

**Minutes, ICoC Working Group #2 Information teleconference dedicated to the OECD NCP and FLA mechanisms: 7 July 2011**

**Attending**

- Sergio Moreno, UK OECD Guidelines National Contact Point (UK)
- Jorge Perez-Lopez, Fair Labor Association (USA)
- Caroline Rees, Adviser to the UN Special Representative for Business and Human Rights (UK)
  
- 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)
- Michael 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**

***1. The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises***

Sergio Moreno outlined the UK's NCP system, responding on occasion to direct questions from participants.

- After receiving a complaint, there is an initial assessment to ensure that the complaint falls within the scope of the OECD guidelines and that it is a material and substantiated claim
- If a complaint is accepted for further consideration, the NCP seeks to bring the parties together and find a solution through a mediation/conciliation process.
- The preferred outcome of any complaint is an agreement between the parties. If the mediation/conciliation is successful, the process is concluded with an agreement of the parties and a relatively short final public statement of the NCP reflecting (or incorporating) the agreement.

- If mediation/conciliation is unsuccessful or is declined, the NCP assesses, on the basis of the available evidence, whether the company acted in accordance with the OECD Guidelines and publishes a statement thereon. If the NCP finds that a company did not act in accordance with the OECD Guidelines, it may make recommendations to assist the company in bringing its practices into line with the OECD Guidelines. In this case, the NCP will ask the parties to report back, usually within three months, on the progress made by the company in implementing the recommendation(s).
- The whole process (excluding the follow up to any recommendations) should not last longer than 12 months. Adherence by the NCP to the published complaint process is monitored by a Steering Board, which includes four external members (representing business, trades unions and NGOs). After the NCP has finalised the final statement on a complaint (or if the NCP has rejected a complaint at the initial assessment stage), either party may request the Steering Board to review, on procedural grounds only, the NCP's handling of the case.
- The NCP receives about three cases per year. It recently cleared a backlog of cases that predated the coming into effect of the 12-months complaint process described above.
- Usually professional mediators are engaged to handle the mediation/conciliation process. The NCP pays for this mediation, but does not reimburse parties' travelling and subsistence costs (mediation preferably takes place in the UK, but international telephone links can be arranged)
- Mediation procedures are informal and confidential, in order to encourage open discussion.
- The whole mediation/conciliation process is voluntary; the outcome of the mediation/conciliation cannot generally be enforced in courts.
- Neither the mediator nor the NCP determine whether national law is breached
- Should an examination of the allegations be required (because conciliation/mediation was unsuccessful or was declined), the NCP mainly relies on evidence supplied by the parties, but may also request the assistance of relevant government departments, UK diplomatic missions or overseas DFID offices to help with gathering additional documentary evidence. All evidence received by the NCP is made available to the parties.
- The fact that legal proceedings are taking place in parallel to the complaint process under the OECD Guidelines, will not automatically cause a suspension of the NCP complaint process. This happens only where the NCP is satisfied, following a substantiated application by either party, that it is necessary to suspend the complaint process (either in part or in its entirety) in order to avoid serious prejudice to a party in those parallel proceedings and that it is appropriate to do so.
- Since the NCP has adopted the above approach on parallel proceedings in September 2009, it has not yet experienced a situation of parallel criminal proceedings.
- The NCP is often treated as a solution of last resort by complainants.
- So far, most complaints came from trade unions or NGOs representing the alleged victims.
- English is the main language used in the complaint process. The NCP has not yet experienced situations where the use of other languages blocked the complaint process.
- NGO criticism of the NCP process has focused on the lack of enforceability of its outcomes, specifically in cases of an adverse statement towards a company. The follow up process was

introduced to address, at least in part, these concerns bearing in mind that observance of the OECD Guidelines by enterprises is voluntary and not legally enforceable.

- The estimated cost of each case (if mediation/conciliation is undertaken) is GBP 5,000. The cost is lower if mediation/conciliation is not used (because either party has rejected it from the start).
- ⇒ More information on the NCP can be found on: <http://www.bis.gov.uk/nationalcontactpoint>

Caroline Rees followed up on a few points:

- Keeping it clear that a mediator is not an arbitrator is key. A mediator does not propose sanctions, but rather injects ideas for a solution between the parties
- Ensuring a clear separation between the mediation and assessment aspects is crucial
- Local mediation experts could be considered – they are important for knowledge of local culture as well because they are locally embedded
- It can save resources and improve trust in the mechanism to have a relatively low threshold for admission of complaints, with substantive investigations needed only if mediation fails

## **2. *The Fair Labor Association***

Jorge Perez-Lopez outlined the FLA's third party complaints system, responding on occasion to direct questions from participants.

- The 3rd party complaint mechanism was not included in the original FLA charter but added later – in 2001. They have ten years of experience.
- The threshold for filing a complaint is deliberately very low: this makes complaints from individuals or groups of workers possible. Others can also make complaints: e.g. companies, factories, NGOs, Trade Unions
- Currently there are 15 to 20 complaints per year: most of them are out of scope, and so only 2 to 4 complaints actually meet the criteria and are processed annually
- The first instance of dealing with complaints should be at factory level, using internal grievance procedures. Only after a complaint has received some initial attention would the FLA get involved. FLA complaint mechanism not intended to be the first instance for addressing a complaint
- At the first stage, FLA staff establish if there is a potential breach of the FLA code. If this threshold is met, the case proceeds to step 2 and the complainant is so informed; if the case does not proceed, the complainant is also informed
- At the second stage, there is a directive from the FLA Executive Director to the company, informing it of the complaint and asking it to prepare within 45 days an initial evaluation report, including whether it accepts the claim and how it intends to remedy it. The FLA assesses this report and consults with the complainant. If the complainant is satisfied, the FLA may close the complaint and issue a public report.

- At the third stage, if the FLA or complainant is not satisfied with the company's report, then the FLA may engage third party investigators who will investigate the allegations and come up with a remediation plan. The FLA will then consult back with the complainant.
  - The fourth stage is following-up with the company on the remediation plan and tracking over time that it is being implemented.
  - Preparing the different reports and managing the complaints is time consuming and staff heavy. It is hard to manage as it is not predictable how many cases there will be and how long they will last
  - Approximate costs (staff time and third party investigators) are USD 5,000 to USD 10,000 per case (mostly for engaging third party investigators), but not including FLA staff time
  - Approximately a third of the time of the executive director currently goes into third party complaints (we have a particularly large crop of cases at this time)
  - The unannounced due diligence audits of the FLA are a separate process to the complaint mechanism; they are not complaints driven; the FLA conducts 150-180 of these audits per annum
  - The FLA covers a large scope of about 5,000 factories (explained as being those within an FLA member's supply chain)
  - The FLA funding comes largely from membership fees from companies and universities; a small amount from grants/foundations. Companies that are being monitored pay into a revolving fund that covers these costs. The funding model is designed to be sustainable.
  - The total FLA budget is over USD 3 million and FLA employs around 18 full-time staff as well as additional external consultants
- ⇒ More information can be found on [www.fairlabor.org](http://www.fairlabor.org)

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