

## The OECD Guidelines for Multinational Enterprises: The Confidentiality Principle, Transparency and the Specific Instance Procedure

### Introduction

The Organisation for Economic Co-operation and Development's (OECD) '*Guidelines for Multinational Enterprises*' (Guidelines) are a government-endorsed set of voluntary principles and standards for responsible corporate conduct.<sup>1</sup> OECD<sup>2</sup> and non-OECD<sup>3</sup> governments that have endorsed the Guidelines have an obligation to set up a 'National Contact Point' (NCP) to promote adherence to the Guidelines by multinational companies. NCPs are also responsible for handling 'specific instances' that are raised by complainants when companies' investment-related activities are alleged to contravene the Guidelines' principles and standards.

When handling specific instances, the Procedural Guidance (see Box 1) instructs NCPs "to take appropriate steps to protect sensitive business and other information" and maintain "confidentiality of the proceedings". At the conclusion of the proceedings, NCPs should "make publicly available the results...unless preserving confidentiality would be in the best interest of effective implementation of the Guidelines".<sup>4</sup>

The Guidelines' Procedural Guidance also instructs the NCPs to "operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence".<sup>5</sup> The term functional equivalence "means that, although NCPs may have adopted different institutional structures and implementation practices, they should still perform to the same standard in terms of their visibility, accessibility, transparency and accountability".<sup>6</sup>

#### Box 1

##### Key sections in the Guidelines Relating to the Confidentiality Principle and Transparency<sup>7</sup>

**The Procedural Guidance:** Contains instructions on the responsibilities of National Contact Points (NCPs) and Investment Committee – the OECD committee with oversight for the Guidelines.

**Commentary on the Implementation Procedures:** Contains additional information to better explain the Procedural Guidance.

In the five years since the Guidelines were revised in 2000, there continues to be disparity in the way NCPs balance the competing demands of confidentiality and transparency when handling specific instances. For example, some NCPs disclose the outcomes of cases in their annual reports whereas others do not even make their reports publicly available. In practice many NCPs have typically placed greater emphasis on maintaining confidentiality in all aspects of the specific instance process, and in doing so, have sacrificed transparency with complainants.

This brief will explain the Guidelines' 'confidentiality principle,' including what it is, when it is applicable, and when an interpretation of the principle is inconsistent with the Guidelines' Procedural Guidance. It also explains NCPs' obligations with respect to transparency and describes how the absence of administrative procedures for handling specific instances, including reporting on results, continues to be the greatest obstacle to achieving functional equivalence.

# The Confidentiality Principle Explained

After an NCP accepts a specific instance, the Guidelines' confidentiality principle must be observed. According to the Procedural Guidance, "While the procedures...are underway, confidentiality of the proceedings will be maintained" (see Box 2).

## Box 2

### Procedural Guidance, Section 1, Sub-section C: Implementation in Specific Instances

**1. Make an initial assessment of whether the issues raised merit further examination** and respond to the party or parties raising them.

**2. Where the issues raised merit further examination**, offer good offices to help the parties involved to resolve the issues ...

**4.(a)** In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. **While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained.** At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, **information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure. (Emphasis added)**

The Commentary for the Procedural Guidance sheds further light on what is meant by 'confidentiality of proceedings':

- The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the Guidelines. It is understood that proceedings include the facts and arguments brought forward by the parties.<sup>8</sup> (see Box 3)

The confidentiality principle is meant to protect sensitive business information and other information such as the identity of individuals involved in the proceedings, if necessary. In terms of information and documentation, the confidentiality principle means the parties to a spe-

cific instance cannot reveal: 1) information learned; or 2) correspondence or documentation received from the other party **after** a case has been accepted by the NCP, except if the party agrees otherwise.

However, during the 'initial assessment' phase – the point from submission up until the NCP accepts the case – the confidentiality principle does not apply. For example, Ascendant Copper Corporation submitted correspondence to the 'Business and Human Rights Resource Centre' website in response to a specific instance filed in Canada concerning the company's activities in Ecuador. At the time, the Canadian NCP had not yet accepted the case, so public statements on the contents of the company's correspondence could be made by the complainants in other fora.

