



**ANNUAL OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY -
Developing a proactive approach to the OECD Guidelines**

Summary of the Discussion

19 June 2006

This document reproduces the summary of the Roundtable discussion which was held on 19 June 2006. It will form part of the forthcoming publication "Annual Report on the OECD Guidelines for Multinational Enterprises: 2006 Edition".

ACKNOWLEDGEMENTS

The National Contact Points and the OECD Committee on International Investment and Multinational Enterprises wish to thank all of those who invested their time and resources in order to participate in the Roundtable on Corporate Responsibility held in conjunction with the sixth annual meeting of the National Contact Points. Their names appear below.

Invited participants included representatives from business, labour and non-governmental organisations.

Mr. Robin ARAM, Retired; Director of Conference Board's work on Social Responsibility, Shell International Limited, United Kingdom

M. Fouad BENSEDDIK, Directeur Recherche et Relations internationales, VIGEO, France

Ms. Eileen CARROLL, Deputy Chief Executive, Centre for Effective Dispute Resolution, United Kingdom

Ms. Rita DONAGHY, President, Employment Relations, Advisory Conciliation and Arbitration Service (ACAS), United States

Ms. Kirstine DREW, Project Manager, Global Political Economy Research Group, UNICORN: A Trade Union Anti-Corruption Network, United Kingdom

M. François FATOUX, Délégué général, Observatoire sur la Responsabilité Sociétale des Entreprises, France

Ms. Kate FISH, Managing Director, Europe Business for Social Responsibility

Mr. Stephen HINE, Head of International Relations, Ethical Investment Research Services (EIRIS) Ltd, United Kingdom

M. Pierre MAZEAU, Secretary of EDF Group's CSR Network, EDF - Energy Branch, France

Mr. Anthony MILLER, Economic Affairs Officer, Enterprise Policies and Corporate Governance, UNCTAD – DITE, Switzerland

Mr. James NICHOLSON, External & Corporate Affairs, De Beers Group External Affairs, United Kingdom

Ms. Emily SIMS, Service de l'égalité et de l'emploi, NORMES Bureau International du Travail, France

Dr. Raj THAMOTHERAM, Director, Responsible Investment, AXA Investment Managers Ltd

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The Preface of the OECD Guidelines for Multinational Enterprises states that the Guidelines “aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.” In order to achieve these goals, the 39 governments adhering to the Guidelines have committed themselves to participating in the Guidelines’ unique implementation procedures.

Every year the OECD holds a Roundtable on Corporate Responsibility in conjunction with the annual meetings of the National Contact Points (NCPs). The purpose of the Roundtables is to generate ideas from external participants for enhancing the effectiveness of Guidelines’ implementation. The 2006 OECD Corporate Responsibility Roundtable was held on June 19. It dealt with two topics: 1) promotion of the Guidelines; and 2) NCP engagement with individual companies, including by providing or facilitating access to mediation and conciliation. In addition to representatives of BIAC, TUAC and OECD Watch, thirteen invited participants (including representatives of business and socially responsible investment services, a trade union anti-corruption expert, two mediation professionals and two representatives of NGOs that provide business services in the corporate responsibility field) contributed their views on Guidelines promotion.

The following summary of these discussions is based on the topics identified by the Chair of the Roundtable in his summing up. The Roundtable was held under the Chatham House Rule¹ and this summary conforms to that Rule.

Promotion

1. The session on promotion began with presentation by BIAC, TUAC and NGOs on their promotional activities. The principal findings of the discussions of promotion were as follows:

- *Importance of an effective policy environment.* Most OECD work focuses on government responsibility – it helps governments to develop more effective public policy. In the investment field, the OECD promotes transparent and open frameworks that help business, unions and civil society organisations play their roles more effectively.² Reiterating a theme developed in all Roundtables since June 2001, Roundtable participants noted that the most important measures taken by governments in support of corporate responsibility are those that create and maintain an effective policy environment.
- *Broader coordination among and within governments.* Roundtable participants noted the lack of a “whole of government” approach to corporate responsibility. One participant described the fragmented situation in his country, where the OECD Guidelines are the responsibility of the Ministry of Finance, the UN Global Compact is with the Department of Foreign Affairs, and the Global Reporting Initiative is handled by the Environment Ministry. Shortcomings in

coordination on corporate responsibility issues among policy communities within the OECD were also noted. Participants described the Guidelines' special place within the constellation of international instruments and their unique "content, governance and credibility." The Guidelines provide: 1) a text that is both detailed and comprehensive; 2) a governance structure that directly engages the responsibilities of governments; and 3) is supported by business, trade unions and NGOs; 4) a normative benchmark based on widely accepted concepts and principles for international business conduct, including those housed in the United Nations and the OECD; and 5) a unique mediation and conciliation mechanisms for resolving problems that arise in connection with implementation of the Guidelines in specific instances. These features make it a unique and valuable instrument for governments wishing to promote corporate responsibility.

