

**THE 2000 REVIEW OF THE OECD GUIDELINES FOR  
MULTINATIONAL ENTERPRISES: A NEW CODE OF  
CONDUCT?**

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# Preface

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The Review of the OECD Guidelines for Multinational Enterprises was started in 1998, and finalised in June 2000. It is one of the most recent attempts at the intergovernmental level to regulate the -world wide- behaviour of Multinational Enterprises (MNEs) originating from OECD countries<sup>1</sup>. Since the start of the Review, SOMO (Centre for Research on Multinational Corporations) has been actively taking part in the debate about which revisions should be made in terms of content and implementation to make this instrument an effective tool to promote corporate social responsibility. In order to follow the Review process closely and critically, SOMO took part in the consultations that were held at the national level by the Dutch Ministry of Economic Affairs and at the international level by the OECD Working Party on the Review of the Guidelines.

During the first months of the Review process it became clear that few Non-Governmental Organisations (NGOs) were having the information and resources that are necessary to take part in the Review constructively. However, the issues at stake during the Review of the OECD Guidelines are of relevance to the work of many NGOs all over the world, as the OECD Guidelines deal - among other issues- with human rights, labour rights, environmental protection, liability and issues concerning disclosure of information, all related to MNE activities. The broad coverage of issues in the OECD Guidelines makes them of vital importance in the current global debate on corporate social responsibility. Therefore, SOMO started a project in August 1999 to increase the involvement of, and co-operation between, NGOs (including NGOs from the South) in the Review, by regularly disseminating information, organising meetings and a workshop on the key issues at stake. Apart from these activities, research was undertaken to analyse the OECD Guidelines in a broader perspective, in particular the relation between the OECD Guidelines and other initiatives in the field of corporate social responsibility. This report forms part of the outcome of SOMO's project concerning the Review of the OECD Guidelines.

In most of its research, campaign, and advocacy work SOMO focuses on labour related issues, particular in developing countries. During the consultations and other discussions on the Review of the OECD Guidelines, SOMO has tried to take into account the perspectives from the South, based on the views expressed by organisations in Asia, Africa and South America. Therefore, SOMO has focused in this project on issues that are of particular relevance to labour standards in developing countries, such as the world wide applicability of the OECD Guidelines and supply chain responsibility. Furthermore, SOMO has stressed the importance of a multi-stakeholder involvement and transparency in the implementation procedures, as experiences in developing countries has shown that this is necessary for any initiative to become reliable and credible.

*SOMO wants to thank all the organisations that have been given their input in this project at the national and international level, that became the basis of this report. Funds for the execution of this project were provided by: the Dutch Ministry of Foreign Affairs and the National Commission on Sustainable Development (NCDO).*

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<sup>1</sup> The OECD brings together **29 countries**. The original 20 members of the OECD are located in Western countries of Europe and North America. Next came Japan, Australia, New Zealand and Finland. More recently, Mexico, the Czech Republic, Hungary, Poland and Korea have joined.

## Note

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SOMO is a centre for research on multinational corporations. In 1973 SOMO was founded to provide different organizations with knowledge on the structure and organization of Transnational Corporations (TNCs) by conducting independent research.

In the Seventies the conduct of Transnational Corporations gave cause for intense international discussions. TNCs were accused of using their power in a negative way. There was a lot of debate about the growth of the economic and political power of TNCs as being the main carriers of Foreign Direct Investment. The concerns included the abuse of dominant market positions, a lack of commitment to the host economy, disrespect for labour rights and interference in national politics. At that time it appeared there was little basic knowledge on the structure and organization of TNCs.

SOMO is an independent research and consultancy bureau. Whether a TNCs investment strategy is involved, the environmental policy of an entire sector, or a major reorganisation at a local branch, SOMO can provide a clear analysis and a critical assessment of the relevant factors. SOMO executes research for international trade union secretariats, for environmentalists, human rights organisations, third world organisations, ethical consumer groups and women's groups. SOMO advises work councils of big and small companies but also solidarity groups and consumer organisations. SOMO also provides lectures and courses on different subjects.

The selection of SOMOs clients is deliberate. In democratic countries the political system is based on a certain balance between the three powers of government, parliament and the law. Such a balance however is hard to find in the economic area. This is particularly true where TNCs are concerned. They can move their investments around the globe and can easily back out from their democratic obligations. In this context the phrase 'democratic deficit' is used.

Fortunately there are NGOs which make an effort to make good this deficit, trade unions for instance, which make companies meet minimum requirements for conditions of employment and working conditions, women's groups which demand more opportunities for women in trade and industry, and works councils which try to use their legal rights to best advantage.