Once the NCP determines the issues raised in a specific instance reflect a possible breach of the Guidelines, it must notify all parties that it has accepted the case. During this phase – i.e. 'proceedings' or 'procedure' – the NCP will act as a moderator between the complainants and the company in an attempt to find a resolution to the problem(s) raised in a consensual and non-adversarial fashion.

## Box 3

### Commentary on the Procedural Guidance

**19. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public** (see para. 8 in "Core Criteria" section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. **Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent. (Emphasis added)**

If, for example, a company brings forth facts and arguments (including documents) during the proceedings and the company also makes this information publicly available, the complainants can logically assume the confidentiality principle does not apply. For example, the British NCP accepted a specific instance concerning BP's Baku-Ceyhan oil pipeline, which alleged that the project's 'host government agreements' (HGAs) violated the Guidelines by seeking exemptions to future human rights, environmental and other laws. The complaint was submitted on 29 April 2003 and was accepted by the UK NCP on 28 August 2003. In response to the specific instance, on 22 September 2003, BP made public a 'Deed Poll' (formally entitled "Human Rights Undertaking") in which the company committed to not challenging future human rights laws. The BTC Deed Poll has since been discussed

extensively in other fora by the complainants (and other NGOs), including with governments and international financial institutions. As of December 2005, the BTC complaint is still pending.

Additionally, the confidentiality principle does not apply if a third party brings forth information or documentation related to, or concerning issues raised in, a specific instance. For example, the filing of a specific instance involving Global Solutions Ltd.'s (GSL) immigration detention centres in Australia coincided with the release of the Australian Government's "Palmer Inquiry", which refers to GSL's operations. In this scenario, the complainants are clearly free to discuss and use information that is made publicly available by a third party while a case is pending with an NCP.

## The Confidentiality Principle: Issues of Concern

There are three issues of concern among NGOs with respect to confidentiality and the specific instance process: 1) the Business and Industry Advisory Committee's (BIAC) and some governments' assumption that publicizing a specific instance at the point of submission undermines the effectiveness of proceedings; 2) BIAC's assertion that public statements on pending specific instances infringes the confidentiality principle; and 3) the possibility of the Guidelines' confidentiality provision being extended to all phases of the complaint.

### 1 Publicizing specific instances

The Investment Committee and other stakeholders have discussed at length whether publicizing the submission of a specific instance undermines the effectiveness of proceedings. There are several assumptions that underlie this argument. First, NGOs are using the fact that a specific instance is being submitted to get publicity for their advocacy campaigns. Second, NGOs do not take seriously the Guidelines' unique procedure for resolving problems in a consensual and non-adversarial fashion, because publicity work that alleges/exposes a company's irresponsible activities is inherently adversarial in nature. Third, confidentiality gives companies more confidence

in the procedure and thus helps resolve cases faster. BIAC's business brief "Guidelines: Confidentiality of Proceedings" states: "If the Guidelines would evolve into a campaigning instrument for the benefit of some interested parties - they would lose their credibility with companies".<sup>9</sup> Several NCPs have also expressed concern that it will be more difficult to get a company to participate constructively in proceedings if there is an ongoing NGO campaign when a specific instance is submitted.

Those that oppose publicizing complaints do indeed have a valid point if the allegations raised in a specific instance are frivolous. However, there are built-in protections against any inappropriate use of the Guidelines' specific instance procedure. Frivolous complaints would clearly be rejected during the initial assessment phase, and the NCP could make a public statement in this regard.

Complainants are not acting improperly if they publicize the fact that they have submitted a specific instance to an NCP. Indeed, it has been the experience of OECD Watch members that any positive outcome in a case is, at least partly, the result of the publicity surrounding the initial filing of a complaint.

Consistent with what is stated in the Procedural Guidance, NCPs should base their decisions on how to

handle a case based on the merits of the issues raised. The existence of an active NGO campaign when a specific instance is submitted is irrelevant.

It is worth noting that many NCPs have not allowed the existence of an active NGO campaign to influence their handling of cases. For example, despite the complexity and sensitivity of the GSL case concerning immigration detention centres in Australia, the Australian NCP placed no restrictions on the complainants during the NCP's self-imposed 30-day initial assessment phase with regard to confirming that a case had been submitted. Only after the commencement of the proceedings were all parties, including the company, advised by the NCP that additional facts, correspondence and arguments could not be made public for the duration of the proceedings without the consent of all parties.

