

The UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises

Response to the Stakeholder Consultation

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Response to the Stakeholder Consultation

Introduction

Rights and Accountability in Development (RAID) and The Corner House welcome the Government's stakeholder consultation and the Government's recognition that "all parties would benefit from greater clarity in the NCP's [National Contact Point] procedures for promoting and implementing the Guidelines".¹ Between them, RAID and The Corner House have experience of filing more than a dozen complaints with the UK and four other NCPs under the OECD Guidelines for Multinational Enterprises (the Guidelines). The complaints include the first case filed (concerning Anglo American), cases on the conduct of UK companies in the Democratic Republic of the Congo (DRC), and the Baku Tbilisi Ceyhan oil pipeline case, the latter of which prompted the first field visit by the UK NCP.

Both business and NGOs would like the Guidelines to grow in credibility and effectiveness. The Guidelines should be observed wherever a company operates.² In other words, a company based in an adhering country operating in any other country in the world (including non-adhering countries) is subject to the Guidelines. In conflict zones and in countries in the immediate aftermath of war, companies often operate in a legal and regulatory vacuum. In other countries, where the state's regulatory powers are weak or where governments are unaccountable, companies are required to do business in an environment that favours malpractice and breaches of the law. The Guidelines are unique among international corporate instruments in that, while they are not directly binding on companies, they are binding on adhering governments who are obliged to implement them. They are the only instrument of their kind to include a complaints mechanism, which, theoretically, can result in detailed guidance to businesses that operate in these difficult political environments.

The Chancellor, Gordon Brown, has said:

Where multinationals are unaccountable across boundaries – and sometimes appear more powerful than the developing countries in which they operate – businesses and government must do more to restore the right balance, increase stakeholder awareness and achieve cross border accountability....I urge more companies to follow the principles of good corporate practice laid out in the OECD's guidelines for multinational enterprises.³

RAID and The Corner House remind the Government of the recent Africa Commission's findings:

The regulatory gap is currently filled by various standards and codes for behaviour, such as the OECD Guidelines on Multinational Enterprises. Although voluntary, OECD governments are obliged to promote and ensure adherence to the guidelines. The G8 has already committed to 'encouraging the adoption of voluntary principles of corporate social responsibility by those involved in developing Africa's natural resources'. That obligation now needs to be implemented.⁴

¹ *Government Response to the All Party Parliamentary Group on the Great Lakes Region Report on the OECD Guidelines for Multinational Enterprises and the Democratic Republic of Congo*, July 2005, paragraph 8.

² *Guidelines*, I. Concepts and Principles, paragraphs 1 and 2.

³ Gordon Brown, speech at the September 2002 Commonwealth Finance Ministers Meeting.

⁴ *Our Common Interest: Report of the Commission for Africa*, section 5.2.4, paragraph 49.

The mechanisms for implementation of the OECD Guidelines through National Contact Points (NCPs) should be strengthened...⁵

The Africa Commission recommends that:

OECD countries should promote the development and full implementation of clear and comprehensive guidelines for companies operating in areas at risk of violent conflict, for incorporation into the OECD Guidelines on Multinational Enterprises.⁶

Moreover, RAID and The Corner House endorse the recent finding of the All Party Parliamentary Group on the Great Lakes Region (APPG):⁷

The purpose of an NCP statement is to provide recommendations, as appropriate, on the implementation of the Guidelines. As they are one of the few public pronouncements of NCPs, it is desirable that they also assist in fulfilling the NCPs' obligation to promote and enhance the profile of the Guidelines. As such, statements should provide sufficiently detailed guidance to the companies in question: businesses who have been wrongly accused should be exonerated by the NCP and equally those who are found to have breached the Guidelines should be clearly identified and given precise recommendations as to how to comply with them in the future.

⁵ Ibid., paragraph 50.

⁶ Ibid., B. Recommendations on Peace and Security, p.69.

⁷ All Party Parliamentary Group on the Great Lakes Region, *The OECD Guidelines for Multinational Enterprises and the DRC*, February 2005, paragraph 68.

The key requirements

Reaching a determination and making meaningful recommendations

- ⊙ **Determination of compliance in the final statement.** When implementing the Guidelines in specific instances, the NCP has a dual role. Firstly, the NCP is required to seek resolution through mediation. Secondly, should mediation fail, 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”.⁸ For those complaints where mediation fails, the final statement should record a breach of specific provisions of the Guidelines or exonerate companies where there is no breach. If the Government’s position is that the UK NCP is not required to make a determination, then NGOs cannot see that there is anything to be gained by continuing to engage with implementation of the Guidelines in the UK. Please see pages 7 – 8 and pages 15 – 17.
- ⊙ **An undertaking to commit to assessment.** To provide the NCP with greater authority, it is proposed that, once an initial assessment has been conducted, the parties to a complaint should sign an undertaking whereby they commit, should mediation fail, to a fair and impartial assessment and determination of the complaint. Please see page 17.
- ⊙ **Specific recommendations.** Should mediation fail, the recommendations to the company contained in the final statement must clearly relate to the issues that are the subject of the specific instance. Specific recommendations are necessarily based on the NCP’s opinion of whether or not a company’s conduct complies with the Guidelines and they should therefore set out what a company must do to bring its conduct in line with specific provisions. The NCP’s statement should also include recommendation to the Investment Committee of the OECD concerning areas in which the Guidelines could be clarified or improved. Please see pages 17 – 18.

Restructuring of the NCP office

- ⊙ **Independence of the NCP office.** Housing the NCP within the Department of Trade and Industry (DTI) inevitably raises conflicts of interest – or the appearance of conflicts of interest – between the NCP’s role as impartial adjudicator and the DTI’s role as promoter of UK business. RAID’s and The Corner House’s preferred option is that the NCP should be independent of any government department to guarantee impartiality and given the status of an ombudsman, with responsibility for both mediation and determining compliance. However, as a pragmatic first step in this direction, we are proposing that while mediation is carried out by the DTI-based NCP, unresolved complaints for determination should be referred to an inter-departmental panel chaired by a legally qualified person. This panel would also have powers to review the NCP’s initial assessment and rule on matters of procedure. Please see page 6.

⁸ *Procedural Guidance*, C. Implementation in Specific Instances, 3.