- *Objectives of promotion – creating a Guidelines brand or promoting appropriate business conduct?* Participants agreed that the ultimate goal of Guidelines promotion is to enhance the business conduct in the day-to-day operations of companies. However, the development of the Guidelines brand can be an important means of realising this broader objective since they provide an important benchmark, helping to clarify what governments (and the societies they represent) expect of companies. OECD Watch pointed out that successful building of the brand will depend on the Guidelines being seen as an effective and credible instrument for enhance corporate accountability – thus, promotion and other aspects of implementation cannot easily be separated.
- *Cooperation among stakeholders.* One business participant started off his remarks by noting that there appears to be less cooperation among the stakeholders involved in Guidelines implementation than for other major corporate responsibility instruments. Participants proposed that improving such cooperation be included as an objective for the June 2006-2007 cycle of implementation. Opportunities for greater cooperation included reinforcing links with the ILO, UNCTAD and SRI fund managers. The ILO representative confirmed the ILO's interest in finding effective ways to promote labour standards themselves as well as the global instruments that communicate these standards. TUAC suggested that more regulator meetings between all stakeholders would assist with enhanced coordination efforts and managing expectations.
- *Sending a positive message and managing expectations.* Participants agreed that promotional efforts should send the message that the Guidelines provide a positive resource for companies and other stakeholders – they are benchmark for understanding appropriate business conduct and provide a forum for exploring solutions to problems. Another important message for Guidelines promotion is that Guidelines implementation has a uniquely valuable contribution to the smooth functioning of the international economy. Promotion should clarify what this contribution is and encourage stakeholders to hold the Guidelines to a high performance standard, while also emphasising the importance of not expecting Guidelines implementation to achieve outcomes that it is not designed to achieve.
- *Promotion in Non-Adhering Countries.* TUAC and NGOs reported on the extensive promotional campaigns they have sponsored in non-adhering countries. A trade union representative noted that his contacts in non-adhering countries did not see the Guidelines as "rich countries telling poor countries what to do"; rather, their attitude was more "thank heavens that this instrument is available". BIAC stressed that finding ways to promote corporate responsibility among companies from non-OECD countries which invest in other developing and emerging countries is one of the most important challenges for the Guidelines promotion.

Business representatives added that promoting responsible business practices among Chinese and other investors from emerging countries' would significantly contribute to enhance the benefits from FDI to societies in non-OECD countries. One participant stressed the importance of dealing with what she referred to as the "African elephant sitting in the room" – many participants agreed on the importance of exploring the implications of China's emergence as a major outward investor, especially in Africa, and of promoting the Guidelines and other relevant international standards in that context. Business representatives pointed out that corporate responsibility and the Guidelines can best be promoted in investment friendly environments and that, therefore, one of the best ways for the OECD, business and other stakeholders to facilitate corporate responsibility is to urge non-OECD countries to improve their investment climates.

- *Visibility of the Guidelines.* There was general agreement that ongoing work to raise the visibility of the Guidelines was required. Specific suggestions included: promoting the Guidelines in business schools and other academic programmes; tightening the links between the work of the OECD Investment Committee and that of other OECD bodies; developing appropriate meta-tags in order to raise the visibility of the Guidelines on the Web.
- *Learning lessons.* Roundtable participants stressed the need for continued learning by all Guidelines participants and noted that the communication and exchange of ideas that takes place during promotion can be part of this learning process. For example, one participant stated that companies need help in learning how to apply the Guidelines recommendations in specific business contexts. Guidelines promotion, especially promotion that focuses on particular problems, sectors or regions (e.g. the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones) provides learning opportunities for companies and for others involved in the promotion.

Mediation and Conciliation

2. The afternoon session on mediation involved presentations by the Australian and Japanese NCPs of their experiences with the specific instances procedure. This was followed by the presentations of two professionals who provide mediation and conciliation services. Perhaps because of this line-up of speakers, most of the afternoon discussion focused on the requirements of successful mediation.

3. The principal findings of the discussion were as follows:

- *Form and flexibility.* Mediation is a means of solving disputes that is increasingly used by governments, companies and individuals because it offers an attractive combination of form and flexibility. It is both formal (with mediators and parties having well-defined roles and responsibilities) and flexible (parties are encouraged to find their own solutions to problems). Since no two problems in international business ethics are the same, this combination holds out the prospect of resolving disputes at lower cost and with better outcomes. The mediation specialists pointed out that, far from being a soft procedure, mediation can (under favourable conditions) be very "muscular", giving rise to substantial changes in the way people think and act. This is particularly true when the consequences of not reaching a resolution are serious (good mediators will develop a clear view of what these consequences are and will be sure that the parties to the procedure understand them).

