

# Flagship or failure?

The UK's implementation of the OECD guidelines and approach to corporate accountability



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**Front cover:** Gold mining in the Democratic Republic of Congo. In October 2003, a UN panel of experts listed 18 British-based companies as helping to perpetuate conflict and human rights abuses in the DRC

**Front cover photograph:** Panos

# Executive summary

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## 1. Introduction

### 1.1 The guidelines as ‘flagship’

The OECD Guidelines for Multinational Enterprises, established in 1976, set out a broad range of responsible business principles for companies to follow. The guidelines are voluntary but are central to the UK government’s delivery of corporate social responsibility (CSR), which it committed to actively promote at the World Summit on Sustainable Development in 2002.

In March 2005 the UK government issued an international strategic framework for CSR which specifically refers to the guidelines as a benchmark for its expectations of corporate conduct. Indeed the government’s stated support for the guidelines has led to the perception that they are a ‘flagship’ among several CSR initiatives.

### 1.2 The guidelines as ‘failure’

There is a growing body of evidence that the activities of some multinational companies are having a predominantly negative impact on many poor communities in the developing world and the environment. Research also indicates that there are major limitations to initiatives – such as the OECD guidelines – that take a wholly voluntarist approach to controlling companies’ activities.

Many non-governmental organisations (NGOs), trade unions and local communities have become increasingly disillusioned with the effectiveness of the guidelines and question the government’s commitment to making them work. Amnesty International UK, Christian Aid and Friends of the Earth jointly produced this study to assess how effectively the guidelines have been implemented by the UK government, and their potential to improve corporate behaviour.

## 2. The background

### 2.1 The rise of multinational companies in international development

Foreign direct investment in the global economy has now reached unprecedented levels, significantly increasing the influence of multinational companies on the development prospects of developing countries.

Many governments of poor countries see foreign capital as key to economic growth and actively encourage foreign investment. However, few such countries have the power to enforce corporate regulation. This has allowed some multinational companies to:

- degrade the environment
- abuse human rights
- provide little benefit to local or national development.

For example, a UN panel of experts concluded that during the 1998-2003 war in the Democratic Republic of Congo (DRC), certain business activities helped perpetuate the conflict and human rights abuses. It listed 85 companies which it considered to be in breach of the OECD guidelines. Of these, 18 were British or British-based.

### 2.2 How the OECD guidelines work

The guidelines apply to multinational companies that operate in and from the territories of the 30 OECD countries and nine non-member adhering countries. The guidelines relate to key business operations, including:

- information disclosure
- employment and industrial relations
- the environment
- bribery

- consumer interests
- science and technology
- competition and taxation.

There are also provisions requiring respect for human rights and a contribution to sustainable development, though these are couched in very general terms. The guidelines have been endorsed by business umbrella organisations and trade unions, giving them a unique aura of legitimacy.

Although the guidelines are not directly binding on companies, adhering governments are expected to promote them and to follow procedures for resolving alleged violations. Each country has a National Contact Point (NCP) to respond to any allegations of company misconduct raised by trade unions, NGOs or individuals.

NCPs must operate with ‘visibility, accessibility, transparency and accountability’ and take account of the OECD’s 2000 review of the guidelines, a cornerstone of which was a new complaints mechanism (the ‘specific instance mechanism’). The UK NCP operates from the Department of Trade and Industry (DTI).

### 3. The acid test: the UK’s implementation of the guidelines

The OECD guidelines are endorsed by governments, who are then obliged to implement them. Looking at the record of the UK NCP, our study demonstrates several severe weaknesses in this implementation.

#### 3.1 Failure to promote the guidelines

NCPs are expected to raise awareness of the guidelines among businesses and the public. The UK NCP’s efforts in this respect have been very limited, while it was only in June 2005 that the Confederation of British Industry (CBI) agreed to collaborate with the

DTI in promoting them. Uptake of the guidelines has been very disappointing, with only 12 of the FTSE 100 companies making any reference to the guidelines in their policies.

#### 3.2 Failure to engage with NGOs

Following the review of the guidelines in 2000, the DTI agreed to cooperate closely with civil society. However, there has been little discussion with NGOs and indeed the UK NCP’s annual reports state that there is ‘no formal role for NGOs or other interested parties’. This is particularly problematic given that NGOs have brought all but one of the complaints submitted to the NCP.

#### 3.3 Lack of due process

The credibility of the guidelines rests on how the ‘specific instance mechanism’ is applied when complaints are made to the UK NCP. In 2001, the DTI decided that the NCP should ‘learn by doing’ rather than adopt formal procedures. Many NGOs voiced concerns about the lack of clear procedures and this study shows that their worries were well-founded:

- **Failure to establish time limits for resolving complaints.** On average, NCPs take ten months to conclude specific instance procedures but the UK NCP is taking more than twice as long. The longest ongoing case was filed more than three and a half years ago.
- **Unequal treatment of parties.** The UK NCP discusses the initial assessment of a complaint with the company first and only then with the complainant, which gives the company an opportunity to exert prior influence. Complainants do not have direct contact with the DTI solicitor or any government departments that have been consulted over a complaint.
- **Unwillingness to investigate and lack of fact-finding capacity.** This is one of the

major weaknesses of the NCP and seems at odds with the OECD's own guidance. The onus has often been placed on NGO complainants to provide evidence when they clearly do not have the resources to do so.

- **Lack of transparency.** The NCP has been less than transparent during the complaints process and in publishing the outcomes. Moreover, there are virtually no safeguards to prevent companies from invoking confidentiality as a reason for withholding pertinent information.
- **Failure to act independently of other government interests.** The NCP's independence within the DTI has recently been questioned following its handling of a complaint about the Baku-Tbilisi-Ceyhan pipeline.
- **Narrowing the scope of the guidelines.** The UK NCP has started to apply the guidelines only where there is a clear investment link with a company's supply chain and not where a trade relationship exists, even though trade relationships are covered in the guidelines.
- **Unwillingness to declare breaches of the guidelines.** In what seems a unique interpretation of the guidelines, the UK NCP does not view them as an instrument for holding UK companies to account for past breaches, even though most ongoing cases concern past breaches. Instead, it sees them as being focused on companies' future behaviour. Yet this view is not supported by the text of the guidelines. It even contradicts the government's assurances about alleged breaches by UK companies named in the report of the UN panel of experts on the DRC that states: 'We need to address what has happened in the past.'

### **3.4 The All Party Parliamentary Group on the Great Lakes Region's verdict on the NCP and the UK government's response to complaints about companies operating in the DRC**

In February 2005 the All Party Parliamentary Group on the Great Lakes Region issued a report on how the guidelines had been applied to complaints made against certain UK companies operating in the DRC. The group was critical of the UK NCP and made recommendations to the UK government, the OECD and the United Nations for improving its effectiveness. The UK government conceded that the NCP had shortcomings and agreed to make certain improvements to the NCP's procedures. We welcome these commitments but regret that there is clear reluctance to provide the NCP with powers to:

- investigate and follow up complaints
- prevent companies from claiming confidentiality when asked to disclose evidence
- provide clear recommendations in final statements on breaches of the guidelines.

The UK government has played to the gallery. It has been strong in advocating the guidelines and championing them as one of its 'flagship' CSR initiatives. Yet many UK NGOs increasingly question their effectiveness and the UK government's commitment to making them work.

### **3.5 A failure of implementation**

Even some companies are sceptical, as illustrated by this comment from De Beers:

We think highly of the guidelines, but the problem is implementation and the political will is lacking.

The UK NCP has yet to find any company in breach of the guidelines and there is much dissatisfaction about its handling of complaints.



#### **4. How the guidelines are working in other OECD countries**

This report looks briefly at how other NCPs operate and how the OECD Investment Committee has overseen the guidelines' implementation. It concludes that all NCPs have weaknesses and that there appears to be a fundamental disagreement between the parties involved about how the guidelines should be used. Many NGOs and trade unions see them as a potential way of holding companies to account, while governments and business view them as a tool for promoting good corporate behaviour rather than enforcing it.

#### **5. The limitations of voluntarism and the need for stronger regulation**

The OECD itself has identified the limits of a voluntary approach in terms of enforcing responsible business conduct. In a 2003 study on achieving environmental targets, it acknowledged that 'business as usual' would continue without a credible threat of sanctions. A 2001 report for the UN Research Institute for Social Development echoed its findings, as did a February 2005 report by the UN High Commissioner on Human Rights. The UK government's approach to CSR in its widest context focuses on voluntary initiatives without any move to regulate industry or impose sanctions on companies for instances of corporate malpractice.

While market pressures are driving some companies to develop explicit social and environmental policies on a voluntary basis, we believe market mechanisms alone will not lead to higher standards of social responsibility. In the absence of strong minimum standards and enforcement mechanisms, the voluntary approach seems unlikely to deliver. There is increasingly a call for more comprehensive and effective regulatory frameworks at both national and international level.

#### **6. Conclusion**

This report shows the lack of rigour and credibility in the way the UK NCP operates, the limitations inherent in the OECD guidelines themselves and the UK government's reliance on voluntary initiatives to improve corporate behaviour. In our view, there is far too much carrot and not enough stick. A voluntary approach simply cannot deliver the standards of business practice that investors, consumers, employees and communities now rightly expect.

The OECD guidelines could, if strengthened, be an important mechanism for scrutinising the conduct of multinational corporations. Ultimately, however, we believe there must be fundamental changes to national and international regulation, with penalties and legal sanctions for those companies which damage the environment, workers and local communities.

As part of the Corporate Responsibility Coalition (CORE), we are campaigning for changes to the law to guarantee that the rights of people and the environment in developing countries are properly protected. We are also calling for the development of an international framework on corporate accountability, using the UN Norms as a starting point.

#### **7. Recommendations**

##### **The UK government should:**

- make greater efforts to promote the guidelines to UK companies and stress that they represent the UK government's firm expectation of corporate behaviour
- ensure that the NCP is adequately funded to undertake its duties
- reorganise the NCP as an interdepartmental office with permanent representation of officials from the Department for International Development (DFID), the Department for Environmental Food and Rural Affairs (DEFRA), the Foreign and Commonwealth Office (FCO) and the DTI.

- report annually to the UK parliament on the steps it is taking to promote, implement, monitor and review the effectiveness of the OECD guidelines.

**In relation to the UK NCP's complaints process, it should ensure that the NCP:**

- has adequate expertise and experience to undertake thorough investigations into alleged breaches of the OECD guidelines, including, where appropriate, fact-finding missions
- establishes clear timeframes for the initial assessment of cases, the receipt of responses from both parties and, in cases of disagreement, the issuing of a final statement and recommendations
- conducts full and impartial investigations of all complaints of alleged breaches of the guidelines, with support from other government departments
- gives the complainant and the company simultaneous access to an initial assessment of the case and any official opinions
- adheres to the principle of transparency at all appropriate stages of a complaint – confidentiality may be applied only once the NCP has made its initial assessment of a complaint and all parties have agreed to enter into dialogue
- establishes an appeals mechanism, such as a parliamentary committee or ombudsman, so that complainants can request a review of specific decisions
- holds regular public meetings with stakeholders, including NGOs
- publishes complete and accurate records of all complaints, including the names of the parties involved and the outcome.

**In order to strengthen national and international regulation it should:**

- support legal frameworks for corporate accountability, at both national and international levels. This would involve changes to UK company law to require UK companies to minimise any negative aspects of their business activities on the people of the countries in which they operate, ensure access to legal redress for the communities overseas their activities adversely affect, and report on their social and environmental impacts
- support the development of an international framework for corporate accountability, using the UN Norms as a starting point.

**The OECD Investment Committee should:**

- widen and clarify the definition of 'investment'
- ensure that the guidelines apply to all trade relationships
- provide NCPs with greater investigative powers and resources
- publish complete and accurate records of all complaints, including the names of the parties involved and the outcome
- ensure final statements on the outcome of complaints include recommendations directly related to breaches of the guidelines
- ensure that all OECD governments link adherence to the guidelines with the granting of export credit.