Improved procedures for examining complaints

- ⊙ **The need to overhaul the procedures for handling complaints.** Detailed procedures for conducting specific instances must be established to avoid confusion and the appearance of ad hoc decision making by the NCP in the future. As advocated at the recent APPG seminar on the Guidelines, a working group comprising representatives from NGOs, business and the trade unions should be established to review the outcome of the consultation and agree new procedures, in conjunction with Government. RAID's and The Corner House's proposals for improved procedures are detailed on [pages 21 – 24](#).
- ⊙ **Improvements in conducting initial assessments.** Initial assessments should be carried out within a specified time scale and according to clear procedural rules. 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. The initial assessment should be published. [Please see pages 8 – 10](#).
- ⊙ **The need to improve disclosure and increase transparency.** [Please see pages 19 and 22](#).
- ⊙ **Field visits.** The criteria against which the need for an NCP field visit is assessed must be clearly defined so that all deserving cases benefit from these fact-finding exercises. The purpose of the visit should be to establish the evidential basis for clarifying disputed facts. Missions should be conducted by the NCP in conjunction with experts, agreed by the parties, who have experience of working at the community level in developing countries. Rules should be formulated to govern, *inter alia*, the facilitation of the visit, the drawing up and dissemination of terms of reference, information gathering, and the conducting of interviews. [Please see page 20](#).
- ⊙ **The need for workable time scales.** Mediation in the majority of cases should take place within four months and determination within another four months. There should be an option for the NCP to permit time-bound extensions. The time scale for the resolution or determination of most complaints will therefore be within one year of filing. In exceptional cases, the parties may agree an alternative timetable at the outset. There should be a facility for the NCP to 'fast-track' aspects of a complaint. [Please see pages 13 – 14](#).
- ⊙ **There should be no blanket rule that parallel proceedings take precedence over the Guidelines.** There is no reason why parallel legal proceedings, either civil or criminal, should preclude the consideration of a complaint by the NCP. The only caveat is that the NCP should take instruction so as not to prejudice criminal proceedings. Indeed, by ensuring coordination between the NCP process and other proceedings, information on common issues can be shared effectively. To give other administrative proceedings precedence over the Guidelines sends out an undesirable signal about the status of the latter. The Guidelines require a robust, impartial and fair complaints mechanism in their own right. Neither criminal, civil nor administrative proceedings can ever decide on questions of compliance with the Guidelines. [Please see pages 10 – 12](#).

Structure of report

This Response to the Stakeholder Consultation uses (1) the headings employed in the original consultation document and takes the questions in order. It also addresses a number of assertions made in the consultation document (each referenced), some of which, although not the subject of further questions for discussion, raise serious concerns.

In addition, because the consultation document does not discuss procedures for handling a specific instance in any detail, a separate section (2) has been added in which RAID and The Corner House set out their proposals for improving current practice.

Attention is drawn throughout the text to what we regard as key requirements for strengthening effective implementation of the Guidelines.

1. The NCP's promotion and implementation of the Guidelines

A. Institutional arrangements

The Government proposes to formalise the current ad hoc group of Government departments that assist the NCP. However, the office of the NCP needs to be restructured to guarantee its independence. This is the position of the APPG. Regardless of the personal integrity of the NCP staff, housing the NCP within the Department of Trade and Industry inevitably raises conflicts of interest – or the appearance of conflicts of interest – between the NCP's role as impartial adjudicator and the DTI's role as promoter of UK business. Such conflicts are evident from DTI's own inputs into the inter-departmental discussions on individual cases. Commenting on the complaint brought against BP over the BTC oil pipeline, for example, the DTI is minuted as having “reminded” attendees at an inter-departmental briefing of the department's interest in the project: “The DTI reminded us that they have international oil and gas team based in Glasgow whose job it is to support the British companies involved in this project.”⁹ RAID and The Corner House suggest two options:

⊙ Independence of the NCP office

Option 1: An independent ombudsman. There is a case for restructuring the office of the NCP so that it functions independently outside of government. The APPG is promoting discussion of this idea. Our preferred option is for an ombudsman-style NCP with responsibility for both mediation and determining compliance where disagreement between the parties persists.

Option 2: Referral of unresolved complaints to an inter-departmental panel and independent chair. Recognising that a consensus may not currently exist for an independent ombudsman, the pragmatic solution is for: (i) the NCP to continue to be located within DTI for the time being (although recognising the Government's undertaking to formalise the current ad hoc group of government departments that assist the NCP) and to continue to undertake the initial assessment of complaints and to conduct the mediation phase and; (ii) should mediation be unsuccessful, the complaint to be heard by an inter-departmental panel chaired by a legally qualified person. This panel would also have powers to review, on appeal from either party, the NCP's initial assessment and rule on matters of procedure.

B. Information and promotion

QUESTION 1. How else could the NCP raise awareness of the Guidelines through cooperation with the business community, employee organisations, other non-governmental organisations and the interested public?

RAID and Corner House welcome the undertakings in the consultation document to raise awareness of the Guidelines, provided the Government acts on the consultation exercise to make the Guidelines an effective instrument of corporate accountability. We recommend:

- The NCP website is given much more prominence. At present, the NCP web pages are difficult to find within the DTI website. Ideally, the NCP should have a standalone website. The e-mail

⁹ ‘BTC Pipeline – Cross Whitehall Coordination Meeting, 22 My 2003 at FCO’, minutes released to Corner House under access to information request to Export Credit Guarantee Department (ECGD), 8 August 2005.

notification list is a useful tool. RAID and The Corner House also propose, in the event that a final statement is posted, the NCP should also include on its website links to the parties' reactions.

- The UK NCP information booklet should be revised, but in consultation with stakeholders. As part of its remit, the APPG-proposed Working Group on improving procedures should review the handbook.
- In order to improve the information provided to prospective investors (inward and outward), RAID and The Corner House suggest the following measures:
 - Adherence to the Guidelines should be a condition for all companies seeking government finance for projects, export credits, subsidies and political risk insurance for both domestic and multilaterally- backed international projects.
 - To avoid confusion or duplication, all UK Government Departments should use the Guidelines as the minimum benchmark for responsible corporate behaviour.
 - The NCP should organize joint training sessions for business, with presentations by the NCP office, companies, unions and NGOs; that the NCP contact professional bodies as a means of disseminating information on the Guidelines to their members; and that the NCP considers placing adverts in appropriate trade journals promoting the Guidelines.
- There is also a need to promote understanding of the Guidelines within Whitehall. With input from other stakeholders, training should be provided to officials from other departments, especially those involved in the formalised inter-departmental grouping proposed in the consultation document.

C. Implementation in specific instances

The role of the NCP

In paragraph 4 of the consultation document,

The Government reasserts that the role of the NCP, as set out in the procedural guidance, is to “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.” Final resolution rests with the parties themselves.

However, this formulation fails to give equal weight to the requirement under the Guidelines to implement the Guidelines and make recommendations where the parties do not reach agreement (Procedural Guidance, C.3). While the Government claims that “it is not the role of the NCP to act as an adjudicator”, many NGOs and companies would argue that, if and when dialogue has been exhausted, a clear-cut adjudication is precisely what is required.

Indeed, the UK Government was initially robust in its view that the Guidelines were to determine the incompatibility or otherwise of company conduct. The official DTI handbook on the Guidelines states:¹⁰

¹⁰ DTI, *Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises – UK National Contact Point Information Booklet*, February 2001, p.15 and p.13 respectively.

There are provisions in the Guidelines for NCPs to make recommendations to enterprises and to issue a public statement on a particular business' behaviour in relation to the Guidelines. Also, national governments remain free, as part of their normal domestic political function, to name companies which they feel have behaved inappropriately. However, it is hoped that the constructive dialogue conducted through the NCPs will make such action unnecessary.

In the event of no agreement being reached, the NCP will issue a statement and, if appropriate, make recommendations on the implementation of the Guidelines. This may also apply if a company refuses to enter into discussions.