- *Multi-faceted role of NCPs.* Several participants noted the multi-faceted character of NCPs' roles in relation to the specific instance procedure. They asked: are NCPs advocates, an information bureau, arbitrators, and/or direct providers of mediation services? One NCP noted that he played several roles in relation to the Guidelines (advocate of the concepts and principles expressed in the Guidelines, judge as to whether or not a specific instance should be accepted, and mediator once a specific instance is under way). OECDWatch noted that, while mediation is potentially valuable, it is important to ensure that it does not diffuse NCPs responsibilities when they become aware of serious wrongdoing (e.g. in the area of human rights). OECDWatch reiterated its interest in ensuring that NCPs issue clear statements that identify the facts and make recommendations on avoiding future wrongdoing.
- *Qualities of a good mediator.* The mediation experts described mediation as an "active and energetic process" demanding special skills and the right "mental make up". Mediation skills include "effective listening"; dealing with the emotions of the parties of the mediation; gathering and distributing information (so that parties can come to a shared view on why the dispute arose in the first place); framing the problem in new ways; suggesting language and new approaches to the resolution of issues that bring the positions of the parties closer together without taking over their responsibility for reaching agreement. Impartiality was also seen as key to effective mediation (e.g. by OECDWatch). Training would seem to be needed for the acquisition of these skills (but some NCPs have shown that they can provide effective mediation services, even without training). One issue about which some NCPs expressed concern was the fairly rapid turnover in NCPs, which may make it more difficult to build up expertise and to ensure continuity and commitment to particular specific instances. At their annual meetings that followed the 2006 Roundtable, NCPs agreed to propose improving mediation capacity as an area for experience sharing among NCPs during the next cycle of work.
- *Importance of building trust in mediators.* Mediators need to have credibility and to earn the trust of the parties to mediation. For NCPs, this implies the acquisition of the skills (discussed above) and resources needed for successful mediation and the cultivation of a reputation for impartiality and fairness. Participants also discussed the need to create ways of handling the various pressures that might develop within governments (e.g. coming from the interests of other branches of governments in the outcome of the specific instance) and that might create a perception of conflict of interest or bias.
- *Importance of building trust and a spirit of conciliation among parties.* The parties to the specific instance procedure have essential responsibilities in creating the conditions which will allow for successful dispute resolution. These include the responsibility to help create the conditions for building up trust and a spirit of conciliation. For the parties, trust is a "fragile commodity" that can easily be damaged or destroyed. For this reason, all parties have a responsibility to take actions (e.g. respecting the "rules of the game" set forth in the Procedural Guidance to the 2000 Council decision that created the specific instance procedure) and to use language that will be conducive to constructive dialogue and problem solving. A number of participants stressed, in particular, the importance of safeguarding confidentiality as a way of building trust and a cooperative spirit.
- *Parallel proceedings.* Both mediation specialists noted that every issue takes place in some kind of legal framework and that most issues that have been the subject of mediation have been or

could be dealt with someplace within this framework. One specialist stated that “ongoing legal processes should be no bar to mediation.”

- *Managing expectations, properly structuring the agenda and seeking appropriate representation.* The most fundamental task of the mediator is to manage the expectations of the parties – they need to embark upon the mediation process with a realistic view of what can be achieved and what is expected of them. Participants also highlighted the importance of focusing the dialogue under specific instances on issues that are important, about which parties can reach agreement and that are in the control of the company whose activities are the subject of the specific instance. Several participants noted that involving the right representatives in the dialogue is of crucial importance. The tendency of companies to want to name lawyers to represent them was noted. One NCP stated that he goes to considerable length to discourage the use of lawyers as representatives of business for his specific instances.
- *Committed engagement by NCPs.* Specific instances often involve difficult situations -- parties may have entrenched view; antagonism and distrust may be high; the facts of the case may be subject to controversy and information sources fragmentary. The message sent by Roundtable participants to NCPs is: don't be too quick to give up and don't be scared off too easily. Successful resolution of problems often requires long-term commitment. At the same time, participants – including both NCPs and mediation specialists – the importance of time pressure and of deadlines in helping the parties to focus on the issues at hand and deal with them effectively and efficiently.

NOTES

¹ Chatham House defines the Chatham House Rule as follows: *When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.* www.riskythinking.com/glossary/chatham_house_rule.php.

² See, for example, the Policy Framework for Investment, which provides a non-prescriptive checklist of issues for consideration by any interested governments engaged in domestic reform, regional co-operation or international policy dialogue aimed at creating an environment that is attractive to domestic and foreign investors and that enhances the benefits of investment to society. www.oecd.org/dataoecd/1/31/36671400.pdf.

Annex 1.

Briefing Paper by OECD Watch on Promotion of the OECD Guidelines for Multinational Enterprises and the Role of National Contact Points in Handling Specific Instances*

This briefing paper was prepared for the OECD Investment Committee's "Roundtable on Corporate Responsibility", which took place in June 2006. The Roundtable's theme was "A Proactive Approach to the OECD Guidelines", which included discussions on "Promotion of the OECD Guidelines" and "Mediation and Conciliation under the OECD Guidelines Specific Instance Procedure".

