

## Minutes, ICoC Working Group #2 Meeting: 5 July 2011 via teleconference

### Attending

- Andy Orsmond, Human Rights First (USA)
- Tara Lee, DLA Piper (USA)
  
- Tricia Feeney, Rights and Accountability in Development (UK)
- Jonathan Morgenstein, US Department of Defense (USA)
- Ian Ralby, ADS Security in Complex Environments Group (UK)
- Glynne Evans, ADS Security in Complex Environments Group (UK)
- Mike Clarke, G4S (UK)
- Graham Kerr, Hart Security (UK)
- Rachel Davis, Legal Adviser to UN Special Representative for Business and Human Rights (USA)
- Christopher Beese, Olive Group (UK)
- Margaret Belof, UK Foreign & Commonwealth Office (UK)
- John Lea, UK Ministry of Defence (UK)
- Ian McKay, US Department of State (USA)
  
- André du Plessis, DCAF
- Thomas Haueter, DCAF

**BEGIN 09:00 DC / 14:00 UK / 15:00 GENEVA**

### Introduction by Chairs

- The chair reported that the TSC had decided to extend the deadline for WGs to 21<sup>st</sup> August.
- A short written report from each WG to the TSC had been requested in advance of its next meeting (on 13 & 14 July).
- The next call for this Working Group will be on the 12<sup>th</sup> of July at the same time (9 a.m. US Eastern time).

#### **1. *Consideration of Rachel Davis' "Informal note for ICoC Working Group 2: Examples of relevant grievance mechanisms at the international and industry levels"***

*Note – these are not consensus statements, but rather comments raised*

- There was consideration of the three models summarized by Rachel in the paper:
  - World Bank Group: Office of the Compliance Advisor/Ombudsman;
  - OECD: National Contact Points;
  - Fair Labor Association: Third Party Complaint Procedure

- The existing mechanisms are a good start for a first draft of a mechanism for the ICoC's grievance mechanism
- Each of the mechanisms had value, but there was some preference for the OECD NCP and FLA models as most directly relevant to this industry and process
- It was noted that there were advantages to a government-backed process (such as the OECD NCP), including from a funding perspective
- It was noted that none of the models have a direct mechanism for suspending participants, although it was also noted that there had been some discussion that deciding on suspension would potentially be a decision for a different body (e.g. a "board")
- The potential multiple duplication of complaints and how the process would deal with these parallel proceedings should be considered in more depth

## **2. Discussion on Potential Functions of the Grievance Mechanism: Referral**

- It is becoming clear that the ICoC grievance mechanism would need to have a referral mechanism of some kind
- This could potentially take the form of an "information" referral: complainants are simply directed to existing grievance mechanisms
- It could also take the form of working more actively with a complainant to identify whether certain mechanisms are appropriate for him/her
- There was discussion on the need for some kind of "gate-keeping" function. This would ensure that complaints submitted would (1) actually be within the scope of the ICoC; and (2) have some substance behind them.
- Any gate-keeping would probably need to have a relatively low threshold so as not to prohibit unnecessarily claims being brought while recognizing the need to potentially restrict "serial litigants" abusing the system
- Gate-keeping could potentially ask complainants to identify if they are already in litigation on the issue or at least have "retained counsel". This could help the mechanism identify the appropriate grievance procedure to recommend/refer.
- Being involved in litigation, however, should not preclude recourse to this mechanism. Examples were given of dysfunctional court regimes where cases carry-on for many years. This mechanism could be a way to resolve the dispute outside of the courts
- There was some good information on gate-keeping in Tricia Feeney's paper: "APPROACH OF THE NCP TO SPECIFIC INSTANCES IN WHICH THERE ARE PARALLEL PROCEEDINGS". In particular, if a parallel proceeding would "prejudice" legal proceedings then it should stop.
- It was noted that this mechanism – as an alternative to other forms of complaints, including litigation – could actively work in companies' interests; complaints that go to litigation through law firms are often protracted as the law firms have an interest in stringing-out the proceedings rather than resolving the issue

- It was agreed that referral would not require a complainant to use, for example, a company-level mechanism over another, particularly where the complainant was reluctant to engage with the company
- Issue that should be addressed: weak state: no functioning rule of law: how does this affect to handle the grievance => no easy referral to other processes

### **3. Discussion on Potential Functions of the Grievance Mechanism: Mediation**

- General agreement that a potential function of the model should include mediation
- It was recognized that mediation was necessarily a consent-based process and it was equally recognized that in some cases mediation would not be the right way to go.
- There was discussion as to whether the mediation function could or should be performed by the ICoC mechanism itself, or by external mediators.
- Cost was again raised, noting that any mechanism established needed to be financially sustainable
- It was agreed to raise questions on how the FLA and OECD NCP processes were funded on any briefing call with them

### **4. Next steps**

- It was agreed that a briefing call dedicated to the OECD NCP and FLA mechanisms should be set-up for Thursday 7<sup>th</sup> July at 9 a.m. Eastern time, speaker-schedules permitting.
- This call would be open to other Working Group and TSC members. Speakers would potentially include experts on the initiatives.
- Andy Orsmond, Rachel Davis and Margaret Belof each agreed to contact various potential experts.
- Ian McKay confirmed he would circulate a discussion paper on special audit functions in the next few days
- Confirmed that in any event, the next call for this Working Group will be on the 12<sup>th</sup> of July at the same time (9 a.m. US Eastern time).

**END 10:30 DC / 15:30 UK / 16:30 GENEVA**