# Introduction

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## 1. The OECD guidelines, private investment and corporate social responsibility

The OECD Guidelines for Multinational Enterprises set out a broad range of voluntary, socially responsible business principles for companies to follow. The guidelines apply to companies based in any OECD country, irrespective of where in the world those companies operate. The guidelines also apply to companies based in non-OECD countries that have signed up to them.

As foreign direct investment (FDI) in the global economy has reached unprecedented levels, the influence of multinationals on the development prospects of developing countries has increased sharply – necessitating the guidelines.

Governments of many poor countries consider foreign capital as key to economic growth and often go out of their way to create an environment that attracts foreign investors. Such an environment frequently involves weakly enforced corporate regulation, which lets companies get away with damaging the environment, abusing human rights and providing little benefit to local or national development.

In 2002, prior to the World Summit on Sustainable Development (WSSD) in Johannesburg, the United Nations Environment Programme (UNEP) published a detailed study of how industry had addressed sustainability over the ten years since the Earth Summit in Rio de Janeiro.<sup>1</sup> It found that although industry was more aware of environmental and social issues, this rarely translated into improved environmental performance. On the contrary, Klaus Toepfer, executive director of UNEP, concluded that:

Today, we are still confronted with worsening global trends related to environmental problems like global warming, loss of biodiversity, land degradation, air and water pollution. Some companies have risen to the challenge... However... we have found that the majority of companies are still doing business as usual.<sup>2</sup>

The debate about companies' impacts on the societies in which they operate has evolved significantly over the last decade – resulting in the development of a culture of corporate social responsibility (CSR). But in the absence of any binding regulation, companies' social and environmental impacts are measured purely against voluntary standards which includes the guidelines.

## 2. The UK government as a champion of voluntarism

The UK government sees itself as 'an international pioneer' and 'world leader' on CSR.<sup>3</sup> It favours the voluntary approach over legislation as the best way to get companies to address the social and environmental damage they cause.

In March 2004, a government consultation document on CSR spelled out its support for three existing international voluntary initiatives:

- the UN Global Compact
- the International Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
- the OECD Guidelines for Multinational Enterprises.

In July 2004 the UK Department for Trade and Industry's (DTI) white paper on trade and investment dismissed international



regulation as a means of achieving sustainable development, arguing instead for a voluntary approach to CSR. It stated:

...we are not convinced of the feasibility of an effective and enforceable universal regime.<sup>4</sup>

In March 2005 the DTI published an international strategic framework on CSR, again emphasising the voluntary approach that describes CSR as a key element of getting businesses to take account of the social, economic and environmental impact of their activities. It also believes that CSR can help deliver on some key international objectives, including:

- commitments made at the World Summit on Sustainable Development in 2002<sup>5</sup>
- the millennium development goals – internationally agreed targets for tackling poverty
- commitments detailed in the Africa Commission report launched in March 2005.

Central to the government's CSR strategy is encouraging companies to follow internationally agreed standards, including the OECD Guidelines for Multinational Enterprises. The government specifically refers to the guidelines as a benchmark for its expectations of corporate conduct.<sup>6</sup>

### **3. The OECD guidelines – a 'flagship' CSR initiative**

The guidelines form a central plank of the UK government's CSR policy, and there appears to be considerable support for them across all government departments.

Where multinationals are unaccountable across boundaries – and sometimes appear more powerful than the developing countries in which they operate – business 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.<sup>7</sup>

#### **Gordon Brown MP, Chancellor of the Exchequer, September 2002**

In 2003, the UK government's annual report on sustainable development and the Department for International Development's position paper on CSR both reiterated the UK's commitment to the guidelines.<sup>8</sup>

The guidelines were also endorsed in the final communiqué of the UK government-hosted Progressive Governance Summit in July 2003.<sup>9</sup>

The Foreign and Commonwealth Office's 2004 annual report on human rights also emphasises the importance of the guidelines:

Through our overseas posts, the FCO further promotes the guidelines to non-adherent countries and to companies operating abroad. We encourage all companies operating in the UK and British companies operating overseas to work in accordance with the guidelines...<sup>10</sup>

It is clear that the UK government has identified the OECD guidelines as a key instrument to achieve its CSR aims and its wider objectives on sustainable development.

The UK government's strategy seems to be based on the assumption that existing CSR initiatives such as the guidelines are successful. But a number of leading human rights, environmental and development organisations have called for the UK government to start from a different set of premises in developing an international CSR framework – one that analyses the impact of UK companies overseas, in particular their impact on communities and the environment, evaluates the effectiveness of current CSR initiatives and looks at whether the UK's regulatory framework needs strengthening.

## Chapter 1

# What are the OECD Guidelines for Multinational Enterprises?

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The OECD guidelines are a series of recommendations for good corporate behaviour made by the governments of the 30 industrialised countries of the OECD and nine non-member adhering countries, to the multinational companies that operate in and from their territories.<sup>11</sup> They have been endorsed by business, which is represented through the OECD's Business and Industry Advisory Committee (BIAC), and trade unions through the Trade Union Advisory Committee (TUAC),<sup>12</sup> giving them a strong sense of legitimacy.

But observance of the guidelines by enterprises is voluntary and not legally enforceable.<sup>13</sup> While they are not directly binding on companies, adhering governments are expected to promote them and they include a procedure for bringing alleged violations to the attention of the governments of the countries where the businesses are registered.<sup>14</sup>

Where breaches occur, governments are obliged to make recommendations to address the corporate conduct of multinational companies operating in or from their territories – making the guidelines a potentially useful tool for improving corporate behaviour.

## 1. The scope of the guidelines

### • Content

The guidelines, originally adopted in 1976, were reviewed in 2000 'to ensure their continued relevance and effectiveness'.<sup>15</sup> After negotiations with civil society organisations, their content was extended

and the implementation process significantly strengthened.

The guidelines now relate to many aspects of multinational companies' operations, including:

- information disclosure
- employment and industrial relations
- the environment
- bribery
- consumer interests
- science and technology
- competition and taxation.

There are also provisions requiring respect for human rights and a contribution to sustainable development – but these are couched in very general terms.

### • Reach

The guidelines have been adopted by the governments of all 30 OECD member countries as well as by nine non-members. They apply to both the domestic and foreign direct investment of companies based in or operating out of any OECD country. Wherever such a company operates in the world, the guidelines apply to its conduct. However, the guidelines are not truly global. They do not cover companies from countries that have not signed up to them – such as China, Russia, India and Malaysia – which are home to some of the world's largest businesses.

### • Application to supply chains

A significant outcome of the 2000 review was the inclusion of a specific reference to companies' relations with suppliers and other business partners. The text calls on companies 'to encourage, where practicable, their business partners, suppliers and sub-contractors to apply principles of corporate conduct compatible with the guidelines.'<sup>16</sup>

## 2. Implementation and enforcement

The ultimate responsibility for implementing the guidelines lies with governments. The guidelines represent 'shared expectations for business conduct',<sup>17</sup> and governments expect companies to adhere to them even though observance is not legally enforceable.<sup>18</sup> Governments are obliged to both promote and encourage compliance with the guidelines. This entails appointing a national contact point (NCP), a civil servant located within government ministries.

## 3. The role of national contact points

The role of the NCP is to inform prospective investors about the guidelines 'as appropriate', as well as promoting them to businesses, employee organisations, non-governmental organisations and the general public.<sup>19</sup> NCPs must also respond to any allegations of company misconduct. Allegations of misconduct are then dealt with using the 'specific instance' mechanism described below.

All NCPs are expected to take account of the 2000 review and operate in accordance with the core criteria of 'visibility, accessibility, transparency and accountability'.<sup>20</sup> NCPs meet annually to report on the implementation of the guidelines in their respective countries, and other interested parties such as NGOs are invited to attend these meetings. The implementation of the guidelines varies considerably from country to country.

## 4. The 'specific instance' or complaints mechanism

A cornerstone of the 2000 review was the establishment of a new complaints procedure – the 'specific instance' mechanism. It requires governments to establish a forum where complaints can be lodged directly against multinationals that operate in or from those countries and that violate the guidelines. NCPs are required to examine such complaints. Complainants can include trade unions, NGOs and individuals.<sup>21</sup> A company may find its operations examined – whether or not it has endorsed the guidelines.

When they receive a complaint, NCPs are expected to liaise where appropriate with businesses, employee representatives, NGOs, relevant experts and NCPs from other countries. Once a complaint is submitted, the NCP makes a *prima facie* assessment of whether it merits further investigation.<sup>22</sup> The procedural guidance does little to elaborate on when such investigation is warranted.

If an NCP decides to proceed, and provided the parties agree, it plays a mediation role, bringing the parties together to resolve the issue,<sup>23</sup> during what is a confidential procedure.<sup>24</sup> If the parties fail to reach agreement, the NCP releases a statement and makes recommendations on how the guidelines should be implemented.<sup>25</sup> So the results of the procedure are supposed to be made public, but only after consultation with the relevant parties and 'unless preserving confidentiality would be in the best interests of effective implementation of the guidelines'.<sup>26</sup>

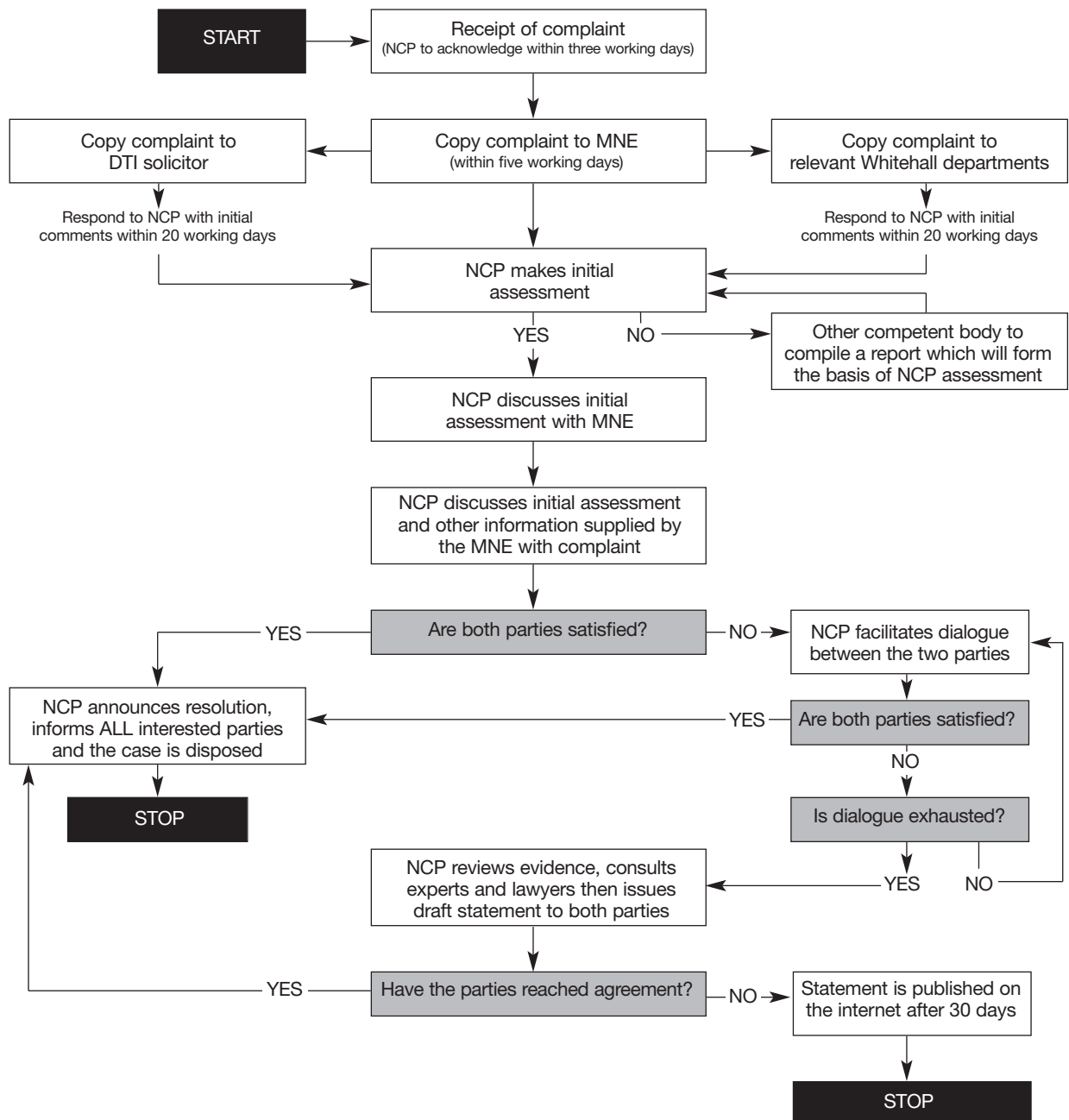
## 5. How the UK NCP operates

The UK NCP operates out of the Department of Trade and Industry (DTI) and is based in the Europe and World Trade Directorate.