Why OECD Watch promotes the OECD Guidelines for Multinational Enterprises

OECD Watch members share a common vision about the need for binding corporate accountability frameworks and sustainable development. The *OECD Guidelines for Multinational Enterprises* (Guidelines) – with its unique mechanism for resolving problems arising from irresponsible corporate behaviour – have the potential to reduce conflict between civil society and multinational companies.

In this regard, OECD Watch monitors how effectively governments promote the Guidelines and handle complaints against companies. OECD Watch also advises NGOs on how to raise issues with National Contact Points (NCPs) concerning companies that breach these minimum principles and standards for responsible conduct.

Our efforts are geared towards finding meaningful solutions for communities impacted by irresponsible corporate activities while continually highlighting how the existing global governance framework must be strengthened to ensure people's rights are protected through the creation of binding corporate accountability frameworks.

Overview of OECD Watch's promotion activities

Publications - OECD Watch has published over a dozen guides, reports and papers to advise NGOs about the Guidelines. Since 2003, OECD Watch has also produced an annual review of how effectively NCPs implement the Guidelines. NGOs can obtain information from OECD Watch in several languages, including Bahasa (Indonesian) English, French, German, Portuguese, Russian and Spanish. OECD Watch's recent publications include:

- "Five Years On: A review of the OECD Guidelines and NCPs", which was distributed to over 2,000 recipients;

* This paper has been made possible through funding from the European Commission, DG Employment and Social Affairs, the Dutch Ministry of Foreign Affairs and Oxfam NOVIB (Netherlands). Editors: Joris Oldenzijl, SOMO – Centre for Research on Multinational Enterprises, Joseph Wilde, SOMO – Centre for Research on Multinational Enterprises, and Colleen Freeman, Rights and Accountability in Development. Contributions have also been made by Serena Lillywhite, Brotherhood of St. Laurence and Peter Pennartz, IRENE

- “Guide to the OECD Guidelines for Multinational Enterprises’ Complaint Procedure: Lessons from Past NGO Complaints”, published in June 2006;
- “The Confidentiality Principle, Transparency and the Specific Instance Procedure”, published in March 2006; and
- “2006 Review of National Contact Points and Bi-Annual Newsletter”, which was disseminated to over 500 recipients.

Training workshops - OECD Watch has carried out multi-day, regionally-focused training workshops in the following countries:

- Germany in October 2004 with participants from new EU member states;
- Argentina in November 2005 and June 2006;
- India in June 2005 and November 2005;
- Poland in March 2006 with participants from new EU member states; and
- Ghana in July 2006, which included a three-day field trip to communities impacted by gold mining.

Other promotion activities - Since its inception, OECD Watch has undertaken a wide range of promotion activities, including with governments and business. For example, OECD Watch members have:

- actively participated in the work of the Investment Committee, including making contributions on the Risk Awareness Tool, the Policy Framework for Investment and the Corporate Governance Principles;
- participated in government consultations in Australia, Canada, the Netherlands and the UK to examine corporate social responsibility (CSR) issues and/or how to improve NCPs’ handling of specific instances;
- hosted a multi-stakeholder roundtable in Brussels in March 2005 that was attended by more than 100 government, business, NGO, trade union and ethical investor representatives;
- engaged in extensive multi-stakeholder discussions facilitated by the UK All Party Parliamentary Committee for the Great Lakes Region in Africa concerning investment in weak governance zones;
- organized a multi-stakeholder roundtable in Paris with FAFO and International Alert to discuss investment in weak governance/conflict zones in late 2005;
- hosted a dialogue in the Netherlands, which brought together representatives from ABN AMRO, Heineken, Nutreco, Berenschot, NBC Vermogensbeheer and the Dutch Ministry of Economic Affairs; and

- participated in several consultations with the UN Secretary General’s Special Representative on Business and Human Rights.

How NCPs should promote the Guidelines

OECD Watch contends that much more could be done at the national level to promote and implement the Guidelines. Specifically:

