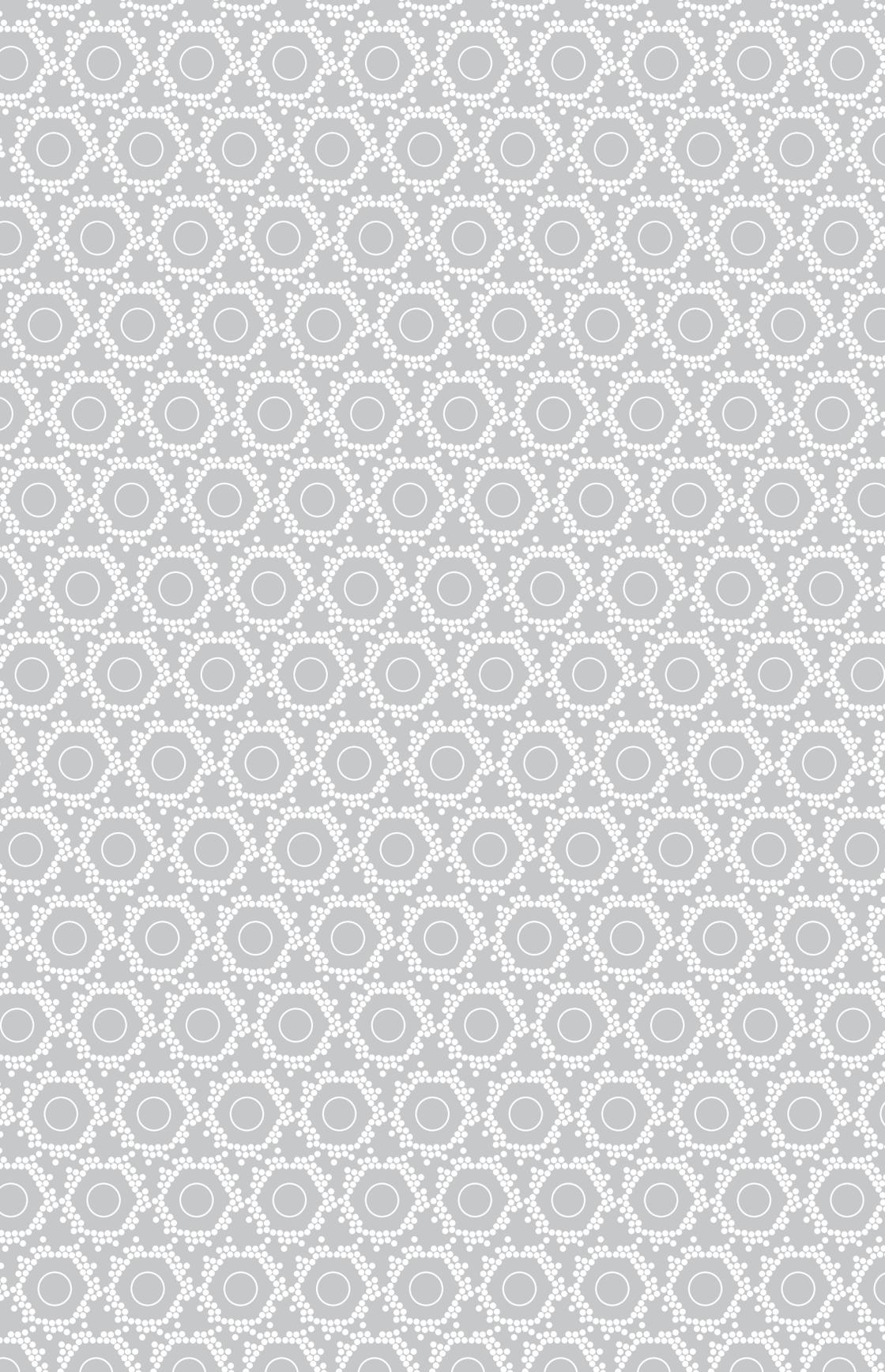


● ECD Watch

Model

National Contact Point





Model National Contact Point

The Model National Contact Point (MNCP):
Proposals for improving and harmonizing the procedures of the National
Contact Points for the OECD Guidelines for Multinational Enterprises.