*Other groups that work in this area are e.g. environmental groups which keep a close watch on companies to see whether they live up to their green image; Third World Groups which keep pointing out companies' responsibilities in the South and consumer organizations which urge consumers to buy products that give workers in Third World countries a better deal.*

SOMO supports these groups by research, consultancy and by helping them to find realistic alternatives.

SOMO has built up considerable expertise in the following areas:

International Trade Regulation, WTO, International Investment Agreements, BITs, Regional Treaties and Multilateral Treaties and the position of developing countries, Competition Policy, Governmental and Non Governmental Codes of Conduct, National and European Works Councils, Environmental Issues.

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## INTRODUCTION

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In June 1998, the Committee on International Investment and Multinational Enterprises (CIME) of the Organisation for Economic Co-operation and Development (OECD) decided to launch the first Review of the OECD Guidelines since 1991. The OECD Guidelines for Multinational Enterprises are recommendations by OECD governments to their multinational enterprises (MNEs), which establish standards of behaviour for the activities of these enterprises. The Review addressed the operating and implementation procedures as well as the actual text. The aim of this Review was to ensure the relevance and effectiveness of the Guidelines in setting standards for international corporate conduct. In June 2000, the revision was finalised, with a new set of standards and new implementation mechanisms as a result.

This report will analyse the review process, the outcome of the Review, and its implications for the effectiveness of the Guidelines as a tool to promote corporate social responsibility. Considering the relative lack of knowledge of existence and working of the Guidelines among the OECD member states, the business community, trade unions and NGOs, the Guidelines certainly needed revision to become of any value among the growing initiatives to promote corporate social responsibility. Besides, the Guidelines were outdated both in terms of content and implementation. The central question after the Review is, of course, whether or not the Guidelines have been revised in such a way that they will lead to the intended improvements in corporate behaviour.

In analysing the value of the Guidelines it is essential to note some of the changes in foreign direct investment and multinational activities that have occurred in recent years, as well as the changes in the structures in society and the respective expectations from civil society from MNEs. The effectiveness of the Guidelines depends on the way these developments are addressed in the instrument. The world is globalising rapidly, and so are the structure and activities of MNEs. Unless these issues are addressed in the Guidelines, the revision could end up being useless.

One of the features of globalisation is the increasing use of out-sourcing and sub-contracting by MNEs. Labour intensive production of goods sold by MNEs originating from OECD countries is increasingly done by suppliers and sub-contractors in developing countries. It is at this level that the worst violations of minimal labour, human rights and environmental standards can be seen, which is directly related to the activities of MNEs. That means that issues like the geographical scope of the Guidelines and supply chain responsibility need to get particular emphasis in this report and in the analysis of the value of the Guidelines.

The issues at stake in debates on corporate social responsibility are often the most pressing in developing countries. This varies from labour rights, human rights, environmental issues to bribery and corruption. Therefore, it is important to assess the relevance of the OECD Guidelines in relation to problems caused by MNE activity in developing countries, and to assess the views and perspectives from southern stakeholders. The changes in content, scope and implementation increases the potential relevance of the Guidelines to issues in developing countries, but the question remains whether this initiative will gain the credibility and acceptance in the developing world that is needed to become effective. Therefore, this report will also analyse the value of the OECD Guidelines from a Southern perspective.

The Review of the OECD Guidelines has taken place in a period where corporate social responsibility is increasingly high on the agenda of businesses, governments and many other stakeholders in the civil society. The current debate on the accountability and social and

environmental responsibility of corporations can be explained by processes like globalisation, liberalisation and privatisation. These processes have resulted in increasing power and influence by MNEs on many aspects of society. Multinational enterprises nowadays operate in areas that were traditionally reserved for the public sector. Due to the diminishing role of national governments and the worldwide operations of MNEs, the lack of an international regulatory framework to control the behaviour of MNEs is increasingly of concern to the societies in which they operate.

Another aspect contributing to the current interest in corporate social responsibility is the fact that enterprises have come under increasing pressure from consumers and non-governmental organisations (NGOs) to adhere to more demanding behavioural norms, based on findings of misbehaviour by these enterprises. Several large MNEs, like Nike and Shell, have experienced the impact of such reported misconduct on their brand image, and therefore on the profitability of the enterprise. This has led to the awareness by companies that it is essential to change their policy with respect to labour rights, human rights and environmental performance. Many MNEs nowadays have their own code of conduct, outlining the enterprises' policy on these issues.

Apart from the proliferation of company codes of conduct, there has been a proliferation of other initiatives in this field, like model codes drawn up by international trade unions, pressure groups, and initiatives by international organisations such as the International Labour Organisation (ILO) and the United Nations (UN). These developments have led to increasing consensus about the content of a certain set of standards for the behaviour of companies, and the discussion is now focusing on the question of how to implement these standards and how compliance should be monitored and verified. More and more systems for monitoring and verification such as the Social Accountability (SA) 8000 are now in development.