There is a logical contradiction between the Government's original position of determining compliance with the Guidelines and the position of avoiding making an adjudication adopted in the NCP consultation document. The fundamental question as to whether or not the role of the NCP is to reach a determination on compliance is in need of urgent clarification. If the Government's position is that the UK NCP is not required to declare a breach or else exonerate a company, then NGOs cannot see that there is anything to be gained by continuing to engage with implementation of the Guidelines in the UK. Presumably, responsible businesses, seeking to safeguard their reputations, would also question the value of entering into a process that failed to produce clear-cut determinations. Moreover, the failure to identify unacceptable practices means the Guidelines lose any positive effect they might have on deterring inappropriate conduct in the future.

The issue of adjudication and the determination of compliance is discussed further under *Statements, Q7 Are there issues not addressed in past statements that should be addressed in the future?*

Initial Assessments

QUESTION 2. What should be addressed in initial assessments?

The consultation document states: "The NCP is considering formalising its initial assessment of whether the issues raised in a complaint merit further examination". This is a basic requirement and RAID and The Corner House had understood that a formal initial assessment, notwithstanding its adequacy or otherwise, is already a part of existing NCP procedures, as outlined in the UK NCP's 'flowchart' for the consideration of specific instances under the Guidelines.

© Improvements in conducting initial assessments

Initial assessments should be carried out within a specified time scale and according to clear procedural rules. The acceptance or rejection of complaints, in whole or in part, should be made against a set of transparent criteria. Reasons should be given either for accepting or for rejecting each part of a complaint. The initial assessment should be published.

The UK NCP's handling of the initial assessment in the DRC cases demonstrates why a formal, fair and transparent procedure must be adhered to. RAID was effectively denied standing and prevented from acting as a complainant in one of the DRC cases altogether, although the UK NCP never formally notified RAID that its complaint had been received, nor that an initial assessment on admissibility had even taken place. The APPG was highly critical of RAID's exclusion. After a year of being blocked as a legitimate interested party, RAID was finally admitted as complainant in the remaining DRC cases.

RAID and The Corner House propose that revised procedures for initial assessment include:

Formal acknowledgement – The receipt of a complaint should be acknowledged in writing within three working days. It should be copied to the company within five working days. Both timeframes are specified in the existing NCP’s ‘flowchart’, but have not been adhered to.

Time scale – There should be a time scale for completion of the initial assessment. The existing flowchart specifies only that other relevant Whitehall departments and the DTI solicitor have 20 working days to comment on the complaint before the NCP makes the initial assessment. The recommendation is that there should be an overall timeframe of 25 working days for concluding an initial assessment. The NCP may extend this by a stated period if further information or clarification is required from the complainant.

Consultation – The existing flowchart also provides for “Other Competent Body to compile a report which will form the basis of NCP Assessment”. This provision is entirely opaque and RAID and The Corner House seek clarification as to which competent bodies the NCP is referring and whether any such reports have been compiled. It is proposed that the revised procedures provide examples of such competent bodies and that both parties to a complaint are notified, agree to their involvement and are provided with a copy of their report.

Assessment criteria – The UK NCP has not set down the criteria against which complaints, in whole or in part, are accepted or rejected. RAID and The Corner House are concerned that this should be rectified. The *Commentary on Implementation Procedures* gives some detail on what an NCP should take into account when making an initial assessment,¹¹ but this needs to be supplemented by the criteria used by the UK NCP. *Inter alia*, these should include:

(i) *Standing* – The NCP is asked to take into account “the identity of the party concerned and its interest in the matter” when conducting its initial assessment.¹² RAID and The Corner House seek confirmation from the Government that their standing as complainants is assessed on the basis of the public interest in the case being heard. Furthermore, the grounds of public interest are sufficient for NGOs to act as a complainant in a situation where serious allegations have been made by another organisation, such as the United Nations, which is not in a position to act as the complainant.

(ii) *Relevance* – The NCP should consider whether the complaint is material to the Guidelines. Hence, the NCP should set out which provisions of the Guidelines are engaged by each allegation made in a complaint. RAID and The Corner House broadly welcome the Government’s position that the NCP will not, except in exceptional circumstances, decline a complaint made under the Guidelines on the basis of uncertainty of their application. In this context, RAID and The Corner House also welcome the Government’s statement that “the UK NCP has never declined a case on the grounds that it does not involve an ‘investment link,’ and other NCPs have also commonly accepted what might appear to be a trade case in such circumstances”.¹³ However, it is pertinent to note that the UK NCP has, in its statement on the conduct of De Beers, determined that the actions of De Beer’s sightholders – companies ‘downstream’ in the supply-chain that buy rough diamonds from De Beers – were “outside the remit of the UK National Contact Point (NCP) acting under the

¹¹ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, paragraph 14: “...the NCP will take into account: the identity of the party concerned and its interest in the matter; whether the issue is material and substantiated; the relevance of applicable law and procedures; how similar issues have been, or are being, treated in other domestic or international proceedings; whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.”

¹² *Ibid.*

¹³ *Government Response to the All Party Parliamentary Group on the Great Lakes Region Report on the OECD Guidelines for Multinational Enterprises and the Democratic Republic of Congo*, July 2005, paragraph 24.

OECD Guidelines for Multinational Enterprises”.¹⁴ No further public explanation was given for this decision, but it appears to have been made because of the lack of an investment nexus.¹⁵ RAID and The Corner House seek assurances that the Government’s stated intention to accept such cases is meaningful, i.e., the issues raised will then be given due consideration.

(iii) *Supporting facts* – A complaint should be substantiated.

Reasons should be given for rejecting a complaint in whole or in part.

Timely release – The existing flowchart specifies that the initial assessment is first discussed with the company and only then discussed with the complainant, alongside any other information supplied by the company. RAID and The Corner House deem this to be unfair and recommend that both parties be provided with the initial assessment at the same time. The initial assessment should then be made public ten days later (see under Q3, below).

Right of appeal – Provision should be made to allow either party to a complaint to refer an initial assessment to the inter-departmental panel for review.

QUESTION 3. Should initial assessments be made public or provided only to the parties to a complaint?

RAID and The Corner House would welcome publication of the initial assessment. The confidentiality provision in the Guidelines relates only to the specific instance procedure post initial assessment (i.e. paragraphs C.1 and not C.2) and it is to be recalled that “transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public”.¹⁶

Parallel proceedings

In paragraph 7 of the consultation document,

‘The NCP asserts that parallel legal process, whether criminal or civil, will take precedence over a complaint made under the Guidelines. The NCP also asserts that it will forebear from handling a complaint where a parallel administrative proceeding is more likely to address the issues raised. It will assess this on a case-by-case analysis.’

The Investment Committee, in its discussion of Specific Instances and Parallel Legal Proceedings, refers to the relevant paragraphs in the Guidelines.¹⁷ There is no explicit statement that supports the UK NCP’s strong assertions, i.e., that parallel legal and administrative processes will take precedence over the Guidelines.

The Investment Committee sets out a number of reasons to justify NCP interventions even when there are parallel legal or administrative proceedings underway:¹⁸ NCPs may be able to promote global values; provide guidance to companies when there are shortcoming in host country legal and

¹⁴ UK NCP, *Statement on De Beers*, 26 April 2004.

¹⁵ In an e-mail of 17 May 2004 from the NCP to RAID, it is stated: “Our legal department has come back to me and I can now give you a response to your question. My original text was ‘De Beers has no management control of, nor shareholder interest in, the 3 companies named by the UN Panel. Consequently there can be no investment nexus and any activities undertaken by these companies in the DRC, in respect of De Beers, are outside the scope of the OECD Guidelines and the U.K. National Contact Point.’”