The DTI describes the UK NCP as ‘an inter-departmental body... working in liaison with other government departments’. However, there is no formally agreed role for government departments in relation to the work of the NCP. Contact between the NCP and these departments is either on an ad hoc basis or through the UK government-wide Inter-Departmental Group on Corporate Social Responsibility.

In response to criticism about the lack of formal involvement of key government departments, such as the Department for International Development (DFID) and the Foreign and Commonwealth Office (FCO), the government is proposing to establish a new working group to discuss issues raised in cases and to assist the NCP.<sup>27</sup>

The flowchart below outlines the UK NCP’s procedure to deal with complaints submitted as ‘specific instances’.<sup>28</sup>



## **6. The role of the OECD Investment Committee**

The Investment Committee is comprised of representatives from all OECD member countries and observers, and is the body responsible for overseeing the guidelines within the OECD. It helps NCPs to carry out their activities and makes recommendations on how they can improve their performance. However, only the NCP can decide if a company has violated the guidelines after a complaint has been submitted. The Investment Committee is prohibited from 'reaching conclusions on the conduct of an individual enterprise' or reviewing the merits of a complaint, because both governments and business were opposed to it having 'a quasi-judicial' role.

An NCP can ask the Investment Committee to judge whether another NCP has interpreted the guidelines correctly. The Investment Committee can then make clarifications to the guidelines, if necessary. The TUAC and the BIAC can also request clarifications. While the Investment Committee's clarifications do not become part of the official text of the guidelines, they demonstrate how certain guidelines should be seen and understood. Currently, individuals, communities, NGOs and multinational enterprises cannot directly ask the Investment Committee to provide clarifications.



## Chapter 2

# Failing the acid test: The UK's implementation of the OECD guidelines

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The OECD guidelines apply to the majority of the world's multinational companies across all sectors. They are endorsed by governments, which are obliged to implement them, providing a valuable test of a government's commitment to making a voluntary approach to CSR work. This chapter critically examines the record of the UK NCP in promoting and implementing the guidelines.

## 1. Failure to promote the guidelines

### 1.1 General promotion and company uptake

NCPs are charged with raising awareness about the guidelines among businesses, employee organisations, NGOs and the public.<sup>29</sup> They are also required to draw the guidelines to the attention of companies wanting to invest in the UK or UK companies investing abroad, 'as appropriate'.

The UK's NCP made a promising start by becoming the first NCP to issue a booklet informing relevant parties about the guidelines in 2001.<sup>30</sup> However, little else of substance was done until December 2004, when Patricia Hewitt, the secretary of state for trade and industry, wrote to the FTSE 100 companies enclosing a copy of the guidelines.

According to the UK NCP 2004 annual report, copies of the guidelines booklet have been distributed at business CSR events. The report refers to 'dialogue with individual companies seeking input into their CSR strategies'. But it does not mention how often these contacts happen, or their outcomes.<sup>31</sup>

UK business's uptake of the guidelines has been very disappointing. Few companies' CSR policies make any reference to them. According to Insight Investment's 2003 survey of the FTSE 100 companies, only 12 out of 100 companies actually referred to the guidelines in their policies.<sup>32</sup>

Business lobbyists such as the Confederation of British Industry (CBI) have played their part in slowing down company uptake. It was only in June 2005, after a five-year delay, that the CBI agreed to collaborate with the DTI in promoting the guidelines.<sup>33</sup>

### 1.2 Engagement with NGOs

Following the review of the guidelines in 2000, the DTI promised that it would continue cooperating closely with NGOs.<sup>34</sup> But it waited almost two years, until May 2002, before holding its first stakeholders' meeting for civil society. Between June 2002 and April 2003, it did not initiate any consultations with NGOs.<sup>35</sup>

In May 2005, the NGO Rights and Accountability in Development (RAID)<sup>36</sup> wrote to the UK NCP asking whether NGOs could see its annual report before it was submitted to the OECD. But the UK NCP replied saying the annual report had already been submitted and it was therefore too late to incorporate NGO comments.

Each year the UK NCP's annual report states that there is 'no formal role for NGOs or other interested parties in the functioning of the UK NCP'.<sup>37</sup> In the UK, this is particularly problematic given that NGOs have submitted all but one of the specific

instances that have been considered by the UK NCP.

## 2. A lack of due process

All adhering governments are required to examine alleged breaches of the guidelines through the specific instances complaints procedure. How NCPs deal with these complaints represents the acid test of their governments' implementation of the guidelines, and the credibility of the guidelines as a benchmark for the behaviour of companies.

### 2.1 Lack of clear procedures from the outset

- In its 2001 booklet on the guidelines, the DTI decided that rather than try to spell out formal procedures, the NCP should 'learn by doing' and elaborate more detailed guidance on the basis of experience.<sup>38</sup> In May 2002, the NCP outlined a procedure for the consideration of specific instances (see box on page 36), and invited comments.

Many UK NGOs voiced concerns about the potential flaws in the proposed approach.<sup>39</sup> These included the:

- lack of a time limit on the conclusion of cases
- lack of opportunity for complainants to respond to all comments received by the NCP
- need to clarify the decision-making process
- need to maintain impartiality.

However these concerns were ignored.

### 2.2 Lack of time limit for complaints

While a timeframe of three days is set for acknowledging a complaint and 20 days are allotted for internal consultation within the DTI and other government departments, there are no other time constraints on the consideration of a complaint. Clearly, there

must be a balance between the need to carefully consider complex cases and the need to resolve them in a timely manner and issue recommendations. However, the UK NCP has not achieved this balance.

The average time taken by NCPs to conclude the specific instance procedure is about ten months, but the UK NCP is taking more than twice that long. The longest ongoing case was filed more than three and a half years ago.

NCPs delaying their consideration of complaints or failing to respond to complainants altogether, has led both OECD Watch<sup>40</sup> and TUAC to seek a timetable for the consideration of specific instances.

A related problem is the length of time companies are taking to respond to complaints: more than 18 months in the case of Anglo American<sup>41</sup> and six months in the case of BP.

The specific instance mechanism was intended to operate without the involvement of lawyers, which would inevitably lead to delays and obstruct the handling of the complaint. However, in reality, companies have resorted to legal and administrative interventions, particularly if they feel their reputation has come under threat.

For example, Anglo American has managed to delay a decision on a complaint made against its copper operations in Zambia by nearly 18 months by challenging the jurisdiction of the UK NCP to hear the complaint. (See case study opposite.)

The guidelines were designed to help companies address their social and environmental impacts in a constructive manner and without the need to resort to the courts. It is the responsibility of the NCP to ensure that the purpose of the guidelines is served and that any blocking or delaying tactics are actively discouraged.

### **Anglo American Corporation (Zambia)**

In February 2002, UK-based NGO RAID and Zambian NGOs Afronet and Citizens for a Better Environment (CBE) submitted a complaint to the UK NCP about the conduct of Anglo American Corporation (AAC) during the privatisation of Zambia's copper mines.

The UK NCP followed the official OECD-level procedural guidance and did 'take steps to develop an understanding of the issues involved'.<sup>42</sup> It acquired some relevant documentation from DFID's office in Zambia, and the written opinion of the DTI solicitor before making an initial assessment of the case. The company was forwarded copies of this information, yet the complainants received neither document.

In June 2002, following a change in personnel within the DTI, communications between the NCP and the complainants ceased abruptly. For almost a year the complaint made no progress and the UK NCP office had essentially stopped operating.

Dialogue resumed in June 2003, but progress was obstructed when the company challenged the UK NCP's jurisdiction in the case. The company questioned whether the UK NCP had the right to hear the case, as parts of the complaint pre-dated the company's incorporation in the UK and listing on the London Stock Exchange in May 1999. This was despite the fact that the NCP, on advice from DTI lawyers, had formally accepted all parts of the submission in full in May 2002, informing both parties of its decision.

The UK NCP then referred the matter to the OECD's Investment Committee for a definitive interpretation. The case could not proceed until the Investment Committee had reached its decision, setting back the complaints process by another year.

In its response, the Investment Committee stated that 'pre-1999 company behaviour needs to be taken into account in order to understand the current situation'.<sup>43</sup> This meant that the UK NCP now had to resume its assessment of the case against Anglo American. The complainants subsequently submitted further information in April 2005 and are awaiting the response of Anglo American.

The absence of clear procedures; the breakdown of communication between the UK NCP and the complainants; and the approach of the company placed an enormous burden on the complainants' resources and prejudiced their ability to pursue their claim. It has been more than three years since the original complaint was filed and the case is yet to be resolved.

### **2.3 Marginalising complainants**

Most complaints against OECD-based companies concern their operations in non-OECD countries. But often those living in these countries are unaware of the guidelines and lack the resources to make proper use of them. So those with the most to gain from the guidelines are the worst equipped to use them.

#### **• Unequal treatment of parties**

Most NCPs (including the UK NCP) are located within the business or industry departments of their government which are, by their nature, pro-business.

The idea that an NCP can act as an honest broker is also undermined by the fact that the UK NCP discusses the initial assessment of a complaint with the company first and only then with the complainant. The failure to hold simultaneous discussions gives the company an opportunity to exert prior influence. Companies have been given a significant degree of access denied to complainants.

Complainants don't have direct contact with the DTI solicitor or any government departments that have been consulted over a complaint. This has resulted in misunderstandings about the nature of complaints.

#### **• Onus on complainants**

Furthermore, despite the fact that NCPs are supposed to offer conciliation and mediation to deal with a complaint, as of the end of June 2005 the UK NCP had only ever convened one meeting between a complainant (RAID) and a company (Oryx Natural Resources).

Instead, the UK NCP has placed the onus on NGOs in developing countries to provide supplementary information to support complaints – see the case study overleaf on CBE Zambia's complaint about National Grid

Transco (now Transco). But NGOs, especially in the developing world, often lack the resources to gather such information.

### **National Grid Transco (now Transco) in Zambia**

In July 2003, the Zambian NGO Citizens for a Better Environment (CBE) filed a complaint alleging that National Grid Transco (NGT), a UK-based utilities company, had breached guidelines on consumer protection from tariffs; anti-competitive practice; and exemptions from taxation and employment regulations.

In November 2003, NGT submitted a written response to the complaint. But the case has stalled for nearly two years because the UK NCP has insisted that CBE produce more information.

In April 2005, the NCP wrote to CBE threatening to close the case. CBE pointed out that Zambia does not have a Freedom of Information Act to compel government officials to release information within a specified timeframe, after it had requested help in obtaining additional documentation from the Zambian Parliamentary Committee Responsible for Energy.

In circumstances where the complainant is unable to provide supplementary information, it would seem unreasonable for the NCP to close the case without making its own attempt to get hold of the information required, especially when it could be obtained via UK government departments. Even NGT, which was anxious to resolve the case, was critical about the UK NCP's lack of action.