The value of the OECD Guidelines depends on its position vis-à-vis the other initiatives in the field of corporate social responsibility. This report will analyse the added value of an instrument like the OECD Guidelines, and the possibilities of the instrument to become an internationally accepted standard. A comparative analysis will be made both in terms of content and implementation. Both content and implementation procedures have been revised, and therefore, it is important to assess both elements in relation to other initiatives.

One of the main criticisms against the Guidelines has always been the fact that they are of a voluntary nature. During the Review this issue was again present. Several NGOs were pressing for more binding rules, while business representatives were strongly opposing this. The fact that there was a discussion on 'more' or 'less' binding, shows that this is an important issue that has to be addressed as well. Now that the Guidelines are also applicable outside the OECD area, the issue of the juridical implications of this instrument is even more important.

In order to analyse the above-mentioned aspects in relation to the OECD Guidelines, the following research questions can be derived:

- What are the key changes in terms of content and implementation procedures that resulted from the 2000 Review?
- What are the views and perspectives from business and labour representatives and NGOs on the outcome of the Review?
- What developments and experiences can be seen with other initiatives in the field of corporate social responsibility?
- What is the position and added value of the OECD Guidelines in relation to these initiatives?

- Which changes in the juridical value and legal character of the OECD Guidelines can be seen after the Review?

This report is divided into four parts. Part I will provide a short overview of the content and working of the Guidelines before the Review. The different institutional arrangements and actors involved in promoting the Guidelines will be outlined here, with particular emphasis on the question why the Guidelines have failed work before this Review.

In Part II the Review process itself and the outcome in terms of content and implementation mechanisms will be discussed. During the Review, the 'OECD Working Party on the Guidelines for MNEs' has held several consultations with experts, representatives from business and labour, non-member governments, and a number of NGOs. Consultations with social partners and NGOs were also held at the national level, by the Dutch Ministry of Economic Affairs, acting as the OECD's National Contact Point. This part of the report will focus on the discussions between business, labour and NGOs and the proposals that were made by these parties for changing the text and implementation of the Guidelines. The positions and proposals made by these consulted parties show the key issues that were at stake during the Review and the differences of opinion that existed. It is therefore interesting to analyse in which way the demands and interests of the different stakeholders are reflected in the revised Guidelines.

Part III of this report will place the OECD Guidelines in a broader perspective by a comparison with other developments in the field of corporate social responsibility and by discussing the Guidelines in relation to some key issues of the current debate about these developments. One of the points of discussion is what the juridical value is of the voluntary initiatives that can be seen at various levels, and whether or not such initiatives could lead to a more binding framework. As the Guidelines are *Government* recommendations to MNEs, discussing the legal character is of particular importance in this respect. Another issue that needs special focus is the perspective from organisations in developing countries. It will be interesting to see in which way concerns of the developing world towards voluntary codes of conduct are addressed in the revised Guidelines. Both the legal character of the Guidelines as well as the perspectives from the South on such initiatives have become increasingly important to assess due to the changes in the content and functioning of the instrument after the Review.

Finally, Part IV will draw conclusions on the basis of the research and comparative analysis of the above mentioned aspects, about the outcome of the Review of the Guidelines. The elements that may contribute to or hinder the development of the Guidelines in becoming an effective tool to ensure corporate social responsibility will be outlined.



## **PART I                    THE OECD GUIDELINES BEFORE THE REVIEW**

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This chapter shortly summarises the content and working of the OECD Guidelines before the adoption of the new text and implementation mechanism in June 2000, and looks at the reasons behind initiating the latest Review. It has become more and more accepted that the Guidelines have failed to be an effective instrument to regulate corporate behaviour in the past.<sup>2</sup> The main reason for this is said to be the lack of an implementation mechanism, which has resulted in a diminishing interest in, and knowledge of the Guidelines from trade unions, MNEs and OECD Governments.

### **1.1    THE DEVELOPMENT OF THE OECD GUIDELINES**

In 1975 the OECD set up the Committee on International Investment and Multinational Enterprises (CIME) to investigate; the possibilities of a code of conduct for MNEs; ways to protect MNEs from discrimination; and tools to regulate incentives for investment. A year later, the OECD Guidelines were first adopted, as part of the OECD Declaration on International Investment and Multinational Enterprises. The primary aim of the Guidelines was to ensure that 'MNE activities are in harmony with national policies of the OECD countries and to strengthen the basis of mutual confidence between MNEs and government authorities.'