¹⁶ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, paragraph 19.

¹⁷ The paragraphs cited are: Preface, 1; I. Concepts and Principles, 1 and 7; Procedural Guidance, C.1. See OECD Investment Committee, *OECD Guidelines for Multinational Enterprises: Specific Instances and Parallel Legal Proceedings*, 3 March 2005.

¹⁸ See *ibid.*

administrative systems; communicate external perspectives to help countries attract more and better investment flows; and provide guidance to companies when law does not provide full descriptions of acceptable behaviour.

According to the *Report by the Chair of the Annual Meeting of National Contact Points* (15-16 June 2005), “‘parallel legal proceedings’ refer to ‘specific instances’ that deal with business behaviours that are also the subject of legal or administrative proceedings in the host country”.¹⁹ At the moment, NCPs differ on whether they should refuse complaints when the specific instance concerns business conduct covered by host country procedures. NCPs have also been asked to provide more information about how they deal with parallel legal procedures. The Investment Committee has not yet issued any formal guidance on this matter. In view of the shortcomings in the legal systems in many non-adhering host countries, RAID and The Corner House believe that domestic proceedings in such countries should not preclude the examination of specific instances by the NCP. This notwithstanding, the UK NCP’s assertion does not relate explicitly to host country proceedings (i.e., the country in which the company is operating), but would seem to relate to proceedings in the UK.

***Parallel proceedings compatible
with the NCP process***

A survey of NCPs handling of specific instances published in the NCPs’ 2003 Annual Report shows that specific instances considered in parallel with legal and administrative procedures are common. According to the Japanese NCP, when domestic legal proceedings are underway, NCPs should seek to collect relevant information and to develop an understanding of the issue.

In Belgium, in the case concerning Marks and Spencer, the NCP coordinated its consideration with another domestic process and felt that it had ‘value added relative to this process’.

In 2004, the French NCP looked into the declaration of bankruptcy by the French subsidiary of the Finnish company ASPOCOMP Oyj, despite the parallel signing of a redundancy scheme with its French employees.

[Source: *OECD Guidelines for Multinational Enterprises: Specific Instances and Parallel Legal Proceedings*]

The NCP is only required to assess a company’s adherence to the Guidelines, not to make a judgement on whether it has broken host country or UK laws. In many areas, the Guidelines go beyond national law and the implementation procedures offer the possibility of reaching settlements out of court. The current practice of many NCPs upholds the position adopted at the time of the 2000 review of the Guidelines that legal or other proceedings do not automatically rule out NCP proceedings.

In the context of the UK, a distinction can be drawn between, on the one hand, those cases where either criminal investigations are underway or criminal proceeding have begun and, on the other hand, civil and administrative proceedings. In criminal cases, there is a danger of prejudicing a prosecution that does not arise in the context of civil and administrative proceedings. However, the fact that companies and individuals, first and foremost, must abide by UK law does not mean that it is correct to infer that the NCP is automatically precluded from acting when a parallel criminal proceedings are contemplated or underway. Provided that the NCP process does not prejudice a prospective or ongoing criminal case, there is no reason why the NCP should not examine a complaint in parallel. Of course, the NCP office should work closely with investigative or prosecuting authorities, following directions where appropriate, to ensure that any NCP findings that may be of assistance are properly handled. It may be appropriate in some cases, when the outcome of legal proceedings is awaited, that the NCP defers the examination of relevant parts of a complaint on the grounds that evidence may emerge which could assist the NCP in making its assessment. Where charges are not forthcoming within a reasonable period, or if a criminal case collapses, then the NCP procedures should be resumed without delay.

¹⁹ See section VII.A, p.20.

The suggestion that the NCP “will forebear from handling a complaint where a parallel administrative proceeding is more likely to address the issues raised” causes particular concern. What constitutes such a process and why should it have precedence? Indeed, a proper assessment by the NCP of whether breaches of the Guidelines have occurred might provide the basis for constructive input into decisions being made about administrative proceedings. Moreover, it is apparent that such processes can never decide questions of compliance with the Guidelines or provide Guidelines-specific advice. The same argument applies to civil proceedings – for example, those considering defamation claims – as these too do not address questions of compliance, although information disclosed and the verdict reached may be relevant to the NCP.

☉ There should be no blanket rule that parallel proceedings take precedence

There is no reason why parallel legal proceedings, either civil or criminal, should preclude the consideration of a complaint by the NCP. The only caveat is that the NCP should take instruction so as not to prejudice criminal proceedings. Indeed, by ensuring coordination between the NCP process and other proceedings, information on common issues can be shared effectively. To give other administrative proceedings precedence over the Guidelines sends out an undesirable signal about the status of the latter. The Guidelines require a robust, impartial and fair complaints mechanism in their own right. Neither criminal, civil nor administrative proceedings can ever decide on questions of compliance with the Guidelines.

The cost of giving other proceedings precedence: recent cases that undermine the Guidelines

Two recent cases exemplify why a blanket ban on the consideration of complaints under the Guidelines when parallel processes are underway would be highly undesirable.

In its complaint concerning British Aerospace, Airbus and Rolls-Royce, The Corner House argued that the failure of the companies to provide the names and addresses of agents used on transactions with public bodies or state-owned enterprises to the Export Credit Guarantee Department (ECGD) is a violation of the Guidelines (chapter III. Disclosure). Yet the NCP, after considering the complaint admissible, then decided to defer its examination of the case on the grounds that a parallel consultation process being held by the ECGD – which had not ruled on the issue – took precedence. The Corner House maintains that, irrespective of the outcome of the ECGD process, the NCP's deferral of the case means that no one will be any the wiser as to whether such conduct is in breach of the Guidelines. Moreover, a decision by the NCP on compliance may have helped inform the ECGD in reaching its own decision on the case. Most importantly, it may also have helped inform multilateral discussions at the OECD about improving export credit agency anti-bribery procedures, where the question as to whether companies should be required to disclose agents' names to competent authorities such as export credit agencies, is a major issue.

In the Oryx case, the UK NCP ruled out consideration of much of RAID's complaint on the grounds that once a civil defamation case had been settled, the same matters, as raised by the UN Panel with the company, would be considered resolved under the Guidelines. The UK NCP took this view despite the fact that the defamation claim was settled out of court without a definitive ruling. Moreover, and this notwithstanding, RAID maintains that while certain facts and material information emerged in the court case, which the UK NCP should have examined, it was never the purpose of the court (nor the intention of the UN Panel) to decide the issue of whether or not the company was in compliance with the Guidelines. This was a matter for the UK NCP to determine and the existence of the court case should not have been used as a pretext for abdicating this responsibility.

Time scales

QUESTION 4. Should time scales be set for every aspect of implementation? If so, what should these time scales be?