However, in July 2005, the NCP closed the case because of the length of time that had elapsed since NGT provided its detailed response and CBE's failure to provide additional information.<sup>44</sup>

### **2.4 Unwillingness to investigate and lack of fact-finding capacity**

One of the major difficulties with the implementation of the guidelines has been the UK government's unwillingness to give its NCP an investigative and fact-finding function. This seems at odds with the OECD's own guidance:

In the event guidelines-related issues arise in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved... the NCP may still be in a position to pursue enquiries and engage in other fact-finding activities.<sup>45</sup>

Companies have access to the kind of human and legal resources needed to defend themselves – resources complainants often lack. The UK NCP should take this imbalance into account.

### **2.5 Lack of transparency**

One of the NCP's core operating criteria is transparency. Yet the UK NCP has been less than transparent during specific instance procedures, both during the complaints process and in publishing the outcomes.

The UK NCP's entry in the OECD's 2005 official table on specific instances is inaccurate. Only four cases were listed, although the UK NCP's own 2005 annual report refers to seven. The criteria under which the UK NCP decides to include or exclude cases from the official OECD table is unclear.

A transparent process would require information that is relevant to the resolution of a case to be shared with the complainant, but in some instances this has not happened. There are virtually no safeguards to prevent companies from invoking confidentiality as a reason for withholding pertinent information.

### **2.6 Failure to act independently of other government interests**

The UK NCP's independence within the DTI has recently been questioned following its handling of the complaint filed against the BP-led consortium responsible for building and operating the Baku-Tbilisi-Ceyhan (BTC) pipeline.

A few months after the BTC pipeline complaint had been filed, the DTI's Export Credit Guarantee Department<sup>46</sup> announced it was supporting the project even though the complaint was still being considered. This effectively pre-empted the consideration of the complaint, thereby throwing into disarray the consideration of the same matter as a specific instance by the UK NCP.



## **BP and the Baku-Tbilisi-Ceyhan (BTC) pipeline**

In April 2003, UK NGOs Friends of the Earth, Platform and The Cornerhouse filed a complaint alleging BP and its consortium partners were potentially breaching the guidelines during the construction of the Baku-Tbilisi-Ceyhan (BTC) pipeline in Azerbaijan, Georgia and Turkey.<sup>47</sup>

It took the NCP four months to declare the complaint admissible and it was another six months before BP replied to the complaint in March 2004.

Yet in December 2003, the DTI's Export Credit Guarantee Department announced that the project complied with the guidelines, and that it would be supporting it financially.<sup>48</sup> In effect, this made the UK government a financial stakeholder in the BTC pipeline. It pre-empted the UK NCP dealing with the same matter as a complaint under the specific instance procedure.

In November 2004 the complainants wrote to the Investment Committee expressing concern about the UK NCP's handling of the case. The NGOs maintained that the BTC consortium's 'failure to reply before financial closure has ensured that the complainants can no longer be assured of a fair and independent assessment of the specific instance given that the UK government is now a party to the project by having agreed to provide support through the Exports Credit Guarantee Department, the World Bank and the European Bank for Reconstruction and Development.'<sup>49</sup>

UK government ministers and officials prejudiced the outcome of the complaint by publicly stating that the BTC project was compliant with the guidelines before the case had been assessed by the specific instance procedure. In February 2005, the Investment Committee stated it was satisfied with the UK NCP's assurances that it should retain responsibility for handling and assessing specific instances and that the specific instance raised will receive impartial attention.

## **3. Narrowing the applicability of the guidelines**

### **3.1 Excluding company supply chains**

Many NGOs are concerned that NCPs are increasingly attempting to limit the applicability of the guidelines by interpreting them as only applying to investment and not trade relationships. There appears to be a trend towards reinterpreting the supply-chain provision of the guidelines to narrow its

scope and reduce the number of complaints that are admissible under the complaints procedure.

Initially, the UK NCP assured NGOs that it was not in favour of such an approach. Yet in its consideration of the alleged breaches of the guidelines by De Beers in its operations in the Democratic Republic of Congo (DRC), the UK NCP has used the apparent lack of an investment relationship as a pretext for dismissing the complaint.

### **De Beers and the DRC: Supply-chain responsibility**

The case against De Beers centred on its relationship with companies further down its supply chain. The Diamond Trading Company (DTC), the rough-diamonds sales arm of the De Beers Group, sells its diamonds to 'sightholders' (companies that buy and sell the diamonds that De Beers extracts). It was the purchasing activities of certain sightholders that caused the UN panel concern.

In its final report in October 2003, the UN panel of experts placed De Beers in the category 'for further investigation'. In January 2004, in a desire to clear its name, De Beers asked the NCP to open the case.

This is De Beers' summary of the panel's allegations:

De Beers was named in Annex III of its report on the basis of information and documentation received by the panel indicating that the three sightholders have purchased rough diamonds from sources that encourage and contribute to the conflict in the DRC. The panel was of the view that by maintaining its business relationship with these sightholders through the Diamond Trading Company (DTC), De Beers has allegedly indirectly provided support to entities that are directly or indirectly involved in fuelling the conflict in the DRC.<sup>50</sup>

The UK NCP concluded in its statement that the actions of De Beers' sightholders 'are outside the remit of the UK National Contact Point (NCP) acting under the OECD Guidelines for Multinational Enterprises.'<sup>51</sup>

No clear explanation was given as to why this was not seen as a supply-chain issue. The UK NCP's statement fails completely to address the key issue of whether De Beers had the power to influence the conduct of partners in its supply chain.



## **The UN panel of experts' report on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo**

In June 2000, the UN security council established a UN panel of experts to examine the links between business, resource exploitation and conflict in the Democratic Republic of Congo (DRC). According to the UN report, an estimated 3.5 million people have died as a result of the conflict – some in the fighting itself and some because of related factors such as food shortages. Up to 1.5 million people have been displaced from their homes. The report accused companies of profiteering from the exploitation of DRC's natural resources and for contributing to armed conflict and human rights abuses.<sup>52</sup>

In an unprecedented step, the panel, in its October 2002 report, listed 85 companies as being in violation of the OECD Guidelines for Multinational Enterprises. This raised the expectation that governments would hold to account those companies that were responsible for misconduct in the DRC.

### **Corporate lobbying to remove or downgrade complaints**

The UN panel's naming of companies prompted many of them to lobby their own governments and the security council, to seek their removal from the annexes. The security council, stung by criticism that companies had been denied an opportunity to respond to the panel's allegations, invited them to send their reactions and promised to publish them. It recommended a six-month renewal of the panel's mandate, to review existing and new information.<sup>53</sup>

In the final report of October 2003, the vast majority of company cases were listed as resolved, even though the panel left serious questions about corporate conduct unanswered. In all, 42 of the companies formerly listed as breaching the guidelines were placed in the 'resolved' category. Dossiers on at least 11 companies were referred to NCPs in Belgium, Germany and the UK for further investigation. Two final categories dealt with cases of companies and individuals 'referred to governments for further investigation' or those that 'did not react to the Panel's report'.

### **UN panel disbanded**

Unfortunately, the UN panel was disbanded following the publication of its last report in October 2003. This meant that the body that had commissioned the investigation and made the allegations was no longer available to provide evidence for NCPs who were undertaking follow-up investigations.

However, UN security council resolution 1457 actually calls on states to 'conduct their own investigations as appropriate through judicial means, in order to clarify credibly the findings of the panel'.<sup>54</sup> This created the expectation that governments would hold to account those companies that were responsible for misconduct in the DRC – an expectation that is yet to be fulfilled.

### **Lack of follow up**

The OECD Investment Committee was critical of the lack of detail in the information the UN panel gave NCPs.<sup>55</sup> While it is true that the UN panel was unable to provide sufficient evidence to support a number of claims made against companies named in their DRC reports, this does not mean that all its claims were without merit.

Many NGOs maintain that there is a wealth of material in the public domain, not only in the panel's report, but also in a host of other government documents, court records and NGO reports. Disappointingly, the government has failed to follow up claims made in the UN panel reports with fact-finding missions of its own.

Furthermore, it is difficult to ascertain precisely what steps NCPs have taken to gain access to information in the panel's archive. The evidence from the NCP annual reports indicates that they assumed most of the breaches re-categorised as 'resolved' were not worth following up.<sup>56</sup>

But the reality was that the UN panel was not in a position to properly assess the potential breaches of the guidelines because it lacked expertise, resources and a clear mandate. The failure of NCPs to investigate further the alleged breaches has led some companies interviewed by the UN panel to assert that many of the companies who had had their case reclassified as 'resolved' were seriously in breach of the guidelines and had 'got away with it'.<sup>57</sup>

## 4. The UK's handling of the UN panel of experts' report on the DRC

The credibility of the UK NCP has been called into question because of the way it handled the DRC cases referred to it by the UN panel of experts. Eighteen British or British-based companies were included in the UN panel's annex or were referred to in other parts of the report, and four were officially forwarded to the UK NCP by the UN panel.

But the UK government appears to have taken an inconsistent approach in resolving these cases that has led to criticism from various quarters, including the UK All Party Parliamentary Group on the Great Lakes Region.<sup>58</sup>

### 4.1 The UK All Party Parliamentary Group (APPG) on the Great Lakes Region

In February 2005 the APPG issued a report assessing the application of the guidelines to the UK companies operating in the DRC and made recommendations to the UK government, the OECD and the UN.<sup>59</sup>

#### Summary of main APPG findings

- The absence of a complainant in the UK NCP procedure is compromising its integrity and impartiality. The UK should follow the example of other OECD states and include NGOs in the process.
- If the UK NCP limits its investigations to the four cases forwarded to it by the UN panel, it risks overlooking a number of grave charges against other companies.
- The statements issued by the UK NCP must be more detailed and must contain concrete recommendations for future conduct, otherwise it risks undermining the usefulness of the guidelines in conflict situations.
- The large number and complexity of the cases in question are beyond the capacity

of any single official to handle alone. A senior civil servant should be appointed to oversee the examination of the DRC cases and to ensure that the NCP is provided with the necessary resources to examine the cases expeditiously.

- Complainants are concerned that NCPs are increasingly interpreting the guidelines as only applying to 'investment relationships' and not to 'trade relationships'. Trading relationships can have serious human rights implications, as the conflict over diamonds in the DRC illustrates.<sup>60</sup> If the guidelines are interpreted in a way that excludes trading relationships, this leaves a significant gap in covering corporate activity.

#### Main recommendations to the UK government:

- admit complainants into the NCP process
- give the NCP more human and material resources
- cases should be examined within an agreed timeframe
- the NCP should give companies clear recommendations
- there should be criminal investigations into any companies that may have committed illegal acts
- there should be possible select committee scrutiny of the NCP process.

#### Main recommendations to the OECD Investment Committee and OECD governments on improving the OECD guidelines:

- give NCPs greater investigative powers and resources
- guarantee the impartiality of NCPs
- elaborate on the guidelines' human rights provisions
- ensure the guidelines apply to both trade and investment.

## The UK government's response

The UK government published its response to the APPG report on the DTI website in July 2005.<sup>61</sup> It included the following undertakings and observations:

- that complainants should be admitted into the process (at least in the case of the DRC)
- it can see merit in setting timetables to help resolve cases as quickly as possible
- it supports the issuing of interim statements on cases where appropriate
- it supports the OECD Investment Committee in developing guidelines for companies operating in conflict zones
- it has agreed to set up a working group of relevant government departments and agencies, including DFID and the Foreign Office, to discuss the issues raised in cases and assist the NCP.

Amnesty International UK, Christian Aid and Friends of the Earth welcome the support for changes to involve complainants, increase transparency and scrutinise cases, and the desire to ensure better coordination between departments. However, closer examination of the UK government's response demonstrates a clear reluctance to provide the NCP with investigatory powers to:

- follow up complaints under the guidelines
- prevent companies from claiming confidentiality when asked to disclose evidence by the NCP
- provide clear recommendations in final statements on breaches of the guidelines.

## 5. An unwillingness to declare breaches of the guidelines

In what seems a unique interpretation, the UK NCP does not view the guidelines as an instrument for holding UK companies to account for past breaches in other OECD countries, even though most ongoing and resolved NCP cases across the OECD concern alleged past breaches. Instead it sees their focus as being the future behaviour of companies.