- Every NCP should have an accessible and informative web site. Links should be provided to relevant OECD papers, OECD Watch, the Trade Union Advisory Committee and the Business and Industry Advisory Committee’s publications. The web site should be promoted by embassies and government ministries such as export credit agencies, trade and investment departments, including with web links. The NCP should also promote the web site within the business community. Ideally, statements should also be published in either English or French (the OECD’s working languages). In addition, NCPs’ web sites could link to a central web site maintained by the OECD Secretariat that provides the public with reliable information on cases, issues and procedures.
- NCP informational booklets should be developed by adhering governments in consultation with all stakeholders. These booklets should provide guidance to companies on the importance of adhering to the Guidelines, especially in those sectors and countries with weak governance where breaches are more common.
- Adherence to the Guidelines should be a precondition for all companies seeking export credits, subsidies, procurement contracts and political risk insurance.
- At a minimum, NCPs should hold multi-stakeholder meetings annually. These consultations should allow participants the opportunity to contribute to the NCP’s agenda. All papers should be disseminated in advance and accessible from the NCP’s website.
- NCPs should provide information on the Guidelines to prospective internal and external investors. NCPs could actively promote the Guidelines as part of risk management and good governance strategies with external investors.
- Embassies and other government ministries should play a stronger role in promoting the Guidelines, including disseminating information on a regular basis and providing guidance to companies on how to better implement the Guidelines. Embassies should also provide information on the Guidelines to groups wishing to bring complaints against companies. To avoid confusion or duplication, embassies and government departments should use the Guidelines as the minimum benchmark for assessing or promoting CSR.
- NCPs could work more closely with industry associations and professional bodies to promote adherence to the Guidelines, including by organizing training sessions that include presentations by companies, trade unions and NGOs. NCPs could promote the Guidelines among major multinationals such as the top 100 companies and those certain sectors at higher risk of breaching the Guidelines, e.g. the extractive industries, textiles and prison management.

- CSR-related events are well established in many OECD and non-adhering countries. NCPs could actively promote the Guidelines by participating more frequently in these events. NCPs could also host seminars to discuss the Guidelines to contribute to the broader dialogue on responsible trade and investment.
- NCPs could promote the Guidelines via relevant government inquiries on CSR issues. For example, in Australia, two concurrent inquiries are taking place on CSR issues and the voluntary versus legislative debate to promote CSR.

NCPs' handling of specific instances

The Procedural Guidance is clear that NCPs have a dual role in handling specific instances. Firstly, NCPs are required to seek resolution through mediation. Secondly, should mediation fail, NCPs are required to reach a determination.

Currently, there are no rules setting out how the mediation process should be conducted and consequently, each case before the NCP has been handled differently. This lack of consistency is unfair both to companies and complainants. If NCPs are to take their role as mediators seriously, a number of measures need to be taken so that they can play the role as mediator:

- NCPs should be trained by experts in the area of dispute resolution and NCPs should learn from procedures adopted by other alternative dispute resolution providers.
- The key to successful mediation is the undisputed independence of the mediator in relation to the parties concerned. Housing the NCP within a government department (Economic, Trade, Industry) inevitably raises a conflict of interest – or the appearance of a conflict of interest – between the NCP's role as impartial adjudicator and its role as promoter of national business. To avoid the NCP being placed (or perceived to be) in a compromised or compromising position in complaints involving enterprises linked to government-funded projects or public private partnerships, a process is required to fast track mediation.
- Complainants should be treated as full and equal partners. Therefore, in specific instance procedures, all correspondence and documents should be shared with all parties.
- Unless the NCP is prepared to make a determination, then final statements will remain meaningless.
- If it is clear that mediation will fail to produce a resolution, NCP statements should not be issued before all parties have been properly consulted.
- NCPs need training by mediation experts in the area of dispute resolution, and informed about other dispute resolution providers.
- If mediation is agreed to by all parties, sufficient time must be allocated.
- All parties should contribute to an agreed agenda.

- All documents must be exchanged in advance to allow maximum opportunity for dialogue and debate. The company must be encouraged to respond to the complaint in writing. Subsequent counter claims by all parties should also be in writing.
- Legal representation should be avoided.
- Both parties should be given the opportunity to provide supplementary written evidence for mediation purposes, however, this must be distributed in advance.
- All parties should be given the opportunity to present an opening and closing statement at mediation.
- Minutes of the mediation must be kept and all agreed outcomes documented and “signed off” by all parties.
- Final mediation should occur within four months, or a maximum of eight months, with the consent of both parties. The extension of time must be on the basis of gathering information relevant to the specific instance.
- A follow-up process is required to ensure that undertakings and agreements reached in mediation are implemented and observed.
- The NCP needs to issue a clear statement on the outcomes of the mediation, including identifying any breaches of the Guidelines and the recommendations for remedy.

If mediation fails - For those complaints where mediation fails, the final statement should record a breach of specific provisions of the Guidelines or exonerate companies where there is no breach. The recommendations to the company contained in the final statement must clearly relate to the issues that are the subject of the specific instance. Specific recommendations are necessarily based on the NCP’s opinion of whether or not a company’s conduct complies with the Guidelines and they should therefore set out what a company must do to bring its conduct in line with specific provisions. The NCP’s statement should also include recommendation to the OECD Investment Committee concerning areas in which the Guidelines could be clarified or improved.

If the OECD Governments’ position is that NCPs are not required to make a determination, then NGOs cannot see that there is anything to be gained by continuing to engage with the Guidelines.

The recommendations are based on the following publications, which are available at www.oecdwatch.org:

- RAID and the Corner House, “The UK National Contact Point’s Promotion and Implementation of the OECD Guidelines for Multinational Enterprises, Response to the Stakeholder Consultation”, 12 January 2006.
- OECD Watch, “Five Years On, A Review of the OECD Guidelines and National Contact Points”, September 2005.
- OECD Watch, “Review of National Contact Points and Update of Cases”, August 2004.