Assuming the possibility of a two-stage process (mediation, in unresolved cases followed by determination of the complaint), NGOs recommend that time scales should be adopted in accordance with the following rules:

Mediation phase

1. The presumption is that, in all cases, the final mediation should take place within four months of the filing of the complaint.
2. With the consent of the parties, the mediation could be extended to a maximum of eight months. Unilateral requests for extensions by either party could be submitted to the NCP on the basis that the party in question is having difficulty in obtaining further information and evidence. The NCP would decide such requests, subject to appeal to the inter-departmental panel. Again, the maximum time limit for the final mediation would be eight months from the time of filing.
3. In exceptional cases – such as those of particular complexity engaging many provisions under the Guidelines or where a field visit is anticipated – both parties and the NCP should agree a timetable once the complaint has been deemed admissible.
4. When a specific instance involves a project for which funding is being sought from a UK government department or through a multilateral institution to which the UK subscribes capital, special provisions should be available to ‘fast track’ the mediation and final determination of such cases. To avoid the NCP being placed in a compromised or compromising position, specific instances involving projects where the UK is a potential funder should be settled *prior* to a decision on funding being approved. RAID and The Corner House believe such provisions are essential in order to avoid any conflict of interest, or the appearance of conflict of interest, arising from the UK government being both a party to the project (via its funding), whilst at the same time being responsible for examining the specific instance.

Determination phase

The procedure for determination by the inter-departmental panel should be concluded within four months of concluding the mediation. Extensions would be granted by the Panel under specified circumstances; for example, in order to allow the parties to assemble documents for disclosure or when new information becomes known.

© The need for workable time scales

- Mediation in the majority of cases should take place within four months and determination within another four months.
- There should be an option for the NCP to permit time-bound extensions.
- The time scale for the resolution or determination of most complaints will therefore be within one year of filing.
- In exceptional cases, the parties may agree an alternative timetable at the outset.
- There should be a facility for the NCP to ‘fast-track’ aspects of a complaint.

QUESTION 5. What should happen if a party to a specific instance does not meet such a time scale? In particular, should the party be liable to a summary finding by the NCP? If not, should the NCP issue an interim statement making it clear where the responsibility for delay lies and the consequences of any future delay?

By specifying a set time scale, but having already allowed for flexibility through extensions, ‘fast tracking’ and an alternative timetable in exceptional cases, suggests that a party should be held responsible for missing a deadline. If a party fails to respond or provide supporting material in time and has already benefited from extensions, the NCP should conduct the mediation on the basis of the information it has before it. (The office of the NCP is, of course, free to conduct its own fact-finding). Should the mediation prove unsuccessful, both parties are expected to observe the time scale for determination before the inter-departmental panel. While interim statements might be a useful way to announce that a complaint has been referred for determination (see below), RAID and The Corner House believe that summary findings and the noting of uncooperative behaviour are only appropriate as part of the final statement, once all avenues to engage a party have been exhausted.

Statements

QUESTION 6. Would you value interim statements? When should they be issued? What should happen if one of the parties to a specific instance objects to the issue of such an interim statement?

Interim statements may serve a useful function, but the circumstances for their use need to be carefully defined. Otherwise, the existence of an interim statement might actually reduce the urgency for issuing a final statement and delay the resolution of cases. Interim statements could be used to: announce the granting of an extension; note the time-table for an exceptional case or report that aspects of a case have been fast-tracked; indicate that an issue has been referred to the Investment Committee for clarification and record the outcome and; note the failure of mediation to resolve a complaint and its referral for determination. Parties are less likely to object to an interim statement if they know in advance the circumstances under which such statements are issued.

In paragraph 10 of the consultation document,

‘[t]he NCP asserts that it is the right of any party to a specific instance to request the issue of a statement at any stage. However, the decision to do so rests with the NCP, who may address the circumstances of such a request in any statement so issued.’

RAID and The Corner House can find no basis for this assertion in the text of the Guidelines, or in the Procedural Guidance or the Commentary. It is, however, pertinent to note that the Guidelines do specify that a statement be issued “if the parties involved do not reach agreement”.²⁰ Hence, statements should be issued after there has been a proper mediation and when this has failed to resolve the issue. Statements therefore cannot be issued at any stage in the proceedings simply because one party or the other makes such a request.

²⁰ *Procedural Guidance*, C. Implementation in Specific Instances, 3.

QUESTION 7. Are there issues not addressed in past statements that should be addressed in the future?

RAID and The Corner House are concerned that the Government is sending mixed signals about the future content and purpose of final statements. On the one hand, the Government has recognised the need to review their content and to target recommendations toward the details of the specific instance in question. On the other hand, given that final statements are issued where disagreement between the parties persists, unless the NCP is prepared to act as an adjudicator, then final statements will remain meaningless. RAID and The Corner House ask the Government to clarify that the potential use of final statements to declare on compliance has not been ruled out. If future final statements are not to include a clear-cut determination, then NGOs cannot see any purpose in pursuing complaints through the Guidelines.

Final statements in the past have failed to examine the substance of complaints, to distinguish the validity of claims and counter-claims, to relate established facts to provisions of the Guidelines, and to declare on compliance or lack thereof with the Guidelines. For example, two years after filing complaints relating to the conduct of British companies in the DRC and three final statements later, business, NGOs and the Congolese people are not any the wiser as to whether the serious factual allegations made by the UN Panel are unsubstantiated or accurate; whether any British company has breached the Guidelines, or indeed whether they are innocent of any breaches; and how business should operate in conflict zones in a manner that is consistent with the Guidelines.

While hoping that mediation can resolve many complaints and accepting that the complaints process is not a judicial mechanism, unless the NCP states whether the conduct of a company complies or not with the Guidelines, responsible companies will be unable to clear their names and the culpable will escape public censure.

To reiterate, OECD-level Procedural Guidance requires that final statements, including appropriate recommendations, must be issued when disagreement persists. The Government, in its own handbook on the Guidelines, added that such final statements “may also apply if a company refuses to enter into discussions”. As already noted (see above, *The role of the NCP*), the UK Government is on the record as having a robust view when it comes to determining compliance. Official DTI guidance asserts that the Guidelines provide for NCPs “to make recommendations to enterprises and to issue a public statement on a particular business’ behaviour in relation to the Guidelines” and that the Government is “free... to name companies which they feel have behaved inappropriately”.²¹

RAID and The Corner House further note that the UK NCP has itself taken the view that final statements should adjudicate on the specific instance, including, where necessary, censuring companies. In a May 2003 Memorandum to Baroness Symons, then Minister for Trade, summarising the procedures under the Guidelines, the NCP accurately and correctly stated:

8. ...At any point in [the] process, if either party feel that the dialogue is not progressing and further discussion is pointless, they can ask the NCP to adjudicate on the matter by issuing a statement...

9. The ultimate ‘sanction’ that the NCP has is to name and shame [the company] if it has not acted in accordance with the Guidelines and refuses to take remedial action or enter into meaningful dialogue. This is very much a last resort.²²

²¹ DTI, *Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises – UK National Contact Point Information Booklet*, February 2001, p.15 and p.13 respectively.

²² Memorandum from Duncan Lawson to Baroness Symons, ‘OECD Guidelines for Multinational Enterprises (MNEs) and the Activities of BP in Azerbaijan, Georgia and Turkey’, Restricted, 12 May 2003, released to Corner House in response to access to information request to ECGD, 8 August 2005.