The UK NCP maintains that:

The purpose of the guidelines is not to act as an instrument of sanction nor to hold any company to account.

The implementation procedures within the guidelines are a problem-solving mechanism with a view to parties coming to an agreement, or the NCP making recommendations for future behaviour in similar circumstances.<sup>62</sup>

Yet this view is not supported by the text of the guidelines. While mediation is suggested as one approach, it is only suggested as a means towards implementation, ie to 'assist in dealing with the issues',<sup>63</sup> and not an end in itself. In other words, the purpose of mediation should be to clarify compatible and incompatible behaviour in relation to the guidelines.

Virtually all specific instances have concerned past events; very few have been designed specifically to prevent a breach from taking place. Past breaches have been declared by the French NCP,<sup>64</sup> which directly challenges the UK government's current position that the specific instance mechanism is solely concerned with 'mediation' and is only 'future focused'.

This interpretation of the guidelines is also at odds with the government's response to the alleged breaches by the UK companies outlined in the UN panel of experts' report on the DRC.

Speaking in December 2003 after the panel published its findings, Chris Mullin MP, Foreign and Commonwealth Office Minister, said:

As well as looking forward, we need to address what has happened in the past. We take seriously the allegations made against the British companies named in the report.<sup>65</sup>

But it remains far from clear what the UK government means by 'taking seriously' the allegations.

## Chapter 3

# How the guidelines have been implemented across the OECD

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In this chapter we look beyond the UK and examine the record of other OECD countries that have signed up to the guidelines. We identify common obstacles to effective implementation and assess how successfully the guidelines have been implemented since the 2000 review.

## 1. Obstacles to effective implementation of the guidelines

### 1.1 Lack of political will to make companies accountable

The introduction of a complaints process has led to a flurry of complaints being filed against companies. This demonstrates that affected communities, trade unions and NGOs have been willing to use the guidelines, despite reservations about their effectiveness. Yet it is hard to avoid the conclusion that governments have been less than enthusiastic about ensuring the guidelines are implemented. Most NCPs are under-resourced and lack the power to verify and follow up complaints.

#### • Conflict of interest

Most NCPs are part of government departments whose job it is to promote business. This creates ‘conflicts’ within the department as they are acting both as a cheerleader for business as well as a watchdog. Referring cases to an independent law officer could remove this conflict of interest.

#### • Lack of investigatory powers

A major weakness in NCPs’ ability to assess complaints is their apparent lack of investigatory powers. They are often unable

to verify the claims of the parties involved, which frequently results in a stalemate.

While NCPs were never intended to have the investigative powers of a law-enforcement body, the OECD states that when complaints arise about corporate activities in countries which are not signatories to the guidelines, NCPs ‘may... be in a position to pursue enquiries and engage in other fact finding activities’.<sup>66</sup> NCPs can call on other officials to gather evidence on the ground – for example, sending government officials on fact-finding missions.

But there has been a marked shift by some NCPs to restrict even this limited fact-finding role. The most obvious example of this has been the collective failure of NCPs to follow up on the cases referred to them by the UN panel of experts on the DRC (see chapter two for more detail).

### 1.2 Transparency and confidentiality

The almost total absence of company names in the NCP annual reports and OECD tables is the most telling indication of a lack of transparency in the complaints procedure.

For example, at a roundtable discussion on supply-chain issues at the 2002 NCP annual meeting, BIAC and some NCPs objected to the naming of Dole, Del Monte and Chiquita by Human Rights Watch, even though its concerns were already in the public domain and had been communicated to the companies involved.<sup>67</sup> The names of the companies were removed from the official minutes.<sup>68</sup>

A letter from Human Rights Watch to the Investment Committee chair on 24 September 2002 stated:

The OECD requested HRW's consent to the deletion of all specific references to the company on which the presentation focused and to the nationality of the NCP mentioned. We understand that this request was made largely at the urging of said company and NCP, though neither party was present when we delivered our presentation.

Initially there was no central register of complaints. The Investment Committee has now created one, although this appears to be in order to provide an official database with which to counter TUAC and OECD Watch's regular online updates on the number and status of cases, rather than to adhere to the guidelines' principle of transparency.

As TUAC has stated:

Some NCPs appear to ignore the expectations to make the results public. They do not even explain to the party raising the case why it would be in the best interest of the Guidelines to keep the results confidential.<sup>69</sup>

Companies must be made aware that they face potential damage to their reputations if they breach the guidelines. In the absence of any sanctions to punish guideline breaches, exposing publicly companies who fail to abide by them is often the only way of ensuring they are respected.

But business lobbyists such as the Confederation of British Industry (CBI) opposed attempts to 'name and shame' companies as part of the 2000 review. It suggested in a briefing paper published beforehand that this would somehow erode the voluntary nature of the guidelines and could deter businesses from engaging with them.<sup>70</sup>

### 1.3 Reluctance to declare breaches

The OECD says that between June 2000 and June 2005, NCPs considered more than 100 complaints.<sup>71</sup> Most of them concerned employment conditions and industrial relations.<sup>72</sup> Others related to corporate governance, bribery, sustainable development, human rights and unfair exemptions from tax or environmental regulations.

Disappointingly, though, it fails to mention how many of the 100 or so complaints filed since 2000 have actually been resolved to the satisfaction of the complainants, nor does it say anything substantial about how successful the guidelines have been in changing corporate behaviour.<sup>73</sup>

TUAC says that more than half the 60 cases brought by its members have yet to be resolved.<sup>74</sup> OECD Watch says the same is true of nearly two-thirds of the 50 cases or more cases filed by NGOs.<sup>75</sup>

The overwhelming majority of NCPs opt for a 'conciliatory' approach rather than choose to declare breaches of the guidelines following a complaint, even at the conclusion of the process. This means that there is no public pressure to compel a company to change its conduct.

NCPs have only declared a handful of guideline breaches in specific instances brought by trade unions and have never declared a breach in cases filed by NGOs. What's more, the declared breaches have always related to the inward investment activities of foreign multinationals, when the NCP is protecting domestic interests.

For example, the French NCP declared that information provided by UK retailer Marks and Spencer to employees on store closures in France was not satisfactory in comparison with the guiding principles of the guidelines. It also determined that the Finnish telecoms company Aspocomp was failing to comply



with certain provisions in the guidelines because it neither gave reasonable notice nor information to employees about closures and lay-offs, nor helped mitigate the effects of these decisions.<sup>76</sup>

#### 1.4 Inconsistency of NCPs

Confidence in the effectiveness of the guidelines is being undermined because of inconsistencies in the way various NCPs handle complaints. NGOs point to differences between NCPs in terms of:

- the time taken to process complaints
- the transparency of investigations
- the unequal treatment of parties to a complaint
- interpretation as to whether there is an actual 'investment connection'.<sup>77</sup>

#### 1.5 Disputes over final statements

##### Failure to agree final statements

It would seem that a major concern for many NCPs is to arrive at a statement agreed by the company, the complainant and the NCP. But this approach reverses a central tenet of the official procedural guidance which stipulates that final statements are to be issued even when there is disagreement between the parties.

There is value in NCPs issuing statements at the end of each and every specific instance, if these are a fair and impartial presentation of the outcome. But NCPs should still make appropriate recommendations to companies.<sup>78</sup>

In a number of cases, NGOs and unions acting as complainants have explicitly rejected an NCP's final statement and in some instances have even felt it necessary to issue their own interpretations.

For example, the German NGO Clean Clothes Campaign rejected the German NCP's final statement and issued its own interpretation after making a complaint about working conditions in the Adidas-Saloman supply chain.

##### Weak and vague statements

The failure of NCPs to clearly identify which guidelines have been breached and to make clear recommendations does little to help businesses learn where they have gone wrong. It also frustrates complainants, who feel their complaints haven't been taken seriously.

Weak recommendations have included:

- encouraging companies to better inform their staff and subsidiaries about the content of the guidelines<sup>79</sup>
- advising a food company to follow guidelines and procedures and consult employees over dismissals<sup>80</sup>
- reminding a military-supplies company to 'carefully consider' its future conduct on sustainable development, human rights and improper involvement in local politics.<sup>81</sup>

TUAC says few recommendations have ever been issued, while OECD Watch states that 'recommendations have been sporadic and extremely general'.<sup>82</sup>

Unfortunately, governments have consistently failed to press companies to rectify any perceived breaches. Recommendations made by NCPs are often vague, fail to specify actual breaches or to recommend specific actions to rectify them.

For many NCPs, issuing statements seems to have become the main focus rather than addressing the negative impacts of corporate behaviour.

##### 1.6 Shrinking the scope: supply chains, trade and the 'investment nexus'

A major consequence of the global economy is the creation of larger and more complex supply chains. Although multinational companies may not be able to directly control these chains, they often have considerable influence over them.

During the 2000 review, the OECD revised the guidelines to cover multinationals' relationships with their supply chains. But NGOs were disappointed with the new text, which used phrases such as 'encourage, where practicable', making it easy for companies to avoid their responsibilities.<sup>83</sup>

#### • Corporate pressure to weaken the scope of supply chains

The 2002 OECD Corporate Responsibility Roundtable was set up primarily to resolve the issue of supply chains. But according to OECD Watch, it was the subject of intense pressure from BIAC, other business lobbyists and governments – notably the US and German governments – to weaken the scope of the guidelines when it came to supply chains.<sup>84</sup>

BIAC argued that it was very costly to monitor supply chains, which were often complex and on short-term contracts, making it hard to put sustained pressure on them. BIAC said the responsibility should lie with national governments. But this runs counter to the purpose of having a set of internationally agreed guidelines for responsible business behaviour.<sup>85</sup>

At the 2003 annual meeting of NCPs the OECD Investment Committee, formerly the Committee on International Investment and Multinational Enterprises (CIME), dealt a further blow to the scope of the guidelines. It decided that they would only apply where there was a clear investment link with a supply chain or 'investment nexus'. But it refused to define this, suggesting a 'case-by-case' assessment instead.<sup>86</sup> At the meeting, the Investment Committee officially declared that trade would be exempt.

Significantly, this contradicted the view of the OECD's own Working Party on the Declaration,<sup>87</sup> which produced a background paper on the scope of the guidelines for the 2003 annual meeting of NCPs. Rather than narrow the scope, it defined investment broadly in the context of supply chains and

business influence.<sup>88</sup> Similarly, at the annual EU CSR conference in November 2004, EU governments concluded that CSR should apply to all business activities, including trade and investment.

#### Coltan mining in the Democratic Republic of Congo

In July 2003, a coalition of Dutch and Congolese NGOs<sup>89</sup> filed a complaint about the conduct of Chemie Pharmacie Holland BV (CPH) in the DRC.<sup>90</sup> CPH is a chemical and pharmaceutical company which procures raw materials, including Coltan, a mineral used in electronic devices such as laptop computers and mobile phones.

The complainants cited the UN panel of experts' report on the DRC and other sources, which accused a number of companies of doing business with rebel groups operating in northeast DRC, thereby contributing to the illegal exploitation of natural resources and the financing of the conflict. CPH was one of the companies named in the report, as was its American business partner Eagle Wings Resources International (EWRI).

The Dutch NCP accepted the case as admissible and met with both the complainants and the company.<sup>91</sup> The NCP established that EWRI sent shipments of ore to its office in Kigali for the attention of CPH, which provided finance for commodity sales, logistics and transport, as well as hiring other agencies to inspect the ore.

Yet the NCP found that the guidelines were 'not applicable' because CPH was involved in trade from the DRC, but had not invested there: '...in this specific instance, there is no investment-like relationship between CPH and EWRI or EWRI's suppliers. The NCP notes that... CPH acted as a facilitator, who at no stage became owner of the goods and who worked on a commission basis.'

But the guidelines' supply-chain provision means they apply not only where companies have a direct, investment-related influence, but also where their influence is indirect.