Annex 2.

International Mediation – Address at the Roundtable

*Ms. Eileen Carroll, Deputy Chief Executive
Centre for Effective Dispute Resolution*

I am a Lawyer and Mediator, who in 1990, inspired by my US experience when working in San Francisco in the 1980s, launched the Centre for Effective Dispute Resolution (CEDR), the first prominent European Alternative Dispute Resolution (ADR) organisation.

In *International Financial Law Review* in 1989 I titled my first article on this subject ‘*Are we ready for ADR in Europe?*’ In the last 15 years CEDR has witnessed a large volume of international clients resolve their conflict using the mediation process. Our internal data search in CEDR showed that clients from 50 countries had recently participated in mediation in the UK. The proposed European Union (EU) directive demonstrates a further maturing in the field.

In the just published Second Edition of *International Mediation - the Art of Business Diplomacy* (Kluwer Law, 2006) written by myself with Karl Mackie, we talk about development of international mediation and look at ‘*Form and Flexibility*’, in part inspired by the quote from Howard Bellman a US environmental and labour mediator:

“There is in our work as mediators, when it is going well, a peculiarly American blend of learned structure and conventions, and improvisation strongly supported by talent and intuition. It is jazz: there are a few orthodoxies and a lot of ad hoc ensemble invention”.

I think this reference to ‘*Form and Flexibility*’ as the critical balance in mediation is a really good place to start when looking at international mediation

“**Form**” – It is acknowledged that a minimum degree of compatibility of civil procedural rules is necessary as concerns the effect of mediation on such basic issues as limitation periods and how confidentiality of the mediation will be protected in any subsequent judicial proceedings. Also how settlement agreements are to be capable of translation to court based judgements and all these issues are acknowledged in Articles 3, 5, 6 and 7 of the draft EU directive.

“**Flexibility**” – recognition that mediation while benefiting from a legal framework should be fluid to preserve its key strength as a flexible process as far as design, conduct and role of parties is concerned. There is a now European Code of Conduct for mediators and mediation organisations, promoting self-regulation.

Entry point and legitimacy for mediation

In the international cases I see there is a tendency towards trying mediation before even starting proceedings. I have noticed also in cases where there is a current provision for international arbitration, the tendency to try mediation before launching into arbitration and to incorporate that into commercial contracts. This was illustrated in the well-known Cable & Wireless case which gave support in the English courts for the enforceability of ADR contract clauses. It is still true however that the majority of

mediations are taking place in the context of civil proceedings and a great deal of our international work in London comes through our Commercial Court.

The view of the EU Commission is that providing a stable and predictable legal framework should contribute to putting mediation on an equal footing with judicial proceedings. I was pleased to see that in drafting the directive the emphasis is very much on the positive opportunities for clients in mediation. That mediation has a value in itself as a dispute resolution method to which citizens and business should have easy access and which deserves to be promoted independently, rather than as a system to offload pressures on a court system.

The overall directive emphasis is client orientation and value added, which I think is again to be welcomed. It will give the same kind of recognition and harmony of approach, which has existed for the use of arbitration for a number of years. In the same way that judges in various jurisdictions have been influential in taking mediation to a new level of legal recognition, the work of the Commission if enacted will raise the game and profile of mediation, particularly in the international context.

CEDR Definition of Mediation

“Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”

Why Mediation Works:

1. Proper structure agenda
2. Commitment and engagement
3. Proper balance of sharing of critical information on history and evolution of the dispute with a forward approach based on solutions
4. Patience and skill of mediator
5. Ultimate control of participant to decide – essentially working with their “enlightened self-interest”
6. A deadline does inject reality.

Judges in the UK have been a great catalyst for the increased use of mediation for international parties particularly through our leading commercial court. There is a lot of debate in different jurisdictions as to whether one should mandate parties to mediate. I think a robust approach is to be preferred. This is based on my experience of the UK Commercial Court, although evidence of the experience of Ontario and some of the Australian experiences is that mandating can be effective if you give the parties the chance to decide on timing. My own personal view is not to go absolutely towards mandating as the psychology in mediation is terribly important and I think even more so important in international disputes. A robust way to get the parties to the table is entirely to be applauded but face saving and the sense of engagement is important, so a completely mandated element could I think create more difficulties, particularly in international cases.

There is of course always a risk that some mediations will not be successful but in my own experience it is a rare thing. Mediation, if conducted well, will have created a focal point for parties to understand the issues, and to recognise not just the legal issues, but also the commercial issues and what they are up against. I believe this has to be a good thing in terms of helping the parties progress to

settlement or to narrowing of the differences between them. (On mandatory mediation see the article in the *IBA Autumn 2005 bulletin on Mediation*, see also *EU Atlas, Lexis Nexus, 2004*).