The NCP subsequently restated its role as adjudicator when briefing officials at a cross-Whitehall co-ordination meeting, which discussed the specific instance filed against BP concerning the BTC oil pipeline: “If the dialogue breaks down [the NCP] will issue a statement, making a judgement on the allegations”.²³

Yet recent final statements include the caveat that “[t]he purpose of the Guidelines is not to act as an instrument of sanction nor to hold any company to account”.²⁴ In the consultation document, the Government states “it is not the role of the NCP to act as an adjudicator”. Given the contradictory nature of official statements on this issue of adjudication and the determination of compliance, it is of the utmost importance that the Government clarifies its position. For the Government to ask business to adhere to a standard, while failing to explain how that standard should be applied, would not, of course, be a credible approach. It would be akin to asking the members of a professional body to comply with a code of professional conduct, but refuse to offer guidance as to how that code should be applied in specific situations. In such circumstances there would be no point in raising issues of non-compliance since the professional body would never state whether and how certain conduct had fallen short of the required standard. If the Guidelines cannot be used to differentiate between acceptable and unacceptable behaviour, they are ultimately meaningless. Under such circumstances, NGOs and, presumably, responsible business would need to reconsider whether or not their engagement with the Guidelines in the UK context served a useful purpose.

© Determining compliance in the final statement

There must be clarity in final statements. The NCP should, where necessary, declare a breach of the Guidelines or exonerate companies where there is no breach. There must be concrete recommendations.

RAID and The Corner House assert that any meaningful final statement must incorporate all of the following elements:

- 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 cases, 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. (Clear procedures will have to be adopted to allow each party a fair hearing before any ‘findings’ on facts are made: please see under 2. *Proposed procedures to improve the handling of complaints*, below).
- 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.

²³ Extract from note of BTC Whitehall Co-ordination Meeting held 22 May 2003, document released to Corner House in response to access to information request to Department for International Development, 8 August 2005.

²⁴ See the UK NCP, *Statement on Oryx*, 14 June 2005, paragraph 15; also *Statement on Avient*, 8 September 2004, Conclusions.

It is understood the Guidelines are voluntary and do not have the force of law and, therefore, the NCP is reticent to declare an outright breach. While few companies will refuse to acknowledge the Guidelines or engage in the specific instance process, as experience shows, some may use the fact that they have engaged with the Guidelines on a voluntary basis to dictate what they will and will not allow to be discussed. In other words, while a genuine and responsible company may allow the NCP to conduct a proper examination of the facts in accordance with established procedures, a minority of companies will impose their own limits on how the NCP acts, reinforcing this with the threat of legal sanction.

⊙ An undertaking to commit to assessment

To meet this concern, RAID and The Corner House propose that, once an initial assessment has been conducted, the parties to a complaint should sign an undertaking whereby they commit, should mediation fail, to a fair and impartial assessment and determination of the complaint.

Recommendations

Following a recommendation from the APPG, the Government has made a commitment to effect targeted recommendations. However, it is difficult to see how these could be meaningful without an implicit recognition of non-compliance. For example, a recommendation that a company desists from doing business with a rebel faction with a poor human rights record implies that any prior business it conducted was in breach of the human rights provision under the Guidelines.

The Procedural Guidance specifies what should happen if mediation fails:

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.

QUESTION 8. What form of “clear” recommendation would be of most value to parties to a specific instance?

The recommendations contained in the Avient Ltd and Oryx Natural Resources final statements simply consisted of a reiteration of certain General Policies found in Chapter II of the Guidelines. It is difficult to see how this offers any meaningful guidance. Both Avient and Oryx are now aware of the general policy on human rights, but that does not assist them in determining how they may need to change commercial practices in their particular business context to ensure compliance with the Guidelines.

For instance, in the Avient Ltd case, the UN Panel alleged that Avient was contracted by the DRC government to organize bombing raids in eastern DRC in 1999 and 2000.²⁵ In response, Avient admitted they had indeed provided crews for a Mig 23 Jet Fighter and a MI 24 attack helicopter and some flight training, but maintained they were not directly involved in any bombing raids. The final statement goes on to assert that Avient “should carefully consider the recommendations of the Guidelines” and draws attention to the policies in Chapter II, which relate to sustainable development, human rights and improper involvement in local politics. It remains entirely unclear whether the NCP is of the view that Avient acted in a manner that was inconsistent with the Guidelines and if, implicitly, the NCP recommends that Avient should refrain from providing crews and training for Jet

²⁵ Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 16 October 2002, S/2002/1146, paragraph 55.

Fighters and attack helicopters to a party in a conflict in the future. Moreover, the final statement provides no analysis of the principal Panel allegation; namely, that Avient organized bombing raids.

RAID and The Corner House further consider that, where appropriate, the NCP's statement should include recommendations to the Investment Committee of the OECD concerning areas in which the Guidelines could be clarified or improved. We believe that such recommendations would be consistent with the NCP fulfilling its role as defined in the commentary on the Guidelines, namely "to further the effectiveness of the Guidelines".²⁶ We note that the Investment Committee has itself recognised the importance of drawing generic lessons from individual specific instances and that it has been willing to consider such lessons, as it is empowered to do under part II.4 of the Procedural Guidance.²⁷

Examples of clear recommendations from other NCPs

In the complaint concerning the conduct of Chemie Pharmacie Holland BV (CPH) in the coltan supply-chain in the DRC, concluded in May 2004, the Netherlands NCP made targeted recommendations:

The NCP procedure raised the awareness of CPH of its own responsibility throughout the business chain, from supplier and producer to consumer. Following the common values for responsible business conduct that are reflected in the Guidelines, CPH could have conducted more enquiries to find out the origin of the ore and the circumstances that surrounded ore mining. Companies should be proactive in asking these questions, particularly in a conflict zone.

On 29 November 2005, the Norwegian National Contact Point (NCP) for the OECD issued its final statement in the specific instance involving alleged breaches of the OECD Guidelines by Aker Kværner in its activities at Guantánamo Bay, Cuba.

The final statement refers to the poor human rights record of the Guantánamo Bay prisons and finds that "the activities that the company has carried out can be said, at least partly, to have affected the inmates of the prison". The NCP observed "Aker Kværner could have delivered a great deal more documentation [during the specific instance procedure] without compromising client confidentiality". Finally, the NCP drew attention to Aker Kværner's lack of guidelines for ethical behaviour and "strongly encouraged" the company to draw up such guidelines to be followed in all future activities. [Source: *OECD WATCH Newsletter*, forthcoming January 2006].

© The need for clear recommendations that relate to provisions in the Guidelines

For the recommendations to a company to be of any consequence, the NCP would need to:

- state clearly whether the specific conduct in question was in breach of the Guidelines and;
- if so, how the company should seek to amend its future conduct to ensure that it complies with the Guidelines.

The NCP's statement should also make recommendations to the Investment Committee about areas in which the Guidelines could be usefully clarified or improved.

²⁶ *Procedural Guidance*, I. National Contact Points, introductory paragraph.