September 2007

Colophon

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Author: Patricia Feeney
Rights and Accountability in Development (RAID)
UK
E-mail: raid@raid-uk.org
www.raid-uk.org

Graphic design: Justine van Heusden, www.justar.nl

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Available on-line at www.oecdwatch.org
To request a copy contact:

SOMO - Centre for Research on Multinational Corporations
Host of the OECD Watch Secretariat

Sarphatistraat 30
1018 GL Amsterdam
The Netherlands

T: +31 (0)20 639 12 91
F: +31 (0)20 639 13 21
info@oecdwatch.org

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Introduction



It is seven years since the review of the OECD Guidelines and there is a growing consensus among policymakers, trade unions, business and NGOs that OECD governments need to improve the policies and procedures of their National Contact Points (NCPs).¹ OECD Watch's September 2005 report, *Five Years On: A review of the OECD Guidelines and NCPs*, was critical of the NCPs' haphazard approach to casework. The report highlighted the way the onerous demands of the specific instance process failed to produce effective outcomes. It concluded that almost invariably the NCPs' final statements were skewed to protect companies rather than to draw a clear distinction between acceptable and unacceptable corporate conduct. These concerns, which were shared by many observers, led to a complete restructuring of the Dutch and British NCPs.² Despite the apparent indifference of some governments to the instrument and the disappointing record of both the US and Japanese NCPs, the G8 communiqué included a reference to the OECD Guidelines and expressed the need to enhance their effectiveness.³

Given the emphasis of European governments on corporate social responsibility, OECD Watch, with support from the European Commission, undertook a survey to identify what constitutes a Model NCP (MNCP).

Aims of the Model NCP Survey:

- _ Identify best practice.
- _ Make recommendations for improving NCP procedures.
- _ Encourage all governments to adopt the MNCP recommendations.
- _ Provide NCPs with a practical guide to the procedures.

The Model has largely emerged from experiences in Western Europe, where NCPs have dealt with the greatest number of cases. In Southern and Eastern Europe and the Baltic States, where NCPs have only recently been established, the Guidelines are not well known and few cases have been filed. The survey has confirmed the view that not even within the EU is it possible to conceive of one model. At present there are different administrative and legal traditions that preclude the adoption of some of the MNCP proposals. There is not a single one-size-fits-all model but the survey revealed a significant degree of consensus about the essential elements of the NCP and what constitutes best practice.

Methodology



To help the debate on the MNCP, OECD Watch drew up its 'model' which was then widely distributed together with a questionnaire. OECD Watch received many thoughtful written responses to the proposals which were supplemented by lively debates at the regional roundtables. In March, April and May 2007, OECD Watch organized roundtables in Madrid, Helsinki and Bratislava which were well attended by NCPs and NGOs from Southern and Eastern Europe and the Nordic and Baltic States. Trade unions and business representatives also participated in the meetings as did one NCP from outside the EU region. The MNCP was also discussed at OECD Watch's Roundtable that took place in Brussels on 15 June 2007. Speakers included Manfred Schekulin, the Chair of the Investment Committee, Stephane Ouaki, the Deputy Head of Cabinet of the European Commissioner for Employment, Social Affairs and Equal Opportunities, Richard Howitt, Member of the European Parliament, Gareth Llewellyn, of National Grid, Veronica Nilsson, TUAC and Gerald Pachoud, Special Advisor to Professor John Ruggie, the UN Secretary General's Special Representative on Business and Human Rights. A preliminary report of the survey's findings was presented to the June 2007 Annual Meeting of NCPs in Paris.

During the consultation, NCPs from the following countries contributed either by participating in one (or more) of the Roundtables or through written comments on the model questionnaire: Argentina, Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, United Kingdom. In total more than two thirds of all European NCPs and more than half of all NCPs (20 out of 39) participated.



This report incorporates the findings of the regional roundtables and responses to the questionnaires. The recommendations that emerged from the MNCP survey are addressed to the European Commission, all adhering governments and the OECD respectively.

OECD Watch would like to express its appreciation of the contribution made by the NCPs and by all the other participants in the survey.



MNCP Structure



“Be careful about demanding too much independence: companies don’t listen to experts, they listen to government.”