The complainants also believe that an investment nexus did exist: 'The sheer fact of embarking, over an extended period, upon a regular stream of business transactions – as was the case between CPH and its Congolese partners – involves a conscious investment in the development of commercial relations and the establishment for itself of a stable line of business.'<sup>92</sup>

- **Consequences of narrowing the scope of the guidelines**

Given the amount of foreign direct investment in the global economy, excluding trade and narrowing the definition of what constitutes investment reduces the applicability of the guidelines and excludes many companies from scrutiny. Nearly a third of all cases filed since the 2000 review have involved a supply-chain relationship.

### **1.7 Failing to link adherence to the guidelines with the provision of export credit**

Many OECD governments are setting a poor example for business by failing to apply the guidelines themselves. Applying the guidelines to the companies they deal with when allocating export credits would give governments the chance to lead by example. But only the Dutch government requires companies to comply with the guidelines in order to receive export credits. French companies seeking credit have to sign a letter to acknowledge they are aware of the guidelines. In Finland, Germany, Korea, Slovenia, Spain, Sweden and the US, export agencies actively bring the guidelines to the attention of applicants. Several others make information on the guidelines available to inward investors.<sup>93</sup>

BIAC is seeking to resist what it views as ‘coerced compliance’ with a voluntary instrument and ‘rejects any explicit or implicit linkage with the availability of export financing or similar instruments’.<sup>94</sup> Those advocating linkage point out that companies are not compelled to apply for public subsidies.

## **2. Summary of problems of implementation across the OECD**

- a lack of transparency
- reluctance to name and shame companies that breach the guidelines
- inconsistency between NCPs

- disagreements over final statements
- lack of political will to enforce the guidelines and lead by example
- the shrinking scope of the guidelines in terms of supply chains and trade.

NCPs need to be transparent when they handle complaints to show that they are being taken seriously both by governments and business. The reluctance of NCPs to ‘name and shame’ companies in breach of the guidelines removes one of the few means of pressuring companies into complying with the guidelines and changing their behaviour. Unfortunately there is far too much emphasis on the positive and future conduct of corporations rather than on addressing existing poor behaviour.

Governments have frustrated complainants by using inconsistent interpretations of the guidelines to handle complaints, particularly when it comes to cases involving investment and a company’s supply chain. This flexibility leads to differing standards of accountability for business depending on which NCP is hearing a particular case.

Governments have undermined the guidelines by drastically reducing their scope. They have excluded trade, weakened the links to companies’ supply chains and narrowed the definition of investment.

Most governments have also failed to provide leadership on the guidelines by not applying them to the granting of export credits. Alongside a tendency to limit the NCP’s investigative function, this approach has led many NGO’s to question their commitment to implementing the guidelines effectively.

Furthermore, from the perspective of NGOs representing affected communities, very few complaints have reached a satisfactory conclusion.

In its report on the 2004 annual review of NCPs, OECD Watch took the view that:

NGOs in most countries feel that the discussions with the NCP are somewhat cosmetic and that prior decisions about the cases have been taken behind closed doors. This means that there is no real opportunity to engage in a proper debate about the issues. Too often decisions seemed to have been made as a result of special pleading by the companies, or tinkering with the procedures, or... by reinterpreting the guidelines.<sup>95</sup>

It seems that governments and business who see **promoting** the guidelines as critical, are happy with their progress. But the trade unions and NGOs acting as complainants for those communities and workers who rely on the guidelines to be **implemented** are less than satisfied with their effectiveness.

As such, there appears to be a fundamental disagreement between the parties about how the guidelines should be used.

Many NGOs and trade unions see them as a potential way of holding companies to account. Meanwhile, governments and business see them as a tool for promoting good corporate behaviour rather than a means of enforcing it.

## Chapter 4

# The limitations of voluntarism

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### 1. Is voluntarism working?

In the context of globalised trade and investment, companies must be held accountable for their social and environmental impacts. Consumers, investors, employees and local communities now expect companies to behave in an ethical fashion.

Unfortunately there is little evidence that major global corporations (apart from the few operating in a niche ethical market) have embraced corporate social responsibility in a manner that fundamentally changes the way they do business. They haven't integrated sustainable development into their business model or in how they try to influence the development of public policy.<sup>96</sup>

There is also a growing body of evidence that the impact of multinational companies' activities on many poor communities in the developing world can be a wholly negative one. This evidence includes reports by Christian Aid (*Behind the Mask: The Real Face of Corporate Social Responsibility*, January 2004); Amnesty International (*Clouds of Injustice – Bhopal 20 Years On*, December 2004); Friends of the Earth (*Behind the Shine: The Other Shell Report 2003*, June 2004; *Lessons not Learnt: The Other Shell Report 2004*, June 2005).

There are limits to how far governments can rely on voluntary initiatives such as the OECD guidelines to bring about socially responsible corporate behaviour. While voluntary initiatives can provide companies with helpful standards of conduct against which to assess their behaviour, effective implementation and enforcement remains a problem.

### 1.1 The OECD and the voluntary approach

The OECD itself has identified the limits of voluntarism in achieving environmental targets. In 2003 it released a major study to assess the usefulness for policymakers of relying on voluntary approaches to achieve environmental targets in OECD countries.<sup>97</sup>

Industry lobbyists had argued that the voluntary approach offers them the 'flexibility' to meet specific environmental targets in the most cost-effective manner. They argue that this allows them to implement strategies that are most relevant for each particular country or circumstance.

Other potentially positive aspects for companies of using voluntary measures include:

- avoiding the costs associated with complying with new regulation
- controlling the rate of response to the problem rather than having to comply immediately with limits or standards set under new regulation
- not having to pay penalties for non-compliance.

There is also the potential under the voluntary approach for a better outcome for the environment – you can address environmental problems more quickly as there is no need to spend time preparing for new regulation.

But after examining cases in the US, Canada, Denmark and Japan, the OECD report found:

- very few cases where the voluntary approach had led to environmental improvements that were significantly



different than had it been 'business as usual'

- in the absence of taxes or policies to discourage companies from damaging the environment, such as a carbon tax or an emissions trading scheme, the voluntary approach provides a weak incentive for business to create new environmentally friendly technologies or improve performance
- voluntary approaches are economically inefficient because targets will tend to be set by individual companies or sectors rather than at a national level where the marginal costs can be distributed more equally among firms
- a voluntary approach works best when there is a credible threat of mandatory action following any failure to achieve environmental objectives.

What is significant is that the OECD itself recognises that there are severe limitations to what the voluntary approach can achieve. In fact, it acknowledges that without the credible threat of regulatory action there isn't much hope of voluntary approaches delivering beyond 'business as usual'.

## 1.2 The UN and corporate responsibility

The limitations of the voluntary approach and in particular corporate codes of conduct are also echoed in other international studies.

A 2001 report for the UN Research Institute for Social Development found that:

There is a danger... of codes being seen as something more than they really are, and used to deflect criticism and reduce the demand for external regulation. In some cases, codes have led to a worsening of the situation of those whom they purport to benefit... codes of conduct should be seen as an area of political contestation, not as a solution to the problems created by the globalization of economic activity.<sup>98</sup>

Similarly, in February 2005 a report by the UN High Commissioner on Human Rights that dealt with business and human rights stated that:

Company and market initiatives have their limits and are not necessarily comprehensive in their coverage nor a substitute for legislative action. Importantly, while voluntary business action in relation to human rights works well for the well-intentioned and could effectively raise the standard of other companies, there remains scepticism amongst sectors of civil society as to their overall effectiveness.<sup>99</sup>

## 2. The OECD guidelines and other CSR initiatives – a comparative perspective

So where do the guidelines fit into the broader CSR debate? They are one of four initiatives referred to in the UK government's new International Strategic Framework for CSR, launched in March 2005. The others are:

- the UN Global Compact
- the International Labour Organisation (ILO) Tripartite Declaration concerning Multinational Enterprises and Social Policy
- the UN Norms on the Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights.

### Comparison of the scope and legal status of selected existing initiatives and standards in relation to business and human rights <sup>100</sup>

Existing initiative	Description	Objectives	Source	Human rights coverage	Territorial coverage	Company coverage	Implementation/ monitoring	Legal status
<b>ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy</b>	International instrument directed at states and business	Promotion and protection	ILO member states and associated employer and employee associations	Workers' human rights recognised in ILO instruments	International	Multinational enterprises	Conventions listed are subject to ILO supervisory mechanisms	Non-binding (conventions included are binding on states parties)
<b>Global Compact</b>	Voluntary initiative	Promotion	United Nations secretary-general	General reference to human rights	Not defined	1,700 participants to date – mostly business enterprises	None	Non-binding
<b>OECD Guidelines for Multinational Enterprises</b>	International instrument directed at states and business	Promotion and protection	OECD member states and eight adhering states	General references plus specific workers' rights	OECD member states and the eight adhering states	Multinational enterprises headquartered in OECD countries	National contact point to resolve specific instances	Non-binding but commitment by adhering states to promote
<b>Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights</b>	Draft international instrument directed at states and business	Promotion and protection	Sub-Commission on the Promotion and Protection of Human Rights	General and specific references to a wide range of rights	International coverage envisaged	Transnational corporations and other business enterprises	National and international monitoring verification and enforcement	As a draft proposal, they have no legal standing

## **2.1 The ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy**

This declaration provides detailed guidance on core labour standards and calls on companies to accept them on a voluntary basis.<sup>101</sup> The ILO conventions and recommendations are only binding on member states that ratify them, but all participants are obliged to include the ILO's core principles in their policies.

The ILO's strength lies in its standard-setting work on labour and workplace rights. In advising governments on steps that can be taken to comply with core labour standards, the ILO fulfils a critical role. It has various mechanisms for dealing with complaints about a member state's failure to apply ILO conventions, which can be raised by international workers' organisations, employees or governments.<sup>102</sup>

But the principles in the declaration are voluntary. There are no mechanisms for implementation, monitoring or independent verification of companies' adherence.

## **2.2 The UN Global Compact**

Kofi Annan, the UN secretary-general, launched this voluntary initiative in July 2000. It attempts to bring together companies, UN agencies, civil society and labour organisations to support ten principles for corporate behaviour, covering human rights, labour standards and the environment.

One of the Global Compact's main weaknesses is the lack of guidance about what the principles mean in practice for business. They offer minimal direction on the content, interpretation and application of human rights standards.

The Global Compact relies on companies reporting on their own activities to show that they comply, and there is concern that businesses are using their participation in the Global Compact to boost their brand value without changing their practices.<sup>103</sup>

## **2.3 The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights**

The UN Norms, approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2003, set out in a single, succinct statement, a comprehensive list of the human rights responsibilities of companies. They include provisions on the protection of civilians, the use of security forces, labour rights, environmental standards and indigenous peoples' rights, and the prevention of discrimination.<sup>104</sup>

They give companies an authoritative framework, helping them operate within international human rights law, treaties and obligations. They provide clarity and credibility amid many competing voluntary codes that too often lack international legitimacy and provide far less detail on human rights. While they are not a formal treaty, they mark a definite step forward, towards developing clear legal norms and accountability in the area of business and human rights.

## **3. Time for a change of approach – stronger regulation and legal accountability**

Voluntary initiatives have raised companies' awareness of key issues and provide clear standards on human rights, labour conditions and the environment. But they have so far failed to:

- allay public mistrust
- reduce significantly the negative impact of some companies on human rights, the environment and sustainable development
- ensure companies are held accountable for their activities to the individuals and communities affected by their activities.

The absence of legal sanctions or financial penalties for non-compliance remains a barrier to any significant increase in socially responsible business behaviour.

While market pressures are driving some companies to develop explicit social and environmental policies on a voluntary basis, we believe market mechanisms alone will not lead to higher standards of social responsibility. If they did, there would be no need for laws to protect the environment and employees' rights. In the absence of strong minimum standards and enforcement mechanisms, the voluntary approach seems unlikely to deliver. There is an increasing call for more comprehensive and effective regulation at both national and international level.

For many developing countries the need for such regulation is critical if they are to build stable economies while protecting the most vulnerable members of their societies.