²⁷ Writing in response to the Belgium NGO Proyecto Gato in relation to a Specific Instance on the Houay Ho dam in Laos, the Chair of the Investment Committee has stated: "Under the Procedural Guidance for the Guidelines, the Investment Committee is not mandated to act as an appellate body on individual NCPs' decisions, nor is it asked to accept requests for clarification and submissions on an NCP's handling of specific instances from parties other than advisory bodies (see the text in parts II.3.c and b in the Procedural Guidance to the 2000 Council Decision). However, *in addressing generic issues before the committee that may have been revealed by individual specific instances*, the authority in II.4 of the procedural guidance provides that the Committee may seek expert advice in relation to its work on the Guidelines and the Committee has sought such advice in the past".

QUESTION 9. Should the NCP assert an opinion on aspects of a complaint that it considers unfounded, frivolous or vexatious?

Clearly, if a company is not in breach of the Guidelines then it must be exonerated in clear and certain terms. It is hoped that any unfounded, frivolous or vexatious complaints would be rejected, with reasons given, after the NCP's initial assessment. However, if, after proper investigation, a particular allegation turns out to be unfounded, this can be stated in the final statement. It follows that if the NCP proposes to dismiss allegations and exonerate a company, the NCP must also be willing to assert an opinion on aspects of the complaint that it considers founded, substantiated and in breach.

QUESTION 10. Should the NCP comment on the willingness of the parties to a specific instance to engage constructively?

The NCP should be obliged to comment if any party has refused to co-operate, disclose relevant evidence requested by the NCP or engage in dialogue with the NCP or the other party. In the absence of any formal legal powers, reprimand is the only stick the NCP wields. Moreover, if a party fails to cooperate it must be made clear that the NCP can only form a view on the basis of the evidence that is produced by the parties and gathered in fact-finding exercises. Non-cooperation is thus more likely to result in a finding against the uncooperative party.

Confidentiality

QUESTION 11. Should the confidentiality requirement be so extended?

The Government proposes an extension of the confidentiality requirement to all stages of a complaint. However, it is noted that the Government recognises that: 'The procedural guidance requires the parties to a specific instance to maintain confidentiality of the proceedings. Interpreted strictly, this does not apply until a complaint has been made under the Guidelines and the NCP has made an initial assessment that the issues raised merit further examination.' RAID and The Corner House cannot see that there is anything to be gained from altering a rule that is given force in the OECD's Procedural Guidance. For RAID's and The Corner House's recommendations on the related issues of disclosure and improving transparency, see *intra* under *Further information and disclosure*.

QUESTION 12. What should be the sanction for any party to a complaint breaching the confidentiality requirement at any stage that it applies?

In the absence of any legal powers, it is difficult to see what sanctions could be applied. It is submitted that breach of the confidentiality requirement would not be in the interest of NGOs since, in future, companies could rightly refuse to co-operate in a specific instance with a particular NGO on the basis it cannot be trusted. Furthermore, the appropriateness of introducing sanctions for breaches of confidentiality is questionable while sanctions are denied for breaches of other aspects of the Guidelines.

Non-Adhering Countries

RAID and The Corner House welcome the assertion that the NCP “may undertake field visits, for which terms of reference will be established in advance”. Such visits, if impartially framed and conducted, can help greatly in clarifying issues and in allowing the voices of those directly impacted by a company’s activities to be heard: they should therefore be encouraged. While the NCP has undertaken a field visit in the BTC oil pipeline case, it has neglected to do so in any of the DRC cases. RAID and The Corner House therefore recommend that the criteria against which the need for an NCP field visit is assessed must be clearly defined so that all deserving cases benefit from these fact-finding exercises.

While RAID and The Corner House recognise the value of the NCP being exposed to conditions on the ground and having the opportunity to assess firsthand the facts of a case, they would deem it more appropriate for missions to be conducted by the NCP in conjunction with experts who have experience of working at the community level in developing countries. We recommend that the choice of experts be agreed by the Parties, together with the NCP.

From the experience gained as a result of the information-gathering visit conducted by the NCP in the BTC oil pipeline case, RAID and The Corner House recommend that:

- The purpose of the visit is to verify the facts of the case and to establish the evidential basis for clarifying facts that are in dispute;
- Facilitation of the visit should, as far as possible, be independent of the parties to the specific instance;
- information gathering, including the allocation of interviews, should be fair to both parties;
- The terms of reference should be translated prior to the visit and made available to all interviewees;
- Interviews should be conducted in a neutral manner;
- The NCP field mission should record all meetings;
- Interviews should be conducted on a confidential basis unless permission has been expressly given to make the interview public, with the field mission report recording the preference of the interviewee;
- The NCP field mission should provide interviewees with an opportunity to check statements attributed to them prior to their inclusion in its report of the visit and;
- The NCP field mission should record any financial or contractual relationship between the interviewee and the parties in its report.

2. Proposed procedures to improve the handling of complaints

As stated above, the Government helpfully acknowledges “all parties would benefit from greater clarity in the NCP’s procedures for promoting and implementing the Guidelines”.²⁸ RAID and The Corner House recommend a number of improvements. These basic procedures should be applied by the NCP irrespective of whether the office is given the status of an independent ombudsman or the Government decides to convene an inter-departmental panel. RAID’s and The Corner House’s proposed procedures for the handling of admissible complaints are summarised at the end of the section.

Ⓞ The need to overhaul procedures for handling complaints

Detailed procedures for specific instances must be drawn up to avoid confusion and the appearance of ad hoc decision making by the NCP in the future. As advocated at the recent APPG seminar on the Guidelines, a working group comprising representatives from NGOs, business and the trade unions should be established to review the outcome of the consultation and agree new procedures, in conjunction with Government.

A. The extent of the NCP’s fact-finding role

The Commentary to the Guidelines states:

“While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities.”²⁹

To date, the UK NCP’s approach has been inconsistent. In the Avient and Oryx cases, the NCP failed to make proper use of its fact-finding powers, while, in other cases, the NCP has sought expert advice from those with specialist knowledge of a situation (the Anglo American case) and has conducted its own fact-finding, including field visits (the BTC oil pipeline case). Guidance should be issued as to what fact-finding activities the parties can expect the NCP to undertake once a specific instance has been deemed admissible. (For further detail on arrangements for field visits, see under *Non-Adhering Countries*, above). If the NCP office is unsuccessful in obtaining the necessary information, it should explain why in its final statement.

In addition, immediately after the initial assessment (provided it is held that there is a case to answer), it would be beneficial for the NCP to list the further information it will be seeking and set out what additional information is requested from each of the parties.

²⁸ Government Response to the All Party Parliamentary Group on the Great Lakes Region Report on the OECD Guidelines for Multinational Enterprises and the Democratic Republic of Congo, July 2005, paragraph 8.

²⁹ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, paragraph 20.

B. Requiring a written response from the company

Once the complaint is received and an initial assessment is made, there is currently no formal obligation on the company to file a written response.³⁰ Regrettably, as for example in the Oryx mediation, the absence of proper rules meant that the company refused to provide a written response. The provision of a written response must be made a requirement, as this would assist in narrowing the issues between the parties and would ensure that both parties are on an equal footing at the start of the process.

C. Further information and disclosure

The NCP asserts that all documents received from a party to a specific instance will be made available to other parties, except in accordance with the exemptions provided for under the Freedom of Information Act 2000. This is a welcome assertion, especially in view of the fact that no documentation from the other party, other than their response, has been disclosed by the NCP in any of the specific instances filed to date.³¹ Indeed, in the current procedure, there is no formal provision to allow for requests for further information or disclosure by either party. Therefore, RAID and The Corner House recommend that the NCP assess each such request, which, if judged relevant, should be the subject of a formal request to the other party by the NCP. If the party fails to cooperate, it should be reprimanded in the final statement.