The survey reinforced the view that governments have a key role to play in promoting, monitoring and enforcing responsible corporate behaviour at home and abroad. Governments have an obligation by virtue of their adherence to the OECD’s Declaration on International Investment to establish a properly functioning NCP structure. The MNCP structure should be kept simple and not have multiple layers. The composition and oversight of the NCP are key components of the MNCP structure (See Chapter 2 *Oversight of the MNCP*). The survey identified the inherent difficulty NCPs face when they have two essentially incompatible roles: promoting the interests of national companies and acting as impartial assessors of company behaviour. The Dutch government has adopted a distinctive model: an independent NCP with government officials providing guidance and support. While the survey showed that there was a strong preference for inter-departmental NCPs, concerns were expressed that in countries with little experience of collaboration between ministries, this structure could slow the process down.

Adhering governments should accept that without proper training and adequate resources the NCP is not a credible solution for tackling problems resulting from globalisation and corporate misconduct. Resources are a major constraint faced by most NCPs, though the problems are more acute in Southern and Eastern Europe and the Baltic region. The Dutch Government is one of the very few to have earmarked significant levels of funding for the work of its NCP (900,000 EUR for three years plus two full time staff). In other countries, civil servants are supposed to allocate a notional percentage of their time to the work of the NCP.

Within the EU there are nine tripartite NCPs; the Finnish NCP (MONIKA) is quadripartite.⁴ While in the best of the tripartite bodies, trade unions and business representatives act as advisors, some NCPs are tripartite in name only. Often it is unclear whether the external members of tripartite NCPs have a direct input into the consideration of specific instances or any formal role in their final determination. Whatever the NCP composition, decisions ultimately rest with government ministers, but the outcome is likely to be better if the NCP is strengthened through the participation of external experts.



PROPOSAL

The MNCP should be independent, informed, and authoritative. It should command the confidence of all parties. The MNCP cannot function unless it has proper resources.



OPTIONS

- Best practice options: an interdepartmental or tripartite MNCP or an independent NCP (Dutch model).
- The MNCP is properly trained, equipped and funded.
- Long term goal: The MNCP is an expert quasi-legal panel with sufficient autonomy to reach decisions and make recommendations, chaired by a senior judge.



Oversight of the MNCP



“As an NCP is neither a tribunal nor an administrative authority exercising coercive power, there is no necessity for an appeal mechanism.”

The Investment Committee has not shown itself to be well equipped to carry out the responsibilities assigned to it under the procedural guidance: overseeing the way NCPs function and interpreting the provisions of the Guidelines (See *Recommendations to the OECD* below). The Committee is in a similar position to other intergovernmental bodies in that it has to proceed on the basis of consensus. Inevitably this inhibits innovation and the laggard countries tend to drive down standards of performance to the lowest common denominator. The results of the survey highlighted weaknesses with the Investment Committee but there was no time to consider how its role could be revitalised in order to ensure consistency and coherence in the treatment of cases and the interpretation of the Guidelines. OECD Watch’s preliminary proposals are included at the end of this paper.

Experience has shown that parliamentary scrutiny of the performance of NCPs has been effective. But if NCPs do not follow proper procedures in handling complaints, the Ombudsman offers an alternative means for holding them to account, since NCPs are part of the public administration. The UK, which does not have an Ombudsman tradition, has established a steering board with external members to advise the NCP and consider complaints about procedures. For more serious cases, parties involved in a specific instance (at least in common law systems) can seek a judicial review of NCP decisions.

Some oversight of the MNCP is desirable at a national level. This could take the form of an independent panel, an ombudsman, a steering board or a multi-stakeholder group. Just as the composition of the MNCP varies in different countries, some of the proposed oversight options will be more attuned to particular cultural contexts than others.



PROPOSAL

Oversight of the MNCP should be reinforced at a national level. External advisers should assist the MNCP.



OPTIONS

- The MNCP reports to parliament.
- The Ombudsman holds the MNCP to account for maladministration.
- In the absence of an Ombudsman, an external steering board oversees the NCP and advises on procedures and interpretation of the Guidelines.
- Serious cases of maladministration by the MNCP – in common law systems – are subject to judicial review.



MNCP

Promotion and Outreach

“Multi-stakeholders should be watchdogs and sparring partners rather than part of the MNCP.”

