

ANCP'S EVALUATION OF THE GSL SPECIFIC INSTANCE PROCESS

BACKGROUND

1. On 23 March 2006, the Australian National Contact Point for the OECD's Guidelines for Multinational Enterprises (ANCP) invited the parties to this specific instance¹ to provide suggestions on how the specific instance process could be improved (see [Annex 1](#)).
2. On 14 August 2006, Ms Serena Lillywhite of the Brotherhood of St Laurence, for the complainants, conveyed views on matters regarded as best practice as well as areas for learning and improvement (see [Annex 2](#)).
3. On 6 October 2006, Mr Tim Hall, for GSL (Australia) Pty Ltd, conveyed GSL's positive experience as well as views about certain aspects of the process (see [Annex 3](#)).

ANCP'S EVALUATION AND RESPONSE

4. The ANCP agrees that the GSL Specific Instance Process contained many best practice features. Those features were acclaimed by civil society, business, professional mediators and national contact points at the 2006 Annual Meeting of National Contact Points in Paris. That international acclaim reflects a collective achievement and the ANCP commends both parties for their contribution to the positive outcome.
5. The ANCP particularly welcomes suggestions for further learning and improvement and will bear these in mind in future specific instances.
6. The ANCP, however, would like to respond to three suggestions.
 - The ANCP does not share the complainants' concern that the win-win approach to handling specific instances "could, in certain circumstances, diffuse and negate the seriousness of the issues being raised" because the discipline of finding workable solutions ought to focus the greatest energy and attention on the issues that truly matter. In the GSL case it was not, and nor should it be seen generally as, a way to simply pick the low hanging fruit.
 - The ANCP notes GSL's endorsement of the win-win approach and its caution that "had the ANCP not taken a firm line in focusing the scope of the complaint, GSL may quite possibly have declined to participate.....".
 - The complainants' wish for the ANCP to rule that GSL had breached the Guidelines was understandable. However the ANCP considers that where there is a likelihood of a mediated resolution (as in the GSL case) that potential would be jeopardised, were there to be judgments of this kind. It is quite likely that anticipating such pronouncements, the party complained against might choose to withhold cooperation and limit mutual exploration of workable solutions. It is worth recalling that the role of NCPs is to make available 'good offices' to enable the disputing parties to find an acceptable resolution through mediation and conciliation.

¹ The final statement is available on the ANCP's website www.ausancp.gov.au.

- The ANCP notes that professional mediators who participated in the open forum at the 2006 Annual Meeting of National Contact Points endorsed the ANCP’s advocacy of impartiality throughout a specific instance process.
 - The ANCP also notes that GSL considers that the specific instance process will be greatly weakened if an NCP ever loses sight of the fact that the process is neither judicial nor arbitral, in either character or process.
 - The complainants’ suggestion that the ANCP should monitor implementation of commitments made in a specific instance, would extend the specific instance mechanism beyond its current scope. The ANCP notes that OECD Watch has made similar suggestions for consideration by the OECD’s Investment Committee.
7. Finally, although the time taken to complete the specific instance substantially exceeded the 90 day period set out in the ANCP’s operational guidelines², the parties and the ANCP agree that the extra time was needed to obtain a quality outcome.³ The timeframes set out in the operational guidelines were established when the ANCP lacked practical experience in handling a specific instance. The GSL experience notwithstanding, for the time being the ANCP retains those timeframes as a general guide but notes that many factors including resources available to the parties and the ANCP, and the complexity of the issues will obviously influence the duration of a specific instance.

CONCLUSION

8. The ANCP thanks the parties for their contributions to this evaluation, both for the generous spirit in which they were made as well as for their useful content. Their observations and suggestions will undoubtedly assist in the successful handling of future specific instances.
9. The ANCP is encouraged that the lessons learnt from this case have already made it into the classroom. In May 2006, in consultation with GSL and the ANCP, the complainants led by Ms Lillywhite prepared a case study to be included in the OECD Watch publication “Guide to the OECD Guidelines for Multinational Enterprises Complaint Procedure - Lessons from Past NGO Complaints” which is intended for training NGOs.
10. The ANCP is also encouraged by GSL’s commitment, as set out in Mr Hall’s letter, to regularly advise NGO colleagues of progress in implementing the agreed outcomes.
11. The ANCP intends to forward a copy of this evaluation to the OECD’s Investment Committee and to post it on the ANCP’s website (www.ausancp.gov.au).

Gerry Antioch
 Australian National Contact Point
 For the OECD Guidelines for Multinational Enterprises
 13 October 2006

² The timeframes set out in the ANCP’s operational guidelines are: 30 days for the ANCP to make an initial assessment on a request to consider a specific instance and 90 days to complete the specific instance.

