory labour
- Non-discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin
- Providing facilities for effective negotiation of collective bargaining agreements
- Providing information for meaningful negotiation on employment conditions
- Promoting consultation and cooperation among employers and employees
- Providing true and fair information on company performance
- Observing standards on a level equal or better to comparable employees in the country of operation
- Implementing measures to ensure the health and safety of employees
- Employing local personnel and providing training
- Providing reasonable notice of major changes such as facility closure or large-scale dismissals
- Unfairly influencing negotiations on employment conditions or employees' right to organize
- Negotiating on matters of mutual concern and authorizing management to take decisions

## **Chapter V – Environment**

- Taking account of the need to protect the environment, public health and safety (EH&S) and contributing to the wider goal of sustainable development
- Maintaining an environmental management system including evaluation of EH&S impacts, establishment of objectives or targets to improve performance and verification of progress towards EH&S objectives or targets
- Providing information on EH&S impacts to employees and the public
- Consulting with communities on EH&S policies and their implementation
- Evaluating activities, goods and services for their EH&S impacts over the full life cycle
- Taking precaution to prevent serious harm to the EH&S
- Maintaining plans to prevent or reduce serious environmental and health damage and maintain systems to report to authorities
- Continually seeking to improve environmental performance
- Researching ways to improve environmental performance
- Providing training to employees on EH&S matters including handling hazardous materials and preventing accidents
- Contributing to the development of environmental policies

## **Chapter VI – Combating Bribery**

- Not offering bribes to obtain or retain business or other undue advantage
- Not offering or giving into demands to pay officials or others a portion of a contract payment
- Maintaining a list of payments to public bodies and state-owned enterprises including making this information available to authorities
- Enhancing transparency of activities
- Promoting awareness of and compliance with company policies against bribery and extortion
- Maintaining management systems that discourage bribery and corrupt practices
- Implementing accounting and audit practices to prevent corrupt practices
- Not making illegal contributions to political candidates or parties including complying with domestic disclosure requirements

## **Chapter VII – Consumer Interests**

- Acting in accordance with fair business practices and ensuring safety and quality of goods and services
- Ensuring goods and services meet agreed and legally required standards for consumer health and safety
- Providing clear and accurate information to enable consumers to make informed decisions
- Providing transparent and effective procedures to address consumer complaints and resolving disputes
- Not engaging in activities that are misleading, fraudulent or unfair
- Respecting consumer privacy
- Cooperating with officials to prevent or remove threats caused by their products

## **Chapter VIII – Science and Technology**

- Ensuring activities are compatible with the science and technology (S&T) policies of the host country
- Contributing to the development of local and national S&T capacity
- Carrying out S&T development work in host countries and hiring people from host countries to encourage training
- Granting licenses for the use of intellectual property rights or technology transfer that are reasonable
- Cultivating relationships with educational and research institutions through collaborative research

## **Chapter IX – Competition**

- Obeying competition laws and regulations
- Not entering into anti-competitive agreements with competitors
- Not fixing prices
- Not making rigged bids
- Not establishing output restrictions or quotas
- Not sharing or dividing markets
- Taking into account the anti-competition laws of other countries whose economies could be negatively impacted by anti-competitive activity

## **Chapter X – Taxation**

- Paying taxes in a timely manner
- Obeying tax laws and regulations in every country with operations
- Providing information to authorities for determining tax obligations
- Applying the arm's length principle to the use of transfer pricing