## 2 Public statements on pending specific instances

BIAC has asserted, "Public statements on specific instances do infringe the principle of confidentiality as long as these instances are pending with the NCPs".<sup>10</sup> BIAC's business brief "Guidelines: Confidentiality of Proceedings" cites a statement made by the chairman of the 24 June 2003 Consultations with NCPs: "The spirit of the confidentiality requirement in the Guidelines procedures does indeed refer to the integrity of the process as a whole, and not only to the area of company secrets".

However, there is nothing in the Procedural Guidance or the Commentary to support this interpretation. While proceedings are ongoing, it is entirely appropriate for complainants to make public statements concerning their specific instance if they so choose, including reporting on the status of their instance if it is 'pending'. However, public statements on information and/or documentation brought forth by the company *during or after proceedings* would infringe the Guidelines' confidentiality principle unless the company agrees the information can be disclosed.

## 3 Expanding the Guidelines' confidentiality principle

Many NCPs, such as the UK NCP, have recognized that the confidentiality principle does not apply until after the NCP has made an initial assessment and accepted a case: "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..."<sup>11</sup>

However, there are some troubling signs that OECD governments could extend the Guidelines' confidentiality principle to the initial assessment phase of the specific instance process, despite the fact that the Procedural Guidance and Commentary provide no basis for this change. For example, in a consultation paper on improving procedures, circulated in October 2005, the UK NCP announced that it was "considering extending the confidentiality requirement to all stages of a complaint".<sup>12</sup>

One obvious problem with expanding the confidentiality principle to the initial assessment phase is it could encourage some NCPs to delay its assessment in an effort to both protect companies from criticism and silence complainants. Excessive delays and stalling over the admissibility of a complaint as a means of discouraging NGOs from using the instrument is already seemingly the case with many NCPs.

# Transparency Explained

There are essentially two aspects to NCP transparency. The first relates to general NCP functions. As mentioned in the Introduction above, the Procedural Guidance instructs the NCPs to “operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence”.<sup>13</sup> Again, the term functional equivalence “means that, although NCPs may have adopted different institutional structures and implementation practices, they should still perform to the same standard in terms of their visibility, accessibility, transparency and accountability”.<sup>14</sup> Some issues to consider when assessing the level of transparency are whether the NCP has a website and if so, what information is posted and also whether the NCP’s annual report to the Investment Committee is publicly available. Some NCPs hold formal consultations with civil society. For example, the UK NCP has committed

to holding two formal meetings per year with stakeholders.<sup>15</sup> Other NCPs have never consulted with NGOs.

The second aspect concerns how transparently the NCP handles specific instances, for example, whether the NCP acknowledges receipt of the specific instance, reports to complainants its decision to accept or reject the case and why, or publicises its final determination. The Procedural Guidance states NCPs should “make publicly available the results” of proceedings “unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines” (see Box 2).<sup>16</sup> Again, the Commentary states that “transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public” and “the proceedings associated with implementation will normally be confidential, the results will normally be transparent” (see Box 3).<sup>17</sup>

## Transparency: Issues of Concern

There are two key issues of concern among NGOs with respect to transparency and the specific instance process: 1) the absence of administrative procedures for handling cases; and 2) the lack of functional equivalence in reporting the results of specific instances.

### ❶ Lack of administrative procedures

While NCPs are afforded a great deal of flexibility in how they function, in practice the absence of administrative procedures has allowed some NCPs to forego transparency altogether, while others have handled cases in an arbitrary and inconsistent manner. For example, one Canadian NGO only found out that its specific instance concerning First Quantum was closed via the Investment Committee’s Annual Report.

In another Canadian case concerning Ascendant Copper Corporation’s activities in Ecuador, while the Canadian NCP has been responsive to email inquiries by the Ecuadorian complainant, they were never formally notified their case had been accepted and only found out a representative from the NCP planned to visit the region from an OECD Watch representative.