Cross Border Element of International Dispute

It is recognised that cross-border elements of a dispute may come from the place of business of one or both of the parties, the place of the mediation or the place of the competent court, the governing law of the transactions, the governing law of the mediation agreement and possibly the governing law in a different and enforcing jurisdiction. Let me put this into context of a case I mediated some time back; an infrastructure project where the governing law for finance was New York, the failed equipment was supplied and warranted under Dutch Law, the Insurance Contracts were in Spanish and governed by a central American country's law, and reinsurance contracts governed by English law and parties from at least four jurisdictions.

Managing expectations and engagement

It is important to ensure parties going into mediation have a mediation agreement and mediate in friendly jurisdictions and that they are advised by competent counsel. It is the role of the lawyers to consider confidentiality enforcement, etcetera, so counsel should check that you are mediating in a mediator friendly jurisdiction where confidentiality is understood and protected, where mediators are properly trained and have professional codes and standards and if a settlement is reached it is drawn in a way that will in fact give the parties what is intended, a workable and binding settlement.

Trust is right at the pinnacle of mediation practice. As one of the participants on one of our CEDR international courses, Steve Davy of the Red Cross, said - '*Trust is a fragile commodity*'. This is never more so than when a mediator is working with parties in international disputes where they may be dealing with a procedure that they have not been engaged with before and the role of the third party may be new to them. Mediators have to work very hard to build up the appropriate empathy and trust and get to a point where principals will trust them and devise ways in which matters may be settled (Articles 5 and 6 of the directive), therefore, it is to be welcomed that the EU is going to ensure that this critical aspect of mediation is more widely and clearly protected.

In all mediations empathy, trust and professionalism are key and in an international context one needs to be particularly tuned to cultural sensitivity. Of course you can meet these needs on a domestic basis but more time and effort should be made on the part of the mediator and those advising the clients to ensure that they understand the process and its intentions, its capabilities and its limitations and also their role in the process and likely reactions of the other party. This is often covered by pre-mediation conferences and teleconferencing or travelling to meet the parties if necessary (depending on the amount at issue and what is sensible). You do have to consider protocol - the manner in which people are addressed, custom, dress, issues of how decision makers typically operate in a culture, the use of language and issues of verbal and non-verbal communication - there is not time to examine them all now but they are all certainly interesting and important to effective international practice.

Conquering logistical nightmares

The location in mediation is always important - it is good to have comfortable, sensible, airy surroundings for parties because it is a very difficult process. It is a long process that requires a lot of energy and the better the surrounding the better the process can be. In international cases you have

people flying in, jet-lagged and irritable, not factors to be taken lightly when people are under pressure to find settlements and particularly when you have business managers engaged who are not often used to sitting in eight or nine hour meetings – which is what mediations are like.

Agenda and timings are always important in all mediations but even more so in international cases – it is very easy to get ambushed with parties announcing other commitments, the need to get to the nearest airport and so forth. Generally, in international cases where there is a lot at issue it is sensible to allow for at least a couple of days and in certain kinds of cases there is a lot to be said for having a three-day cycle, one day of mediation, then a day of rest and preparation to work with lawyers and then a final day.

As a mediator I will work with the lawyers or other professional advisors who are going to be much closer to the clients and talk about expectations, process, about the roles of their clients and the decision-makers. This will obviously cover things like cultural expectations, language and interpreters, but one has got to drive towards creating the best possible environment to keep the energy and focus on settlement at all times.

A process growing in demand

I think the EU Draft directive if enacted will raise the profile of mediation across borders and particularly creates greater opportunities for making international mediation a recognised professional practice, which we are already seeing in London, but I think there is a lot more scope for mediation to reach the same level of sophistication and extent as international arbitration and indeed I would suggest is likely to overtake it.

I think the balance between form and flexibility, is welcome. The quality of lawyers and those advising clients, and their having an effective understanding of the process is really important. Quality and commitment of mediators is of course of vital importance. Ultimately everyone should be driving towards assisting the clients in achieving their commercial objectives, to have a satisfactory and professional procedure where any settlement can be properly relied upon. Arbitration has long been harmonised within the legal framework and now mediation is finding a similar home.

Conflict is a rich tapestry – part of the fabric of commerce and human interaction. Mediation allows parties in conflict to negotiate or mediate a solution base on a number of factors:

- The legal interpretation of rights
- Commercial considerations
- Social needs and responsibility
- Human dynamics and relationships.

Parties own the conflict -- they need to be involved in the decision whether to settle, how to settle or whether ultimately their interests are best served by a third party making a decision. Let me put this into context by looking at some of the real cases that I have been involved in mediating. I have chosen three examples just to highlight the point:

- An international dispute involving the failure of a electricity generator in a third world country;
- International entrepreneurs fighting over technology;
- International chemical companies post sale of company dispute.