³ The parties agreed to participate in the specific instance on 22 August 2005 and the ANCP’s final statement was issued on 6 April 2006. Therefore, the actual time taken was 227 days.



Australian Government

The Treasury

23 March 2006

Ms Serena Lillywhite
For 'The Complainants'
C/- Manager
Ethical Business
Brotherhood of St Laurence
67 Brunswick Street
FITZROY VICTORIA 3065

Mr Peter Olszak
Managing Director
GSL (Australia) Pty Ltd
PO Box 8004
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Dear Ms Lillywhite and Mr Olszak

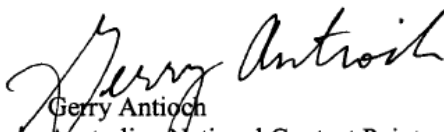
I am taking the opportunity to express my appreciation for your participation in the GSL specific instance mediation session held on Tuesday 28 February 2006. The professional approach taken by both parties during the session was impressive and has resulted in a successful outcome.

I am enclosing the draft statement by the ANCP for your consideration. I envisage attaching to the final ANCP statement, the list of outcomes agreed between the complainants and GSL. I would appreciate any comments you may have and request confirmation of your agreement to the text of Attachment B (the list of agreed outcomes) by Friday 31 March 2006, and intend to issue the final ANCP statement shortly thereafter.

I am also seeking your assistance in evaluating the specific instance process, particularly any views and suggestions for improvement by Friday 28 April 2006. I will be referring to the GSL specific instance in my 2006 ANCP Annual Report which I am required to lodge with the OECD Investment Committee by the end of May.

Please feel free to contact Debra Chesters or me should you have any queries regarding matters raised in this letter.

Yours sincerely


Gerry Antioch
Australian National Contact Point and
Executive Member
Foreign Investment Review Board



OECD Guidelines for Multinational Enterprises Evaluation of the NCP process in the conduct of the specific instance inquiry concerning GSL (Australia)

Serena Lillywhite for the complainants
August 2006

Introduction

Overall the process was handled well by the ANCP. It is recognised by OECD Watch as one of a small number of 'best practice' examples of the specific instance process. The willingness of GSL to participate and the facilitation of the ANCP were critical in achieving the overall outcomes of the case.

Best practice

- ANCP demonstrated a genuine commitment to the process
- ANCP willing to accept a highly sensitive case as a specific instance. Despite placing limitations on the scope of the complaint, the ANCP did not use this as an opportunity to reject the case outright
- The ANCP undertook to proceed to the specific instance phase without engaging in debate about paralegal proceedings or using other government and independent inquiries, as well as public scrutiny, as a justification for not proceeding.
- The ANCP established a process of non-adversarial dialogue and engagement that was effective in this case
- Process and timeframes clearly articulated at the outset of the process. The ANCP made it clear he was seeking a mediation process that provided an opportunity for both parties to reach negotiated outcomes.
- ANCP adhered to the timeframes established in a timely manner. Any delays (including those from the complainants) were clearly articulated and explained to all parties
- A transparent process was implemented and followed
- ANCP invited and actively encouraged both parties to provide additional information and expert advice during the initial determination stage. This included meetings with individuals and experts as identified by the complainants and government departments as deemed appropriate by the ANCP
- All correspondence was exchanged and shared, including confidential documents, company protocols and policies
- All parties (GSL, complainants and NCP) approached the case in 'good faith'
- ANCP assisted in bringing GSL to mediation and alleviating initial concerns GSL had
- The Complainants and the company were given equal recognition, authority and opportunity to develop materials and respond to issues raised
- ANCP allowed both parties to contribute to the development of the agenda for mediation
- ANCP sent a draft of his 'final statement' to both parties for comment prior to making it public
- ANCP (and GSL) welcomed the undertaking of the complainants to document the 'agreed outcomes' of the mediation. This resulted from the 'environment of trust, confidentiality and professionalism' that was established early on in the process
- Mediation was genuine. Significant time was allocated, an agreed agenda developed and there was scope for robust discussion of sensitive issues. The conversation was not 'gagged'. The mediation session was successful, in part, as written information had been previously exchanged allowing maximum opportunity to explore areas of agreement and negotiate outcomes that reflected concerns raised
- ANCP included the 'agreed outcomes' in his final statement
- ANCP distributed his final statement to groups with a direct interest in the management of Australia's immigration detention centres (Department of Immigration, Commonwealth Ombudsmen, Attorney General, Human Rights and Equal Opportunity Commission and the Immigration Detention Advisory Committee)
- ANCP agreed (as did GSL) to the case being written up as a case study in the OECD Watch training manual (to be published July 2006)