In respect of the reference to the Freedom of Information Act 2000, it should be recognised that bona fide parties engaged in mediation will not be requesting public disclosure at that stage, but rather disclosure as part of the confidential process to resolve specific instances. It is therefore hoped that the NCP will not, generally, find it necessary to invoke FOIA 2000 exemptions. If such exemptions are cited – for example, section 41 Information Provided in Confidence or section 43 Commercial Interests – then written confirmation should be provided from the party concerned stating that it wishes the exemption to be applied. In addition to inter-party disclosure, it is recommended that the NCP should disclose any information it has been able to gather, provided it does not fall under the FOIA 2000 exemptions.

◎ The need to improve disclosure and increase transparency

- Provision should be made to allow the NCP, on request, to enable formal requests for disclosure to be made to either party.
- When documents are withheld under FOIA 2000 exemptions, there should be written confirmation from the party concerned that it wishes the exemption to be applied.

³⁰ *UK National Contact Point Information Booklet*, op. cit., p. 12, offers unspecific advice: “The NCP will promote informed discussions, for example by encouraging the dissemination to the parties involved of expert papers; originator evidence; and company responses (or extracts from them)”.

³¹ In the case concerning *Das Air* (ongoing), the NCP refused to disclose substantive exchanges between the NCP and the company to RAID, citing FOIA exemptions. Only perfunctory correspondence was disclosed.

D. Mediation procedure

Currently there are no rules setting out how the mediation process should be conducted. Hence, each case before the NCP has been handled differently. This lack of consistency is unfair both to the companies concerned and the complainants. For example, in the Anglo American case, mediation has been based on a detailed written exchange between the NCP and the parties. Yet in the Avient case, RAID was excluded from being a complainant and the mediation was held solely between the NCP and the company, producing an unwarranted final statement. In the Oryx case, there was no proper mediation and no established procedures to deal with an impasse when Oryx refused to enter into a dialogue with RAID. In the absence of detailed rules on how to proceed given such a refusal, the UK NCP simply moved to end its examination of the substance of the complaint. The NCP made no attempt to analyse the arguments or to interrogate the facts. However, on other occasions, notably in the Anglo American case, the NCP has undertaken an analysis, with advice from others (in this case, the Department for International Development).

RAID and The Corner House recommend that the NCP should be trained by the Centre for Effective Dispute Resolution (C.E.D.R.)³² and that the mediation process should be improved by examining the procedures adopted by other alternative dispute resolution providers. In particular, in cases where the parties are entrenched in their positions, consideration should be given to a model of mediation that allows for the NCP to adopt an Early Neutral Evaluation procedure to facilitate the mediation. (See <http://www.cedrsolve.com/index.php?location=/services/ene.htm>).

E. Determination procedure

Should mediation fail, the NCP is obliged to issue a final statement. The NCP's current procedural chart states that at this stage the "NCP reviews evidence [emphasis added], consults experts and lawyers then issues draft statement to both parties". However, it is important to note that once mediation has broken down and a final statement is contemplated, the role of the NCP will have altered from that of a conciliator to that of an independent third party who will express a view on the case.

As already stated, RAID's and The Corner House's preferred option is for an independent NCP ombudsman outside of government. At a minimum, given the different nature of the NCP's role if mediation fails, we recommend that, as an interim measure, the complaint should be referred to an inter-departmental panel chaired by an independent, legally qualified person. It is essential that clear procedures be adopted to ensure that all parties are given a fair hearing and the rules of natural justice are respected before a final statement is issued. RAID's and The Corner House's proposals in this respect are detailed in the box below.

The difficulty in past cases, such as Oryx, is that a final statement was issued immediately after an unsuccessful mediation without ensuring that the complainant and the company (should it have wished to do so) were given the opportunity to address the NCP on the evidence and issues in the case. To avoid a repeat of such problems, the inter-departmental panel would conduct an assessment as to: (i) which allegations can be substantiated as a matter of evidence; (ii) if any allegations can be substantiated, whether the company is in breach of the Guidelines and; (iii) make recommendations on the implementation of the Guidelines in respect of that specific instance.

³² The Centre for Effective Dispute Resolution is an independent non-profit organisation supported by multinational business and leading professional bodies and public-sector organisations. It was launched in 1990 with the support of The Confederation of British Industry.

An improved procedure for handling complaints

Initial assessment (see *intra*, pages 8 – 10).

Stage 1 – mediation and dialogue

- The company responds in writing within a set time to the initial complaint.
- The complainant is given a set period to review and comment on this response.
- The NCP analyses the information from both parties. The NCP is required to consult other government departments and, in the case of a complaint relating to events in a non-adhering country, to consult overseas embassies and departmental offices. Where facts are in dispute, the NCP should conduct its own fact-finding, including the option to conduct field visits.
- For the sake of clarity, the NCP will set out the further information it will endeavour to obtain and the further evidence required of each party. All information disclosed by a party or obtained by the NCP will be disclosed to the other party.
- Requests for further information by either party, if deemed relevant, shall become the subject of a formal request by the NCP.
- Both parties shall be given the opportunity to make written submissions regarding any additional information or clarifications.
- Any interlocutory decisions taken by the NCP can be reviewed by the panel at the request of either party.
- The NCP issues a confidential written assessment of the complaint to both parties, including an assessment of where there appears to be a prima facie breach of the Guidelines (akin to an early neutral evaluation).
- The NCP invites both parties to meet to discuss unresolved issues and any prima facie breaches. The meeting will be held in private, in accordance with the Guidelines' confidentiality principle, although the parties may agree to publicly disclose information and views arising from the proceedings.
- Within a set period, the NCP issues a statement identifying those issues raised in the initial complaint where the parties have reached a resolution and those issues where a resolution has not been reached.

Stage 2 – referral for determination

- At the request of either party, unresolved parts of a complaint will be examined and determined by the ombudsman panel (or inter-departmental panel if the NCP remains housed by a government department).
- The undertaking to commit to assessment, signed by both parties after the initial assessment, should help ensure the cooperation of both parties. However, if one of the parties fails to cooperate it should be made explicit that the NCP/panel will come to a view based on the evidence before it and thus it is in the parties' interests to make full disclosure and to cooperate.
- The panel will invite fresh written submissions on: (i) the evidence and; (ii) whether the allegations amount to a breach of the Guidelines.
- The panel will determine: (i) whether any of the allegations are substantiated as a matter of evidence and; (ii) if so, whether these allegations engage provisions in the Guidelines.
- The panel will convene a hearing, which will normally be held in private. The hearing will be conducted according to the principles of natural justice. Both parties may appoint representatives. They will be given the opportunity to present evidence, including witnesses. Each party is permitted to ask questions of the other party. Witnesses may be cross-examined. The panel may call upon or appoint experts.
- The panel will reach a decision on whether there has been a breach of the Guidelines. Both parties will be provided with written reasons for the decision, which will be made public.
- The panel will make recommendations on actions that the company should take to bring its conduct into compliance with the Guidelines.