Apart from the OECD Guidelines the Declaration includes:

- The National Treatment Instrument; which stipulates that foreign enterprises be accorded treatment no less favourable than domestic enterprises by host country governments in like circumstances;
- An instrument on International Investment Incentives and Disincentives, which provides for efforts among Member countries to improve co-operation on measures affecting international direct investment;
- An instrument on Conflicting Requirements, which calls on Member countries to avoid or minimise conflicting requirements imposed on multinational enterprises by governments of different countries.

Since then, the Guidelines have been reviewed in 1979, 1982, 1984 and 1991, containing clarifications, comments and explanations on the Guidelines. However, these reviews did not bring many changes to the original text of the Guidelines, mainly because of the argument that effective application of the Guidelines depends on their stability. It has been argued that changing the text of Guidelines significantly would undermine its stability. The Business and Industry Advisory Committee (BIAC) has been using this argument again during the latest Review, to prevent the adoption of too many additional demands placed on MNEs. The only major change up to the 2000 Review was the addition of a new chapter on Environmental Protection in 1991, reflecting the growing concerns with the environment and the role that can be played by MNEs and governments in ensuring greater environmental protection.

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<sup>2</sup> A survey by the Trade Union Advisory Committee (TUAC) among member unions has shown that in many countries, the existence of OECD Guidelines and the National Contact Points (NCPs) were unknown: TUAC Approach and Survey, 1999

## ***The role of BIAC and TUAC***

As the Guidelines are addressed to enterprises, input from business and labour was deemed especially important, and the OECD has taken pride in the support they have received from both parties after each Review. In order to maintain this support, the role of business and labour was institutionalised in the form of official advisory bodies to the CIME: The Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). Both BIAC and TUAC have been regularly consulted on matters relating to the Guidelines and on other issues concerning international investment and multinational enterprises. BIAC and TUAC have played an active role in the reviews, but they also have an active role in the follow-up procedures of the Guidelines. BIAC and TUAC can raise Guidelines issues at the CIME, and request consultations with the National Contact Points (NCPs)

## **1.2 THE CONTENT OF THE GUIDELINES**

It is clear that the text of the Guidelines reflects the concerns and characteristics of the period in which they were drawn. At that time, the concerns about the growth of MNEs in general were related to their power vis-à-vis national governments, in particular in developing countries.<sup>3</sup> The main concern was that MNEs might undermine the sovereignty of their host countries. On the other hand, the possibility of a large influence and an active direct role of the government in the overall economy was part of the dominant economic thinking in the seventies, based on the Keynesian economic model.

This situation contrasts with the current situation where the role of governments on economic processes has been decreasing, due to liberalisation and privatisation. The market-oriented neo-classical economic thinking has now become the dominant theory. Today, the concerns about the unbalanced power of MNEs relates more to the social, environmental and development impact of MNE activities, which is reflected by the concept of corporate social responsibility. This concept includes a more responsible relationship between MNEs and the stakeholders in the societies in which they operate.<sup>4</sup>

The Guidelines cover a broad range of MNE activities. They begin with an introduction and are followed by chapters on General Policies, Disclosure of Information, Competition, Financing, Taxation, Employment and Industrial Relations, Environmental Protection and Science and Technology. The introduction of the Guidelines explains their purpose, nature and scope and clarify that they are addressed to MNEs and all their entities. Even though it is mentioned that the growth of activities by MNEs can lead to abuse of concentrations of economic power and to conflicts with national policy objectives, the emphasis lies on the positive contributions, which MNEs can make to economic and social progress. The text is not very balanced in the sense that they are basically aimed at improving the investment climate.

The text of the different chapters further outlines the general recommendations from governments to MNEs in the different areas. These are quite broadly formulated expectations, for example that enterprises should take Member countries' general policy objectives fully into account, co-operate

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<sup>3</sup> OECD (1999), 'The OECD Guidelines in a globalising world', by Arghyrios A. Fatouros, University of Athens, 16-2-1999.

<sup>4</sup> The term 'stakeholders' is used in this report as referring to individuals and groups who may affect or be affected by the actions, decisions, policies, practices or goals of an enterprise. In other words, this includes employees, shareholders, customers, consumers, suppliers, governments, trade unions and civil society organisations (NGOs).

with local community and business interests, and refrain from bribery and improper political activities.

In all the different areas, competition, taxation, financing and science and technology, similar recommendations are made, most of them in the context of national laws, regulations and practices in each of the countries where MNEs operate. In the competition area for example, MNEs are encouraged to conform to countries' rules and policies by refraining from cartels or restrictive agreements, and from abusing dominant market position through anti-competitive acquisitions, predatory behaviour and other practices. The chapter on disclosure of information states that enterprises should provide information about their structure, activities, common financial information and overall policies of the company.