Learning's and opportunities for improvement

- The complainants were disappointed that the initial assessment by the ANCP placed conditions and limitations to the scope of the complaint. The complainants felt this was incompatible with the 'supranational applicability' of the Guidelines
- By limiting the scope of the complaint this reduced the effectiveness of the Guidelines to address breaches that occur when the operations of enterprises are structured through a Public Private partnership. This is of significant concern given the global trend towards such governance frameworks. The blurred lines of responsibility arising from public private contractual relationships has the potential to significantly impede the implementation of the Guidelines if enterprises choose to diffuse their responsibilities based on contractual relationships with government and compliance with national law.
- The non-adversarial approach was effective in this case but should not be interpreted as the only way to investigate a specific instance. The 'win-win approach' encouraged by the ANCP could, in certain circumstances, diffuse and negate the seriousness of the issues being raised
- Even the 'best practice' implementation of the Guidelines (such as the GSL case in Australia) requires a clear statement of determination by the NCP of those issues that were found to be in breach of the Guidelines, or exonerate the company if no breach is found. The non-binding voluntary nature of the Guidelines does not prevent NCP's issuing a 'judgement'. This will assist in ensuring the Guidelines are widely respected as the most effective CSR tool that currently exists
- A process of 'follow up' is required to ensure that enterprises undertake and implement commitments made to bring their operations in line with the Guidelines if a breach is confirmed.

6 October 2006

Mr Gerry Antioch
Australian National Contact Point
OECD Guidelines for Multinational Enterprises
C/- Executive Member
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The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Antioch

EVALUATION OF THE GSL SPECIFIC INSTANCE

I am pleased to submit GSL's evaluation of the specific instance process. While we are not in a position to comment on whether the process followed was 'best practice', GSL has no doubt that it was excellent practice. From an inauspicious start, when it appeared to GSL that the Complainants' principal, even sole, objective was to use GSL to pursue its stated objective of securing changes to the Commonwealth's policy of mandatorily detaining unlawful non-citizens (the OECD Guidelines not permitting a complaint to be lodged regarding a government's conduct), we arrived at a position which provided the company with significant opportunities for learning and improvement, which we have grasped.

That the process did not disintegrate was initially achieved entirely by the ANCP's firm line in focusing the scope of the complaint. In particular, he excluded those parts of the Complainants' submission and supplementary material which addressed "Australia's mandatory detention policy and its relationship to international conventions through the activities of GSL." The objective, he stated, was mediation and not at all any finding of guilt. This was a seminal turning point for GSL. When the Complainants and GSL finally agreed on the ANCP's proposal for moving to the specific instance phase, and then on to the agenda for a mediation meeting, the process progressed rapidly and with much goodwill.

We saw it as a unique opportunity to explain GSL's position and those practices which most concerned the Complainants, but more importantly to learn from the Complainants' expertise and experience in human rights issues. This was a very sensitive case and the Complainants demonstrated throughout the mediation process that they understood the complexity and sensitivity of the business in which we operate.

If there is one specific suggestion that we would make for ensuring the effectiveness of future specific instance processes, and to minimise the risk of alienating the MNE named in the complaint almost before the process starts, it is that NCPs should insist on a non-adversarial approach, as did the ANCP, and maintain the importance of achieving a win-win outcome. While this may not be a desirable outcome for many complainants, and was not in the case of this complaint, it provides a much higher likelihood (at least based on GSL's experience) of achieving really substantial and worthwhile outcomes. Had the ANCP not taken such a firm line in focusing the scope of the complaint, GSL may quite possibly have declined to participate, and we would have wasted the opportunity to achieve all that we did.

We strongly reject any implied notion that the process would be improved if an NCP approached a specific instance with the intention of issuing a judgement or a finding of fault. The specific instance

process, as the ANCP emphasised, is neither judicial nor arbitral, in either character or process, and it will be greatly weakened if an NCP ever loses sight of this fundamental fact.

For GSL, the outcome has resulted in a clearer understanding of our human rights obligations and, no less important, of how best these can be achieved. The company's Managing Director has signed a commitment on behalf of the company that GSL policy will in future be framed around international human rights standards and this is already being implemented. It is the intention of GSL to regularly advise our NGO colleagues of progress in implementing the various recommendations. In retrospect, it was a valuable and worthwhile exercise that will continue to benefit GSL in all its future operations.

Yours sincerely

Tim Hall
Director of Public Affairs