Case study: Failure of a power generator in a third world country

The issues involved were: the failure of one engine; possible allegations of breach of warranty by the supplier; the immediate effect of the local community; the needs and interests of third parties project finance; insurance claims around property damage and business interruption and lots of interweaving issues on governing law. This case was mediated in London, I received the papers in New York and travelled to London at short notice and we had two very long days. The 40 individuals, with lawyers and advisors from many countries presented the various issues, experts were involved, complicated computations around the issues of energy calculations pertaining to financial and business interruption claims. The case settled at 3am in the morning.

Why did it settle? It settled because all the decision makers were present – the important people from third party project finance where there to use their muscle and persuasion, there were of course risks and uncertainty, insurers and re-insurers were all present to think about their potential liability. There was one missing party – that was the engine supplier so we were able to phase the settlement with a two-month time lag to finalise all other issues including communications with the engine supplier and the possible issue of further proceedings to put some leverage on them. What I talked about at the beginning was the present parties focusing long and hard. The decision makers were involved, there was an energy, there was a pressure chamber effect, there were lots of flying of feathers and upset. At one point I was told by one American that he thought I wasn't being evaluative enough – which was very funny given I had only received a very large amount of paper the day before, he rather overlooked the real role of the mediator, it is to facilitate understanding but not to behave as a judge – but that is the life of the mediator. Calming him down and calming the parties down and keeping everything on track, did indeed work.

Case study: Entrepreneurs and Inventors

Starlight was set up to exploit media digital Technology. The directors and officers had put substantial sums in excess of £100,000 into the company .The venture was unsuccessful.

A new company Moonlight Limited was set up by some of those involved in the company Starlight. One of the directors of Starlight based and resident now in Florida, USA claimed that the new company Moonlight Ltd was a continuation in effect of the previous company Starlight and the new company and its directors and funders had taken without consent and compensations from Starlight the ideas and technology now being developed by the new company Moonlight Ltd. He threatened to commence proceedings in Florida for breach of contract, fiduciary trust and other heads of claim.

Both parties had sought previously to negotiate the dispute themselves without success and lawyers in Florida and in London were appointed. Both parties sought to settle the dispute and came to CEDR to appoint a mediator.

The starting point of the claimant in the USA was that there was a clear prima facie case which would be pursued in Florida; the prospective defendants disputed that there was any substance to the case at all, as the technology was wholly different as promoted by the new company compared with the former one. The amount in dispute was the settlement figure to dispose of the action. The claim was at least 800,000US\$ but not particularised prior to the mediation. The real issues were feelings of injustice, unfairness and frustration by one party and on the other party held a genuine view that they held different

technology. Through a focussed day of mediation using the techniques described in this article the parties signed a binding settlement agreement at the end of the day of mediation.

Case Study: Chemical Company

The summary of the dispute a claim made by the purchaser ‘Seltrack’ against ‘Rapid’ was that in acquiring the share capital of a subsidiary ‘Acid’, that there were several breaches of SPA (Share Purchase Agreement) and a claims letter was delivered to Rapid. The essence of the claims was that the one-off price for Acid SPA was gauged by the production capacity of Acid and the management information that was provided pre-acquisition, the purchaser alleged that the seller was in breach of various warranties under the SPA. There were five heads of claim although some of the heads of claims dispensed with before the mediation.

The essence of getting this dispute settled was to look at the different heads of claims, simplify the heads of claim, look at the big numbers and then work through the calculation of loss of profit and to see how those calculations had been arrived at and to understand those calculations. In the course of the mediation it was necessary to sit down with the accountant and the General Manager of Seltrack and suggest that it would be helpful if they revamp some of their numbers to look at the loss of profit calculation: this revamping the numbers did help to concentrate the mind in the way in which the matter could be settled. There were a number of private sessions working on the numbers, plus having two days and an over a night period to reflect was also extremely helpful. Both teams were ably represented by corporate lawyers who were smart and quick on the numbers, the small team focus and abilities of the participants made it, although a highly technical mediation both as to numbers and facts, a good mediation in terms of being able to arrive at a result in terms of pre-mediation involvement.

The two-day mediation resulted in a binding settlement agreement. The claim was for over Euros 10 million. The parties reached an agreement whereby the purchaser reduces its claims. The Sale Purchase Agreement has varied in a number of respects and terms of guarantees and deferred payment altered to allow for effective price reduction.

Conclusions

When parties decide to mediate they have the opportunity to use all elements of the “Rich Tapestry” of conflict to find their solution

- The legal rights;
- The commercial and social considerations and
- Needs and responsibilities
- And importantly the human dynamics and relationships.

Today, we have a situation where - lawyers, solicitors, barristers and indeed the judges and arbitrators understand mediation and use it as a tool to engage and review all elements of conflict to help the party’s make a decision.

Mediation is mainstream and part of conflict resolution’s rich tapestry – it works in conjunction with the law courts and the legal community – all who are very much part of its development, but most importantly – when it works it works because and on behalf of those affected by conflict.