The chapter on employment and industrial relations is fairly detailed, thanks to the input from the unions, represented by TUAC. Spread over 9 paragraphs, the chapter outlines the following rights and principles, expressed in each case as recommendations for the behaviour of individual enterprises:

- Freedom of association (paragraphs 1 and 8):
- Collective bargaining (paragraphs 1, 2, 8 and 9):
- Provision of information (paragraph 3):
- Observance of employment standards (paragraph 4):
- Skills and training (paragraph 5):
- Reasonable notice and co-operation in case of major changes (paragraph 6):
- Non-discrimination policies (paragraph 7):
- Access to decision-makers (paragraph 9):

However, one of the major criticisms towards the Guidelines, which has been particularly related to the employment and industrial relations chapter, is that there are no references to other internationally accepted standards such as the ILO Conventions. This means that the above-mentioned rights and principles are not directly formulated in terms of the respective ILO-Conventions. Instead the Guidelines are formulated in their own, relatively vague terms.

### **1.3 IMPLEMENTATION MECHANISMS**

The text of the Guidelines has been accompanied by implementation procedures. In order to assess whether or not the Procedural Guidance attached to the new Guidelines will have the desired result in terms of effectiveness and adherence, an overview is given of the implementation procedure accompanying the 1991 text. The different roles of the NCPs and the CIME will be outlined as well as some examples of cases of supposed breaches by MNEs that were brought forward by several parties.

#### ***The CIME***

The CIME is made up of investment policy officials in OECD Member countries and is staffed by the OECD Directorate for Financial, Fiscal and Enterprise Affairs. In relation to the Guidelines, the CIME has the following obligations:

- provide clarifications;
- propose changes in the Guidelines/and or the procedural Decisions;
- regularly review the Guidelines;
- exchange views periodically on the role and functioning of the Guidelines;

- respond to requests from Members on specific or general aspects of the Guidelines;
- respond to requests from social partners –BIAC and TUAC- on various aspects of the Guidelines;
- and
- organise promotional activities like symposiums, seminars and other activities.

Apart from the reviews that were undertaken, the follow-up procedure of providing clarifications has been the most important role for the CIME, because they have the final responsibility for this. A clarification entails an explanation of how the scope and meaning of the Guidelines should be interpreted. This was necessary because of the vague and general terms in which they were drawn. The CIME was also responsible for providing clarifications in specific cases when a solution to the issue could not be solved through the NCP.

### ***National Contact Points***

NCPs were introduced to the member states in 1979. The National Contact Points are established under the responsibility of Member governments with the following objectives: To engage in promotional activities; to gather information on experience with the Guidelines; to handle enquiries; to discuss all matters related to the Guidelines; and, to assist in solving problems which may arise between business and labour in matters covered by the Guidelines.<sup>5</sup>

Members are free to choose the institution to act as NCP, and therefore the activities in which they engage varies from country to country. At first, the business world was against the establishment of the NCPs, fearing that judgements would be made at national level. But the NCPs were not given the authority to do this; clarification was still confined to the CIME. NCPs are expected to try to resolve the issue by acting as a forum of discussion, so that cases don't have to be brought to the CIME. In practice, the role of the NCPs was very limited, and recent surveys have shown that in many countries businesses and trade unions were not even aware of the existence of the NCPs.<sup>6</sup>

### ***The complaints procedure***

One of the mechanisms to promote adherence to the Guidelines has been the possibility to raise cases to the CIME and the individual NCPs of breaches of the Guidelines. Since 1976, thirty formal requests have been made, over half of which date from the 1970's.<sup>7</sup> Most requests were made by TUAC, the remainder by national delegations. Because most cases were brought before the Committee came from trade unions, it is no surprise that the employment and industrial relations chapter has been the subject of most cases and subsequent clarifications.

The difference between the role of the NCP and the CIME is the following. BIAC, TUAC and Member governments may raise issues on the individual conduct of a company or a more general question relating to the Guidelines intention and applicability at the NCP first. The NCP will then contact the enterprise in question, and try to resolve the problem. Co-operation can also be sought from other NCPs, for example, when the issue is related to an enterprises activity in another OECD country.

If a solution cannot be found the NCP in question should contact the CIME for clarification. The clarifications given by CIME always refer to how the Guidelines should be interpreted in that

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<sup>5</sup> The OECD Guidelines for Multinational Enterprises (OCDE/GD(97)40, OECD, Paris 1997

<sup>6</sup> TUAC Approach and Survey ( Review of the OECD Guidelines), 1999.

<sup>7</sup> OECD Working Party on the Guidelines for MNEs, 'Towards effective implementation of the OECD Guidelines for MNEs, 28-10-1999.

specific case, without judgement on the behaviour of an enterprise, and thus does not refer to the enterprise by name. Critics have seen this as one of the main shortcomings in the complaints procedures.