DFID acknowledges this, noting that:

Effective governments are needed to build the legal, institutional and regulatory framework without which market reforms can go badly wrong at great cost – particularly to the poor... effective regulation remains essential – for instance, to promote financial sector stability, to protect consumers, to safeguard the environment, and to promote and protect human rights, including core labour standards.<sup>105</sup>

### **3.1 Strengthening the regulatory framework in the UK**

As part of the Corporate Responsibility Coalition (CORE),<sup>106</sup> Amnesty International UK, Friends of the Earth and Christian Aid are campaigning for changes in UK law to guarantee that the rights of people and the environment in developing countries are properly protected. If companies are to contribute to sustainable development, as a first step they must be made accountable to those who are adversely affected by their policies and practices.

Over the next year, the UK government will be making the biggest changes to UK company law in decades, by taking the Company Law Reform Bill through parliament. This presents a major

opportunity to deliver a framework of company law to ensure that business is accountable for its wider impacts on society and the environment.

UK company law must reflect the interests of affected stakeholders, not just shareholders.

CORE has set out proposals aimed at providing a balanced approach to business that will benefit us all. These include:

- a clear legal requirement for directors to minimise the negative impacts of their business operations, policies, products and procedures on stakeholders (such as employees and local communities) and the environment
- giving affected communities access to justice in the UK, when the behaviour of UK companies abroad harms them
- companies must be required to report on their social and environmental impacts.<sup>107</sup>

### **3.2 Towards a stronger international framework for corporate accountability**

While national law remains the most important means of ensuring legal accountability, systems of regulation in many countries are inadequate, either because the legal framework itself is weak or because there are no effective enforcement mechanisms. These limitations are compounded by the absence of binding international laws.

Many national governments are unwilling or simply unable to hold companies operating in their countries to account. This reinforces the need for an international framework that can be applied to companies directly, acting as a catalyst for national legal reform and serving as a benchmark for national law and regulations. The UN Norms are the most credible attempt yet to establish a set of global standards that would apply to companies wherever they operate, and should form the basis for developing such a framework.

## Chapter 5

# Summary – Reforming the guidelines and rethinking the UK’s approach to CSR

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### 1. The UK government and the OECD guidelines – a failure of implementation

The UK government has played to the gallery. It has been strong in advocating the guidelines and championing them as one of its flagship CSR initiatives. Yet many UK NGOs increasingly question their effectiveness and the UK government’s commitment to making them work.

Even some companies are sceptical, as illustrated by this comment from De Beers:

We think highly of the guidelines, but the problem is implementation and the political will is lacking.<sup>108</sup>

The UK NCP has yet to find any company in breach of the guidelines and there is much dissatisfaction about its handling of complaints.

This reluctance to take action against companies is further reinforced by the UK government’s unwillingness to give its NCP greater investigatory powers, despite admitting that the delay in responding to the DRC cases was partly because of the need to rely on other departments and agencies with investigatory powers. In addition, companies are quite prepared to employ corporate lawyers to defend their case, often putting complainants, who are generally not well resourced, at a disadvantage.

The UK NCP also seems reluctant to produce final statements linking breaches of the guidelines to recommendations for companies, appearing to favour engaging in

secret and confidential discussions with the companies involved.

In summary the key weaknesses in the implementation of the guidelines are:

- a failure to adequately promote them
- the marginalisation of complainants
- a failure to establish time limits for resolving complaints
- the lack of opportunity for complainants to respond to comments received by the NCP
- the UK government’s unwillingness to investigate alleged breaches and gather evidence
- a lack of transparency
- excessive corporate influence over the process
- a narrowing of the scope of guidelines by attempting to exclude complaints relating to companies’ supply chains.

The UK NCP’s handling of cases concerning the UK companies named in the UN panel of experts’ report on the DRC has also raised questions about its commitment to the guidelines. In May 2005, the Bishop of Winchester told the House of Lords:

NGOs in this country, which look to the UK national contact point within the OECD processes as a means of bringing to account those suspected of improper economic activity in the DRC and similar places, find the UK contact point, in comparison with its EU equivalents, poorly staffed and unable or unwilling to take initiatives or to seek to make an independent assessment of the allegations



made on a number of fronts, not least in the UN panel of experts' report. Frankly, they find the contact point incompetent in the face of the powerful players with whom it is its business to deal.<sup>109</sup>

But the UK government continues to argue that the purpose of the guidelines is to promote good behaviour rather than enforce it. For instance, in its response to the All Party Parliamentary Group on the Great Lakes report, the UK government states that:

The nature of the recommendations made by the NCP is taken from the text of the Guidelines, whose overarching purpose is to encourage better corporate behaviour... It should also be remembered that adherence to the Guidelines by companies is voluntary.

Yet for communities or workers adversely affected by companies' operations, the need to move beyond such an approach is increasingly urgent. They see the guidelines as a set of principles that companies should abide by.

In short, the UK government needs to act now to reform how the guidelines are implemented. It should also work with other supportive governments to address wider concerns about the guidelines themselves, so they establish a minimum level of acceptable corporate behaviour.

## **2. The UK government's approach to CSR – too much carrot, not enough stick**

Earlier this year the UK government developed an international framework on corporate social responsibility. It recognises the crucial role companies can play in promoting sustainable development in poor countries. Unfortunately, however, the UK government has chosen to exclude regulation as a possible mechanism to bring companies to account.

Instead, it has opted for the voluntary approach – and in particular initiatives such as the OECD guidelines – to address CSR issues. As this report and other international research reveals there are fundamental limitations to voluntarism.

A CSR strategy based entirely on voluntarism fails to take account of the many thousands of UK companies who do not subscribe to CSR principles.

We believe the UK government must carefully appraise companies' voluntary commitments, rather than use them to justify opposing binding regulation. We view voluntarism and regulation as complementary and mutually reinforcing. The UK government appears to view voluntarism as a substitute for regulatory measures. The problem with the UK government's approach is that it is all carrot and no stick.

Ultimately, if the UK is to abide by the CSR commitments it made following the WSSD to 'actively promote responsibility and accountability' it must go beyond the voluntary approach, towards developing a legal framework for corporate accountability. There must be penalties and legal sanctions for those companies that damage the environment, workers and local communities.

## **3. The limitations of the OECD guidelines**

As an initiative to improve companies' social and environmental impact, the guidelines promise much. They move beyond the existing plethora of company standards, which are often ill-defined, to provide a comprehensive multilateral code governing business conduct. In terms of scope they apply to all companies based in adhering countries wherever they operate in the world, and (in theory) extend to their supply chains. If properly implemented, the guidelines offer a monitoring mechanism that brings company actions under

government scrutiny and provide a relatively accessible avenue for trade unions and NGOs to raise their concerns.

However, there are both operational and structural problems with them that limit their effectiveness. Of fundamental concern is the absence of any legal sanction attached to breaches. The lack of penalties for non-compliance allows companies to delay taking any positive action indefinitely.

The guidelines are not global in their reach, and the extent to which they can be enforced in non-OECD countries is uncertain. The guidelines' supporting documents recognise that it is vital to apply them to business conduct in countries outside the OECD.<sup>110</sup> Indeed, the majority of complaints have involved the operations of developed-world multinationals in developing-world countries. Yet it is in precisely these countries that their implementation is most problematic.<sup>111</sup>

The inconsistency with which NCPs apply the guidelines, has also led to frustration and confusion among complainants. Fundamental problems remain, including a lack of transparency, the excessive time taken to assess breaches, the lack of investigatory powers to follow up claims and weak final statements with no clear link to the guidelines. There has also been considerable controversy over the attempts to restrict the definition of investment, exclude companies supply chains and exclude trade relations.

The guidelines are a positive but preliminary step towards holding multinational companies to account. If they were strengthened, they could represent an important mechanism for scrutinising corporate conduct.

Yet improving the guidelines by addressing the deficiencies outlined in this report will only take us so far. Companies will still be

able to ignore the guidelines if they are threatening their profits, unless breaches are accompanied by the threat of legal action.

## Recommendations

### 1. Improving the implementation of the OECD guidelines

#### The UK government should:

- make greater efforts to promote the guidelines to UK companies and stress that they represent the UK government's firm expectation of corporate behaviour
- ensure that the NCP is adequately funded to undertake its duties
- reorganise the NCP as an interdepartmental office with permanent representation of officials from the Department for International Development (DFID), the Department for Environmental Food and Rural Affairs (DEFRA), the Foreign and Commonwealth Office (FCO) and the DTI.
- report annually to the UK parliament on the steps it is taking to promote, implement, monitor and review the effectiveness of the OECD guidelines.

#### In relation to the UK NCP's complaints process, it should ensure that the NCP:

- has adequate expertise and experience to undertake thorough investigations into alleged breaches of the OECD guidelines, including, where appropriate, fact-finding missions
- establishes clear timeframes for the initial assessment of cases, the receipt of responses from both parties and, in cases of disagreement, the issuing of a final statement and recommendations
- conducts full and impartial investigations of all complaints of alleged breaches of the guidelines, with support from other government departments

- gives the complainant and the company simultaneous access to an initial assessment of the case and any official opinions
- adheres to the principle of transparency at all appropriate stages of a complaint – confidentiality may be applied only once the NCP has made its initial assessment of a complaint and all parties have agreed to enter into dialogue
- establishes an appeals mechanism, such as a parliamentary committee or ombudsman, so that complainants can request a review of specific decisions
- holds regular public meetings with stakeholders, including NGOs
- publishes complete and accurate records of all complaints, including the names of the parties involved and the outcome.

*To the OECD Investment Committee*

- Define clearly and as broadly as possible the definition of ‘investment’.
- Ensure that the guidelines apply to all trade relationships.
- Provide NCPs with greater investigative powers and resources.
- Make public complete and accurate records of all complaints, including the names of the parties involved and the outcome.

- Ensure final statements include recommendations directly related to breaches.
- Ensure that all OECD governments link adherence to the guidelines with the granting of export credit.

**2. Strengthening the regulatory framework in the UK and internationally**

*To the UK government*

The UK government must further support the development of stronger legal frameworks for corporate accountability, at both national and international level by:

- making changes in UK company law to include a requirement for directors to minimise any negative impacts of their business activities on affected stakeholders and the environment
- ensuring access to justice for communities overseas adversely affected by UK companies
- requiring companies to report on their social and environmental impacts
- supporting the development of an international framework for corporate accountability, using the UN Norms as a starting point.

## How to raise a guidelines issue with the UK NCP

*Extract from DTI: UK National Contact Point information booklet (2001).*

GL issues can be raised with the NCP regarding the corporate behaviour arising in the UK or of a MNE headquartered in the UK. If the activity takes place in a non adhering country the UK NCP will 'take steps to develop an understanding of the issues involved and follow these procedures where relevant and practicable'.

The general principle for the UK NCP is transparency.

Information required:

- the complainant must provide details of their identity and interest in the matter
- name of the company
- the location of the activity in question
- which parts of the guidelines are relevant
- description of the activity with supporting evidence
- what information can be revealed to the company.

The NCP will decide whether to pursue an issue, by consulting the company in question and also any other interested parties as appropriate. 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 treated in other proceedings
- whether consideration of the issue would contribute to the purposes and effectiveness of the guidelines.

If the issue merits further consideration, the NCP will contact the originator and seek to contribute to its resolution. The NCP will promote informed discussions, for example, by encouraging the dissemination of expert papers to the parties involved; originator evidence; and company responses (or extracts from them). Information and views provided during the proceedings by an involved party will remain confidential, unless that party agrees to their disclosure.

The aim of these discussions is to reach agreement with all parties and for the company to take any appropriate action to resolve the issue. If no agreement can be reached, the NCP will, with the agreement of the parties involved, offer, or facilitate access to, consensual and non-adversarial procedures.

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.