In Belgium, there was no formal notification to NGOs that two of the complaints following up on the UN Panel reports on illegal exploitation in the Democratic Republic of the Congo had been rejected because of ‘parallel legal proceedings.’ Again, the NGOs only found out their specific instances were rejected by reading the Investment Committee’s Annual Report.

Some NCPs, however, have developed more transparent processes, which have led to complainants having a better idea of what to expect. For example, the Australian NCP has developed a process for handling specific instances that includes timelines for conducting an initial assessment within 30 days. The UK NCP is “considering issuing interim statements as a means of providing public updates on specific instances, particularly in long and/or complex cases or where that has been an unanticipated delay...and/or to close down particular aspects of a specific instance that has not yet been fully resolved”.<sup>18</sup>

### ❷ Lack of functional equivalence in reporting the results of cases

According to the Commentary, “Transparency is an

important criterion...in gaining the confidence of the general public...Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*".<sup>19</sup> However, many NCPs have sacrificed transparency "in their dealings with the public" by withholding all details of specific instances until the Investment Committee took steps in 2004 to address the lack of functional equivalence in this regard".<sup>20</sup> The Chair's Annual Report now contains a list of specific instances that have been or are being considered by NCPs. The publication of this list is a welcome development; however, several NCPs have not provided the names of the companies and still do not make their annual reports to the Investment Committee publicly available.

A significant issue of concern with respect to transparency and the specific instance process is whether the NCP issues a public statement and, if so, the content and quality of statements. The lack of functional equivalence in reporting on results was acknowledged in the Chair's report for the 2004 Annual Meeting of NCPs:

- Trade unions and NGOs expressed concerns about the transparency of NCPs' handling of specific instances at both the 2002 and 2003 Annual Meetings of National Contact Points. As part of their evaluation of their own practices over the past two years, NCPs have looked carefully at disclosure of information during the entire process of handling specific instances. Based on the surveys, the recent round of cases studies and individual NCPs reports, it would appear that divergences in information disclosure practices persist. For example, while some NCPs do not issue public statements at the end of their consideration of specific instances (presumably because they believe that this decision promotes the best interests of the Guidelines), many do issue such statements (for example, Belgium, Chile, Czech Republic, France, Germany, Netherlands, Sweden and the United Kingdom)...<sup>21</sup>

While NCPs can withhold information on specific instances if they deem it in the best interest of the Guidelines, many NCPs have adopted a *de facto* policy of never issuing statements, presumably because these NCPs believe this to be in the best interest of the Guidelines. However, blanket confidentiality fails to "strike a balance between transparency and confidentiality in order to build confidence in the Guidelines procedures"<sup>22</sup> – particularly among civil society.

Alternatively, the UK NCP has asserted, "it foresees no circumstances in which the best interests of effective

implementation of the Guidelines will be served by not making publicly available the outcome of a complaint made under the Guidelines".<sup>23</sup>

BIAC's business brief entitled, "Guidelines: Confidentiality of Proceedings" has incorrectly suggested that only the conclusion of a case is public information: "Filing notice of a Guidelines issue with an NCP *is public information*; discussion/ deliberations with the NCP *are confidential*; **conclusion of deliberations is public information**" (underlining added).<sup>24</sup> However, the Procedural Guidance and Commentary do not support this interpretation.

In a few cases, some NCPs have produced reasoned statements with constructive recommendations, but these are the exceptions. The NCP statements that have been produced concerning the UN Panel's reports on illegal exploitation of resources in the Democratic Republic of the Congo have been inadequate, particularly in view of the gravity of the allegations. For example, the UK NCP has produced a number of statements that merely highlighted the existence of a few provisions in the Guidelines, but offered nothing by way of specific actions a company is expected to take to remedy breaches. Other NCPs handling cases concerning the UN Panel reports never issued statements, including the Canadian, French, German and US NCPs.

In another case submitted to the French NCP concerning the Nam Theun 2 hydropower project in Laos, the NCP issued a statement remarkably quickly, but in doing so, it abandoned virtually all notion of transparency. For example, the NCP never shared with the complainants the documentation it had obtained from other institutions that served to form the basis of its decision that no breach of the Guidelines had occurred. It issued its statement without adequately consulting the complainants and without having facilitated any dialogue between the complainants and the company.