The MNCP has a duty to promote the OECD Guidelines to companies that operate at home or abroad. It should inform other interested parties, including government departments and embassies about the work on the Guidelines: for example the types of complaints that have been filed and how the provisions are interpreted and how cases have been resolved. The MNCP also has a prominent role to play in training other government officials and companies. It should advise trade and investment officials about government expectations of company behaviour wherever they operate. Embassies and trade missions should also undertake promotion and training activities. The other stakeholders, particularly business groups, have a responsibility to undertake promotional activities.

OECD Watch’s proposal that government subsidies, credits or risk insurance should depend on companies’ adherence to the Guidelines was rejected by NCPs. But at the very least the MNCP should liaise with export credit agencies and other relevant bodies involved in screening company projects. Companies that are involved in specific instances should not be eligible for government subsidies, credits or risk insurance until the matter has been resolved. If a complaint concerning a company that is seeking or has obtained export credits or risk insurance from an ECA is filed, then the NCP should be involved in assessing its compliance with the Guidelines.

An essential component of a functioning MNCP is to have a dialogue with multi-stakeholders and the opportunity, through yearly consultations, to exchange views on developments and receive reports about the work of the Investment Committee. These contacts are the means by which the NCP fulfils the obligation on transparency, visibility and accountability. In many EU countries including the Baltic States and Eastern and Southern Europe, consultations and exchanges take place rarely, if ever. But in most OECD countries, meetings have been infrequent and reporting on the work of the NCP and the Investment Committee has been sporadic and limited. This has had a deleterious effect on the quality of debate at the Investment Committee.



PROPOSAL

The MNCP should engage in a range of promotional and training activities. These should be complemented by other government initiatives. All stakeholders should promote the Guidelines.



OPTIONS

At a minimum, the MNCP should:

- Produce and distribute a booklet on the guidelines and procedures.
- Maintain an accessible and updated website.
- Adopt a clear promotion strategy.
- Carry out training within and outside government.
- Hold an annual consultation with stakeholders.
- Conduct more regular meetings with key stakeholders, particularly before Investment Committee consultations.
- Embassies and trade missions should help promote the Guidelines.
- If a company seeks government support for activities which are the subject of a complaint, the MNCP should help the ECA or other body screen the project.



Procedures for Handling Specific Instances

“The MNCP should deal with cases promptly, efficiently and fairly”

The survey revealed a considerable degree of consensus on a number of aspects of the procedures. However further discussion is required to define best practice with regard to the initial assessment phase, for which there is no standard process. Agreement was not reached on other outstanding issues, which are listed below.



There was general agreement that:

- Cases should be dealt with within a reasonable time frame.
- The MNCP has a fact-finding role, though the onus remains on the parties to supply the relevant information.
- There is no need to revise the existing guidance on who can submit a complaint.
- Parties should be treated equitably.
- There should be transparent, consistent procedures.
- Cases should be properly managed.
- The final statement should be properly reasoned.



The following issues were more contentious:

- ‘Investment nexus’ and supply chain responsibilities: in what precise cases do the Guidelines apply?
- Parallel procedures: could NCP procedures prejudice legal proceedings?
- Confidentiality: which aspects of the proceedings are confidential?
- Adjudication: ultimately if mediation is not possible, should the MNCP determine whether a company has complied with the Guidelines?

1

Initial Assessment

There is no standard practice as to how the NCP deals with complaints in the initial phase. There should be a clear statement from the NCP at the beginning of the process as to what the participants can expect.



OECD Watch believes that the initial assessment should include:

- A date by which the company must respond in writing.
- A direction that the response will be shown to the other party.
- A specified date by which the party must reply to the response of the company.
- All additional information supplied by the participants to be disclosed to each other.
- A date by which the initial assessment will be published.
- The initial assessment should specify which aspects of the complaint have been rejected and which will be taken forward under the specific instance procedure.

Time frames

Most NCPs disliked the proposal for hard-and-fast time frames, but there was general support for greater guidance on timings. It was recognised that NCPs could benefit from clearer time limits for different stages of the process to prevent either party from unduly prolonging the proceedings or prevaricating. We suggest the following indicative and non-prescriptive timelines to provide clarity to all parties. OECD Watch intends these to be a guide for NCPs as to what should be, in all but the most complex cases, a reasonable time frame.