## **Cases**

The cases that have been raised show some of the limitations of the Guidelines and its implementation problems in practice. An example is the issue of the geographical scope of the Guidelines. Up to the 2000 Review it has not been very clear whether or not the Guidelines apply to the world-wide operations of OECD based MNEs or only to the operations in other OECD countries. The text of the Guidelines reads, for example, that they are recommendations jointly addressed by Member countries to multinational enterprises operating in their territories. On the other hand, paragraph 3 of the Introduction to the Guidelines states that:

*“Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the organisation, international co-operation in this field should extend to all States. Member countries will give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make, and by minimising and resolving the problems which may arise in connection with their activities.”*

On the basis of this statement, WWF (The Worldwide Fund for Nature) decided to file a complaint in late 1997 with the UK national Contact Point for the OECD Guidelines over a planned investment by P&O, a UK shipping company, in a port near Bombay, India.<sup>8</sup> WWF filed this complaint despite the fact that they ‘were aware of the difficulties in applying the Guidelines outside the OECD territory.’ However, they argued that the proposed port project of P&O in India ran contrary to the spirit of that statement and to a number of specific recommendations in the Guidelines.

WWF believed that P&O was breaching elements of the OECD Guidelines relating to competition, employment, industrial relations and particularly environmental practices. But WWF was unable to persuade the UK Contact Point to accept its claim against P&O, or raise the case the CIME for clarification. The reason given for this was, among other things, that ‘there is lack of clarity about the scope and the applicability of the Guidelines outside the OECD territory and, on a more practical level, the absence of a Contact Point in India makes it difficult to investigate the case fully.’<sup>9</sup>

This case shows that the Guidelines did not contain an implementation mechanism to ensure the adherence by MNEs to them in non-OECD countries, and therefore, they were only applying to OECD territory in practice.

The Dutch trade union FNV has submitted several cases in the 1980’s, of which the best knowns are Ford Amsterdam, Hyster Nijmegen, and C&A. However, the outcome has been extremely unsatisfactory for the trade union: ‘The outcome has been useless: The CIME did not wish to express an opinion on specific cases and either came with pointless “clarifications” of the

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<sup>8</sup> WWF-International ‘Expanding the application of the OECD MNE Guidelines to non-OECD Countries: rationale, implications and practical options’, Presentation by N. Mabey to the OECD Conference on the Role of International Investment in Development, Paris 20-21st September 1999.

<sup>9</sup> WWF-UK Research Paper ‘Can the OECD MNE Guidelines promote responsible corporate behaviour? An analysis of P&O’s proposed port in Dahanu, India’, by S. Bashir & N. Mabey, November 1998

Guidelines involved or to no reaction at all as, allegedly, the Guidelines did not apply (cf the C&A Brenninkmeijer-case, on which they ingeniously stated that the company was neither a multinational nor a national company).<sup>10</sup>

Another obstacle in the complaints procedure is that trade unions may only bring forward fresh breaches of the Guidelines. If complaints regarding repeated breaches are brought forward, the CIME can only refer to earlier decisions. This is another reason why the amount of cases brought forward to the CIME has decreased over the last years, which has made the CIME to believe that the Guidelines are effectively followed by MNEs. Thus, the complaints procedures have frustrated trade unions and others in many respects.

## **1.4 WHY THE REVIEW**

The OECD has repeatedly stated that the reason for initiating the Review is to update them in a timely manner to ensure their relevance and effectiveness, and to improve them so as to reflect developments in the MNEs and in the world economy. The fact that it became increasingly clear that the Guidelines were not working at all, contributed to the need to review them, in terms of text as well as implementation procedures.

The Review process must also been considered against the background of the failure of the MAI (Multilateral Agreement on Investment). Growing civil society opposition to the MAI triggered the review. In the face of opposition it was suggested that the Guidelines should be annexed to the MAI to offer some responsibilities to balance the new rights that the MAI would have granted investors. Updating the Guidelines would have been necessary for this. When the MAI failed, the Review of the OECD Guidelines was initiated.

Another reason for reviewing the Guidelines has obviously been to reposition the Guidelines, given the current proliferation of codes of conduct, and other initiatives started by international organisations, trade unions, NGOs and different branch organisations. The Guidelines were losing importance in the non-governmental as well as the governmental sphere. Apart from that, the aim of the OECD is to reposition the Guidelines in such a way that they are complementary to many voluntary initiatives. As the OECD puts it: "The value added of OECD Guidelines (relative to corporate codes) stems in part from their potential for alleviating some of the inherent problems from self-regulation."<sup>11</sup>

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<sup>10</sup> FNV answers to the 'TUAC Approach and Survey'- Questionnaire (Review of the OECD Guidelines), 23-2-99

<sup>11</sup> OECD, 'Review of the OECD Guidelines, Framework for the Review,' 21 May 1999.