# Recommendations

To address the lack of functional equivalence with respect to transparency and the specific instance process, OECD Watch recommends that NCPs:

- acknowledge receipt of the specific instance within 14 days;
- notify all parties of the process and timelines for dealing with case (e.g., initial assessment completed within 30 days, specific instance addressed within 90 days, public reporting within 14 days of final mediation/resolution).
- provide interim updates on cases that are particularly complex and cannot be concluded within a 90-day timeframe;
- notify complainants it has accepted the specific instance or, if it was rejected, explain why;
- inform complainants of meetings or conversations with the company and other relevant parties;
- share all correspondence and documents furnished by the company with complainants and vice versa;
- explain to complainants how documentation provided by the company has influenced the NCP's handling of the case, including decisions taken;
- inform complainants on steps taken to obtain information or advice from other parties, for example, if the NCP sought clarification from the Investment Committee or contacted officials in the complainants' home country; and
- publicise its final determination on the specific instance, and if not, explain why confidentiality in the case was in the "best interest of the effective implementation of the Guidelines".

## Endnotes

- 1 The full text of the Guidelines is available at: [http://www.oecd.org/department/0,2688,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html)
- 2 Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.
- 3 As of December 2005: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania, and Slovenia.
- 4 Procedural Guidance, "Section I, Sub-section C: Implementation of Specific Instances", p. 4a.
- 5 Procedural Guidance, "Section I. National Contact Points", chapeau.
- 6 Julie Smith, "Putting the OECD Guidelines for MNEs into practice: International Multi-Stakeholder Round Table on the OECD Guidelines Five years after their revision", 1 April 2005, p. 1: [http://www.corporate-accountability.org/docs/OW\\_Roundtable\\_Report.pdf](http://www.corporate-accountability.org/docs/OW_Roundtable_Report.pdf)
- 7 The Guidelines have several sections. The "Preface" and Chapters I-X contain the official text. In addition to the "Procedural Guidance" and "Commentary", some chapters are also followed by "Clarifications", which are clarifications made by the Investment Committee on complaints submitted before the latest revision of the Guidelines in 2000. The "Decision of the OECD Council" is legally-binding and instructs governments that have endorsed the Guidelines to create NCPs.
- 8 Commentary on the Implementation Procedures, p. 19.
- 9 [http://www.biac.org/pubs/mne\\_guidelines/business-brief-1-2-final.pdf](http://www.biac.org/pubs/mne_guidelines/business-brief-1-2-final.pdf)
- 10 [http://www.biac.org/pubs/mne\\_guidelines/business-brief-1-2-final.pdf](http://www.biac.org/pubs/mne_guidelines/business-brief-1-2-final.pdf)
- 11 "Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises", p. 14: "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..."
- 12 "Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises", p. 14.
- 13 Procedural Guidance, "Section I. National Contact Points", chapeau.
- 14 Julie Smith, "Putting the OECD Guidelines for MNEs into practice: International Multi-Stakeholder Round Table on the OECD Guidelines Five years after their revision", 1 April 2005, p. 1: [http://www.corporate-accountability.org/docs/OW\\_Roundtable\\_Report.pdf](http://www.corporate-accountability.org/docs/OW_Roundtable_Report.pdf)
- 15 "Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises", p. 2.
- 16 Procedural Guidance, "Section I, Sub-section C: Implementation of Specific Instances", p. 4a.
- 17 Commentary on the Implementation Procedures, p. 19.
- 18 "Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises", p. 9.
- 19 Commentary on the Implementation Procedures, p. 8.
- 20 Chair's Report, 2004 Annual Meeting of the NCPs: <http://www.oecd.org/dataoecd/5/36/33734844.pdf>
- 21 Chair's Report, 2004 Annual Meeting of the NCPs: <http://www.oecd.org/dataoecd/5/36/33734844.pdf>
- 22 Commentary on the Implementation Procedures, p. 19.
- 23 "Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises", p. 15.
- 24 [http://www.biac.org/pubs/mne\\_guidelines/business-brief-1-2-final.pdf](http://www.biac.org/pubs/mne_guidelines/business-brief-1-2-final.pdf)



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