PROPOSAL

The MNCP should aim to complete the proceedings within a twelve-month time frame.

OPTIONS

- Indicative time frame:
- Initial assessment: three months.
- *Once the case has been accepted, the NCP and the parties should meet promptly to agree on a timetable.*
- Mediation phase: normally not more than six months.
- Final assessment/adjudication phase: three months.
- Final statement: issued after twelve months.
- For highly complex and/or time- or issue-sensitive cases, the MNCP should “fast track” the process by hiring a reputable, independent mediator that is approved by both parties.
- In cases of state-owned or partially state-owned enterprises, the MNCP should use an independent assessor in order to avoid the perception of a conflict of interest.

Fact-Finding

Many NCPs welcomed the proposals about how to approach a fact-finding mission as useful, but warned about the difficulties in non-adhering countries.

PROPOSAL

The MNCP makes whatever efforts it properly can to resolve questions of fact, including by carrying out information-gathering or fact-finding visits.

OPTIONS

- The MNCP informs the parties a visit is being considered or planned and provides at least 30 working days for the parties to prepare for the visit.
- The MNCP's rationale for undertaking the visit is to verify or clarify the facts of the case and to consult with all relevant parties.
- The MNCP negotiates a terms of reference (TOR) that is agreed to by the parties at least 21 working days prior to the visit.

The MNCP makes every effort to ensure the visit:

- is independent of the parties;
- is carried out in a neutral, transparent and fair manner;
- does not endanger the confidentiality of sensitive information;
- does not endanger the participants or local communities;
- does not unfairly advantage one party over another; and
- equitably allocates time.
- Transparency is the ideal but it may have some practical implications. Security issues and the protection of witnesses are matters that should be discussed in advance and included in the TOR.
- The TOR should be translated (when necessary) and provided to all interviewees beforehand.

- Interviews are public unless the interviewee requests confidentiality (in which case the MNCP's report notes that a confidential interview took place).
- All interviews should be recorded.
- The MNCP publishes a report on the visit.
- The MNCP provides interviewees with an opportunity to check statements attributed to them prior to their inclusion in its report.
- The MNCP records any financial or contractual relationship between the interviewee and the parties in its final report.



Investment Nexus and supply chain responsibility

The Investment Committee acknowledges that '[t]he fact that the OECD Declaration does not provide precise definitions of international investment... allows for flexibility of interpretation and adaptation to particular circumstances. The degree to which relationships in the supply chain constitute pure trade outside the scope of the Guidelines or else 'investment like' activity is to be decided on a case by case basis. NGOs believe that here has been a selective interpretation of the text of the Guidelines by some NCPs which has unduly narrowed their scope.

Under the supply-chain provision, companies should encourage, where possible, suppliers and sub-contractors to apply principles of corporate conduct compatible with the Guidelines. The commentary to the Guidelines recognises that compatible conduct is sought with all entities with which MNEs enjoy a 'working relationship', although established or direct business relationships are the main object of the recommendation. It is further acknowledged that, while there are practical limitations on the ability of an enterprise to influence the conduct of business partners, companies having market power vis-à-vis their suppliers may be able to influence business partners' behaviour even in the absence of investment giving rise to formal corporate control.

Practice among NCPs varies considerably with such cases.

5

Parallel procedures

Informed legal opinion consulted as part of the survey holds the view that there are very few circumstances in which the NCP procedures would ever need to be dropped to avoid prejudicing criminal proceedings. All too often, as with the 'investment nexus' argument, this has been used merely as a pretext for not accepting cases.

6

Confidentiality

NCPs should bear in mind that as regards the OECD's procedural guidance, the complaint itself, the initial assessment and any final statement are not covered by the confidentiality provisions of the Guidelines which are in place to protect and encourage the free flow of information between the parties during mediation and investigation.

7

Adjudication

"NCPs are not a court of law".

Some but not all NCPs are uncomfortable at having to determine whether a company is acting in conformity with the OECD Guidelines. If there is no final determination about a company's behaviour then the whole procedure is meaningless.

"The MNCP has a dual role: that of mediator and adjudicator. If mediation fails then the MNCP makes a determination on compliance with the Guidelines".