## Footnotes

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- 1 UNEP, *Industry as a Partner for Sustainable Development 10 years after Rio: The UNEP assessment*, a report for the World Summit for Sustainable Development, May 2002.
- 2 UNEP press release, 'The state of the planet is getting worse but for many it's still 'business as usual'', 15 May 2002.
- 3 Letter to the Trade Justice Movement from Patricia Hewitt, DTI, 'CSR, A draft international strategic framework', March 2005.
- 4 DTI white paper on trade and investment, *Making Globalization a Force for Good*, [www.dti.gov.uk/ewt/whitepaper.htm](http://www.dti.gov.uk/ewt/whitepaper.htm), July 2004.
- 5 At the WSSD in September 2002 a range of commitments were made on CSR, including a decision 'to actively promote responsibility and accountability... including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, appropriate national regulation and continuous improvement in corporate practices in all countries'. See the WSSD Plan of Implementation, [www.johannesburgsummit.org/html/documents/summit\\_docs/2309\\_planfinal.htm](http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm)
- 6 Corporate Social Responsibility: International Strategic Framework, [www.csr.gov.uk](http://www.csr.gov.uk)
- 7 Extract from a speech by the Chancellor of the Exchequer, Gordon Brown, at the Commonwealth Finance Ministers Meeting, World Economic Situation and Prospects, London, 25 September 2002. There was a commitment to 'strongly encourage initiatives which involve business and civil society in solutions as appropriate, such as the UN Global Compact, the Extractive Industries Transparency Initiative (EITI) and the OECD Guidelines for Multinational Enterprises, and encourage greater co-ordination and coherence between existing Corporate Social Responsibility (CSR) efforts.' Progressive Governance Summit, 13-14 July 2003, communiqué available at [www.number-10.gov.uk/output/page4146.asp](http://www.number-10.gov.uk/output/page4146.asp)
- 8 Government annual report, *Achieving a Better Quality of Life: Review of Progress Towards Sustainable Development*, [www.sustainable-development.gov.uk/ar2003/05.htm](http://www.sustainable-development.gov.uk/ar2003/05.htm), DFID and Corporate Social Responsibility, September 2003, p 9.
- 9 There was a commitment to 'strongly encourage initiatives which involve business and civil society in solutions as appropriate, such as the UN Global Compact, the Extractive Industries Transparency Initiative (EITI) and the OECD Guidelines for Multinational Enterprises, and encourage greater co-ordination and coherence between existing Corporate Social Responsibility (CSR) efforts.' Progressive Governance Summit, 13-14 July 2003, communiqué available at [www.number-10.gov.uk/output/page4146.asp](http://www.number-10.gov.uk/output/page4146.asp)
- 10 The Foreign & Commonwealth Office's annual report on human rights, section 2.4, 'Working with Business', p 90, 2004.
- 11 'Holding Multinationals to Account – using OECD Guidelines to Protect Workers' Interests', TUC, March 2003. The member countries of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the US. Nine non-member countries – Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia – have also declared their adherence to the guidelines.
- 12 BIAC and TUAC are the advisory committees to the OECD of business and labour federations.
- 13 The OECD Guidelines for Multinational Enterprises, Concepts and Principles, section one.
- 14 See the OECD Guidelines for Multinational Enterprises, Concepts and Principles, section two.
- 15 Statement by the chair of the Ministerial, June 2000, reproduced in the OECD guidelines.



- 16 The OECD guidelines, General Policies, section ten.
- 17 OECD Guidelines, op. cit, Preface 7.
- 18 OECD Guidelines , op cit., I. Concepts and Principles, 1.
- 19 Procedural Guidance, op cit, I. National Contact Points, B. Information and Promotion, 1 & 2.
- 20 Procedural Guidance, I. National Contact Points, preamble.
- 21 Procedural Guidance, op cit, I. National Contact Points, C. Implementation in Specific Instances. Parties to a specific instance are listed as the business community, employee organisations and 'other parties'. Hence the process is open to unions and NGOs. The wording does not rule out submissions from individuals.
- 22 Procedural Guidance, C. Implementation in Specific Instances, 1.
- 23 Procedural Guidance, C. Implementation in Specific Instances, 2.
- 24 Ibid, 4(a).
- 25 Ibid, 3.
- 26 Ibid, 4(b).
- 27 UK government response to All Party Parliamentary Group on the Great Lakes Region report on the OECD Guidelines for Multinational Enterprises and the Democratic Republic of Congo.
- 28 Source: UK NCP, 2002.
- 29 Procedural Guidance, op cit, I. National Contact Points, B. Information and Promotion, 1 & 2.
- 30 UK National Contact Point information booklet, DTI, February 2001.
- 31 UK NCP annual report 2004 ([www.dti.gov.uk/ewt/report.htm](http://www.dti.gov.uk/ewt/report.htm)).
- 32 Rory Sullivan, director, investor responsibility, Insight Investment, Pers Comm, 25 July 2005.
- 33 CBI announcement at annual meeting of NCPs, June 2005.
- 34 Department of Trade and Industry press release, 'UK Takes Lead on Responsible Investment', 27 March 2001.
- 35 OECD Watch, Report on the UK NCP, 2002-03.
- 36 RAID is a UK-based NGO. It aims to promote social and economic rights and improve corporate accountability.
- 37 UK NCP's annual reports 2004, 2005 ([www.dti.gov.uk/ewt/report.htm](http://www.dti.gov.uk/ewt/report.htm)).
- 38 UK NCP information booklet, op cit, pp 10-11.
- 39 Letter to UK NCP from RAID and other UK NGOs, 19 May 2003.
- 40 OECD Watch is an international network of civil society organisations promoting corporate accountability. Its purpose is to inform the wider NGO community about the policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.
- 41 The complaint was deemed admissible by the UK NCP in May 2002; however, Anglo American did not address the substance of the complaint until 5 December 2003. This notwithstanding, the specific instance procedure was effectively stalled until the issue of the retrospective application and scope of the guidelines was clarified by the Investment Committee in April 2004.
- 42 Procedural Guidance, I.C.5.
- 43 The Investment Committee declared itself 'reluctant to respond' to the first set of questions because the 1991 version of the guidelines had been repealed and because the current version of the specific instance procedure did not exist until the 2000 revision of the guidelines. However, on the application of the 2000 guidelines, the Investment Committee noted that: 'The Guidelines text is sufficiently clear and that it allows useful flexibility to NCPs.' See letter from the chair of CIME regarding the request for clarification from the UK, 13 April 2004, reproduced in OECD Guidelines for Multinational Enterprises: 2004 Annual Meeting of the National Contact Points, Report of the Chair, pp 53-54.
- 44 UK NCP statement on National Grid Transco, 6 July 2005.
- 45 OECD Commentary on the Implementation Procedures, paragraph 20.

- 46 The Export Credits Guarantee Department is the UK's official export credit agency. It helps UK exporters of capital equipment and project-related goods and services to win business and invest overseas. See [www.ecgd.gov.uk/index.htm](http://www.ecgd.gov.uk/index.htm)
- 47 The complainants alleged that the BTC consortium exerted undue influence on the governments of the three countries – Azerbaijan, Georgia and Turkey – on whose territory the pipeline was to be constructed; that the consortium had failed to consult with the local populations in all three countries about the potential and likely impacts of the construction of the pipeline; and that through the investment agreements underpinning the project, known as host government agreements, the companies had undermined the host governments' ability to mitigate serious threats to the environment, human rights and health and safety.
- 48 The Baku-Tbilisi-Ceyhan Pipeline Project, ECGD note of decision, [www.ecgd.gov.uk/btc\\_-\\_note\\_of\\_decision-2.doc](http://www.ecgd.gov.uk/btc_-_note_of_decision-2.doc), 17 December 2005.
- 49 Letter to the chair of the Investment Committee, Manfred Schekulin, 19 November 2004.
- 50 Reaction 29, written statement from De Beers to the panel, reproduced in UN panel, addendum, 20 June 2003, op cit.
- 51 UK NCP statement on De Beers, [www.dti.gov.uk/ewt/debeers.doc](http://www.dti.gov.uk/ewt/debeers.doc)
- 52 United Nations, final report of UN panel of experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo, October 2002.
- 53 UN security council resolution 1457, 23 January 2003, paragraph 9.
- 54 UN security council resolution 1457, 24 January 2003.
- 55 Public statement by CIME at conclusion of UN expert panel's mandate, 12 February 2004, reproduced in OECD Guidelines for Multinational Enterprises: 2004 Annual Meeting of the National Contact Points, Report of the Chair, pp 51-52.
- 56 OECD, Guidelines for Multinational Enterprises: 2004 Annual Meeting of National Contact Points, Report of the Chair, 14-15 June 2004.
- 57 All Party Parliamentary Group on the Great Lakes Region, the OECD Guidelines for Multinational Enterprises and the DRC, House of Commons, London, February 2005.
- 58 The APPG is the leading forum in parliament for discussion and critical analysis of policy issues affecting the people of the Great Lakes region of central Africa. It comprises of 148 MPs and peers from the UK parliament. The report is available at [www.appggreatlakes.org](http://www.appggreatlakes.org)
- 59 The APPG on the Great Lakes Region, The OECD Guidelines for Multinational Enterprises and the DRC, APPG-02-05, February 2005.
- 60 See C Heydenreich et al 'The OECD guidelines and the supply chain' available at [www.oecdwatch.org](http://www.oecdwatch.org)
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- 80 In the specific instance concerning the transfer of production from a factory in Brazil, the complainants alleged that Parmalat had not consulted unions prior to the dismissal of workers: 'The conclusion supported the facts put forward by the CUT (the Brazilian union), but the wording could have been stronger. The NCP's first draft conclusion had been even weaker, but the CUT insisted on having the text changed.' (See TUAC Internal Analysis of Treatment of Cases Raised by Trade Unions with National Contact Points 2001-2004, Parmalat, p 9).
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- 92 Novib and Niza joint press release – [www.oecdwatch.org/docs/Press%20release%20Novib%20and%20Niza%20on%20CPH%20case.PDF](http://www.oecdwatch.org/docs/Press%20release%20Novib%20and%20Niza%20on%20CPH%20case.PDF)
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- 102 The ILO's supervisory bodies – the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards – regularly examine the application of ILS in ILO member states. Representation and complaint procedures can also be initiated against states that fail to comply with conventions they have ratified. A special procedure – the Committee on Freedom of Association – reviews complaints concerning violations of freedom of association, whether or not a member state has ratified the relevant conventions. See [www.ilo.org](http://www.ilo.org)
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- 104 See 'The UN Human Rights Norms For Business: Towards Legal Accountability', [www.amnesty.org](http://www.amnesty.org) for details of the full commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights U.N.Doc E/CN/Sub.2/2003/38/Rev.2 (2003).
- 105 DFID, 'Eliminating World Poverty: Making Globalisation Work for the Poor', white paper, December 2000, p 24-25.
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- 107 The UK government has placed an obligation on UK listed companies – through the Operating and Financial Review (OFR) – to report on some social and environmental impacts only where it is in the interests of current and potential shareholders. In most cases, this means that meaningful and transparent reporting is unlikely to occur.
- 108 De Beers, quoted in 'How the OECD's fine principles are getting bogged down in detail', *Ethical Performance*, September 2004.

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## Notes

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**Christian Aid** works in some of the world's poorest communities in more than 50 countries. It works where the need is greatest, regardless of religion, supporting local organisations which are best placed to understand their communities.

**Amnesty International UK** is the UK section of the international human rights organisation, Amnesty International. It has 257,000 supporters working together to improve human rights worldwide.

**Friends of the Earth** is the world's most extensive grassroots network working for environmental justice, ensuring a fair share for everyone now and in future, while looking after the planet. Friends of the Earth Limited inspires individuals and communities around the world to take action for a healthier, safer and more sustainable future for all.

**CORE** – as part of the Corporate Responsibility Coalition (CORE), Amnesty International UK, Friends of the Earth and Christian Aid are campaigning for changes in UK law to guarantee that the rights of people and the environment in developing countries are properly protected. If companies are to contribute to sustainable development and uphold human rights, they must be made accountable to those who are adversely affected by their policies and practices.

**Christian Aid**

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