## **PART II**                      **THE 2000 REVIEW OF THE GUIDELINES**

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The Working Party of the CIME has taken a twin-track approach in the revision of the Guidelines, in the sense that both the text of the Guidelines was revised as well as the implementation procedures. The CIME has pointed out, and most agreed, that revising the implementation procedures would be the key for effective and useful Guidelines. Therefore, major emphasis was put on this part of the Review by the Working Party and by the consulted parties. On the other hand, designing new implementation procedures that would be acceptable to BIAC, TUAC and preferably NGOs, proved to be one of the most difficult tasks for the Working Party. Key questions concerning the implementation remained open for a long time during the review.

This chapter will discuss the proposals that were made to change the text and the implementation mechanism, thereby pointing out some of the key issues that were discussed, with the views from BIAC, TUAC and the consulted NGOs. Some of the most important new provisions in Guidelines and procedures that came out of the review will be outlined as well.<sup>12</sup> It should be noted that the views of the different parties shown in relation to several key issues couldn't be considered complete, as each party has submitted extensive criticisms and textual suggestions on nearly each paragraph. Describing all of these submissions would be beyond the scope and aim of this report, which is to highlight some of the most important differences and positions of the consulted parties.

### ***Commentaries***

Before discussing the textual changes in the instrument it is important to mention that the text of each of the chapters as well as the text on implementation is accompanied by Commentaries. They have been prepared by the Working Party to provide information on and explanation of the Guidelines. During the review, there was uncertainty about the status of the Commentaries; whether they would be part of the Declaration or not. The difference between the commentaries being part of the Declaration or not, lies in the value these commentaries would have when they would be formal part of the Declaration. Then they would be under much more scrutiny by all the consulted parties. In the end, it was stated that they are not part of the Declaration. Although this decreases the value of the content in terms of interpretation and clarification, they do sometimes provide valuable explanation of scope and meaning of the formal texts.

## **2.1**    **TEXTUAL REVISIONS**

### **2.1.1**    **PREFACE**

As mentioned in Chapter One, the first Guidelines were written in a very different international context. This meant that the introduction chapter of the Guidelines, which established the motivation and background for the Guidelines, needed to be revised completely to redefine the nature and scope of the instrument. The introduction chapter was also divided in a *Preface* chapter and a *Concepts and Principles* chapter.

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<sup>12</sup> See Annexes for the full text of the Guidelines and the Procedural Guidance.

## ***The impacts of MNEs***

The *Preface* of the Guidelines sets the stage for the Guidelines as a whole, and explains their purpose and intent. Therefore, revisions had to be made to reflect the changes in MNE structure and the world economy. As the aim of the Guidelines is to encourage the positive contributions that MNEs can make to economic, environmental and social progress and to minimise the negative impact MNEs can have, some wording on both aspects needed to be included.

Not surprisingly, the discussions between BIAC, TUAC and NGOs on what kind of language had to be used, shows clearly the different angles from these parties and their perceptions of the meaning and intent of the Guidelines. During the consultations, BIAC emphasised on the positive contributions of MNE activities, and pressed for weakening the wording on the negative impacts. BIAC basically wanted the positive impacts of MNE activity to be stated as factual, while portraying the negative impacts merely as (false) perceptions by the public.

On the other hand, TUAC and the consulted NGOs have tried to accomplish the exact opposite, by stating that the Guidelines should be honest about the impacts on society and the environment, and therefore acknowledge the fact the multinational activity is in fact sometimes harmful to the society, economy or environment. Serious warning about the potential negative impacts of MNE activity and globalisation was seen to be essential to ensure that the Guidelines promote sustainable and equitable growth.

Looking at the result of these discussions in the new text, it's clear that the OECD has chosen to emphasise on the positive contributions of MNE activities. For example, paragraph 4 of the *Preface* states that MNE activities *bring* substantial benefits to home and host countries. Wording on the negative impact is much weaker; paragraph 6 states that some enterprises *may* be tempted to neglect appropriate standards and principles, and that such practices by the few *may* call into question the reputation of the many and *may* give rise to public concerns.

## ***Standards versus Principles***

In the introduction chapter before the 2000 Review, the Guidelines were referred to as *standards*. At some point during the review (December 1999), the Working Party decided to change this into *principles*. The Working Party stated that the reason for this change was of a technical nature, and should not be interpreted as a change in the value of the Guidelines. BIAC, TUAC and NGOs were all in agreement over this issue; all parties wanted the CIME to reinstate that the Guidelines are *standards* for corporate behaviour, but for different reasons.