Final statements

There was a consensus about the elements that should be included in the final statement, although the issue of determining compliance remains a stumbling block. As an accepted principle of due process, the NCP should recognise that it is unacceptable to reach a decision on a complaint based on information supplied by one party but to which the other party has no access. If a party refuses to participate during the assessment phase, the NCP should examine the available material and produce a final statement. Some NCPs appear unable to obtain cooperation from companies. This should not deter them from proceeding with a specific instance and reaching a conclusion based on the evidence before it.



OVERALL PROPOSAL

At each stage of the specific instance, the MNCP should follow consistent procedures, keep the parties properly informed and treat both fairly. At the end of the process the MNCP should issue a reasoned final statement.



OPTIONS

- The initial assessment clearly sets out the parameters of the specific instance to both parties.
- The complaint itself, the initial assessment and any final statement are not covered by the confidentiality provisions of the Guidelines.
- As regards parallel proceedings, the MNCP will only exclude cases when there is a clear risk of prejudicing criminal proceedings.
- The MNCP has a fact-finding role:

The final statement should:

- List each allegation and the company's response.
- Provide clear, specific recommendations including measures for follow up.
- State if there has been a breach of the Guidelines.

OECD Watch's recommendations to the EU and EC



Recommendations

In the EU there is plenty of opportunity for pooling resources, which would reduce costs and increase efficiency. There would be a clear benefit in involving the EC in coordinating such activities.

- EU Member States should undertake joint promotional efforts and training programmes.
- The European Commission should provide support to less well-resourced NCPs in newer EU states by, for example, facilitating multi-stakeholder meetings and coordinating joint activities.
- The Commission should act as a focal point for exchanges between civil society and the region's NCPs.
- The Commission and Member States should work to harmonise the NCP procedures.

OECD Watch's recommendations to all Governments

- All Governments should adopt the MNCP recommendations contained in this document.
- All governments should integrate the OECD Guidelines for Multinational Enterprises into trade and investment agreements and condition export credits, subsidies, procurement contracts and public private partnerships with adherence to the Guidelines. By imposing such measures, governments would:
 - _ Remove ambiguity.
 - _ Reward responsible conduct.
 - _ Provide incentives to correct or improve behaviour.
 - _ Eliminate perverse incentives for continuing misconduct.

OECD Watch's recommendations to the OECD's Investment Committee



Recommendations

- Establish a 'mentoring' system to assist new NCPs.
- Institute an effective peer review mechanism to improve NCP performance.
- The IC should obtain more precise information about the legal status of NCPs; how decisions on specific instances are arrived at and by whom. Whether, for example, decisions on final statements are ministerial decisions or acts.
- The IC should obtain information about staffing levels and funds available to NCPs to engage in fact-finding in relation to specific instances.



Review of the Guidelines

- A wholesale review of the Guidelines is not recommended, but work should be undertaken with stakeholders to review the human rights provision.



Preliminary Proposals on Measures to Strengthen the Investment Committee

- A study should be made to evaluate the role of the Investment Committee and its procedures in order to see how it might be made more effective and transparent.

Work on the OECD Guidelines for Multinational Enterprises is one of the OECD's distinctive areas of competence. It is time for the OECD and governments to give further consideration to the Investment Committee's structure and operations. Should, for example, the Corporate Governance and Investment Committees be merged in order to avoid duplication?



Reform of the Bureau

The Bureau is a small group of NCPs who assist the Chair of the Investment Committee in running the Committee.

- Selection should be made more transparent and governments should be willing to allocate greater resources to broaden membership.
- The Committee should set out selection criteria by which NCPs are eligible for membership of the 'Bureau'.

Notes

- 1 In March 2007, the European Parliament's Committee on Employment and Social Affairs called on the European Commission and Member States to: "[I]mprove the functioning of [NCPs] in particular in dealing with specific instances raised concerning alleged violations throughout operations and supply chains of European companies worldwide".
- 2 In February 2007, the Special Representative of the Secretary General, John Ruggie, stated in his report to the Human Rights Council in Geneva, that "some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs' overall performance remains highly uneven."
- 3 In June 2007 the final communiqué of the G8 summit stated "We commit ourselves to promote actively internationally agreed CSR and labour standards (such as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration), high environmental standards and better governance through the OECD Guidelines National Contact Points."
- 4 The Chilean NCP is also quadripartite.