TUAC and NGOs were against changing the status of the Guidelines from standards to principles because the word principles would give the Guidelines more weight than they would deserve in their current form. They argued that a *standard* sets a minimum expected level of behaviour, whereas a *principle* is a personal code of right conduct. TUAC argued that this would make the Guidelines even more optional.<sup>13</sup>

BIAC was against changing the status of the Guidelines from *standards* to *principles* because they were seeing principles as having a stronger value and therefore placing more demands on business. The Working Party claimed that the change was merely for technical reasons and did not imply any change of value of the Guidelines.

In the end, the Working Party decided for a compromise, by stating that the Guidelines are *principles and standards* for responsible business conduct. By doing this, the Working Party avoided further discussion on whether the Guidelines can be best described as principles or as standards, and which weight should be given to each of the descriptions. However, the risk of different interpretation of the Guidelines and thereby the risk of the Guidelines becoming more optional was obviously not taken away by this move.

## 2.1.2 CONCEPTS AND PRINCIPLES

The *Concepts and Principles* chapter sets forth principles in such areas as the equitable treatment of enterprises by adhering Governments, the geographical applicability of the Guidelines, the meaning of the Guidelines in relation to domestic enterprises and the relation between the Guidelines and national and international law.

### ***Geographical scope of the Guidelines***

One of the key issues that is dealt with in the *Concepts and Principles* chapter is the geographical scope of the Guidelines. As mentioned in the previous chapter this issue needed to be clarified. Most adhering governments and the parties involved were (more or less) in favour of clarifying that they apply to all MNE activities, wherever they operate.

Several (macro-economic) developments can be seen in the last decade that would favour world-wide applicability of the Guidelines.<sup>14</sup>

- Investment by OECD based MNEs to non-OECD countries have risen sharply, increasing the importance of responsible investor behaviour.
- Large flows of investment have been seen to overwhelm weak regulatory institutions and corporate governance systems in many countries, especially less developed ones.
- Competition for Foreign Direct Investment is growing among developing countries, whereby some developing country Governments seek to increase their competitive advantage by neglecting environmental and social standards.
- In many developing, non-OECD countries, the host government is weak and unable or unwilling to implement internationally accepted and ratified environmental and social standards, and pressure in the investor's home country is often the only way to achieve changes in damaging behaviour.

In other words, for the OECD Guidelines to become a credible tool to stop some of the worst offences of multinational behaviour, the scope of the Guidelines needs to extend outside the OECD area. BIAC was initially against clarifying that the Guidelines should apply world-wide, but moved forward slightly during the review, focusing more on the practical limitations to the world-wide applicability, and problems regarding conflicting requirements in non-OECD countries.

As a result of the objections by BIAC, the final text reads that enterprises are encouraged to observe the Guidelines wherever they operate, *while taking into account the particular circumstances of each host country*. Apart from the fact that TUAC and NGOs were opposing this

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<sup>13</sup> Comments by TUAC Secretariat on Draft Integrated Text-Chapters and Commentary, 17-12-1999

<sup>14</sup> Expanding the application of the OECD MNE Guidelines to Non-OECD Countries: rationale, implications and practical options; Presentation by Nick Maybe, WWF-International to the OECD Conference on the Role of International Investment in Development, Paris 20-21 September 1999

addition, the question how to implement the Guidelines in non-adhering countries was the object of much debate, which will be outlined in paragraph 2.2.

### **2.1.3 GENERAL POLICIES**

The *General Policies* chapter of the Guidelines is the first to contain specific recommendations to MNEs. Some of the issues that were mentioned in this chapter before the 2000 Review were deemed of such importance to warrant a separate chapter, such as bribery and corruption, and consumer protection. These paragraphs were removed from the *General Policies* chapter.

On the other hand, many new paragraphs were included, or extensively rewritten, reflecting new corporate and social responsibilities of MNEs in the society. The *General Policies* chapter now deals with:

- Sustainable development (paragraph 1)
- Human rights (paragraph 2)
- Local capacity building (paragraph 3)
- Human capital formation (paragraph 4)
- Not lowering standards (paragraph 5)
- Good corporate governance (paragraph 6)
- Effective self-regulation (paragraph 7)
- Employee awareness (paragraph 8)
- Protection of whistleblowers (paragraph 9)
- Supply chain responsibility (paragraph 10)
- Improper local activities (paragraph 11)

The standards and principles set forth in this chapter have been placed here because of their importance in relation to several chapters in the Guidelines. The CIME has for example decided to include a paragraph on sustainable development to the *General Policies* chapter to show the overall goal of the Guidelines to promote sustainable development. The paragraph on protection of whistleblowers is also relevant to other chapters. The Working Party had at first included different paragraphs on this issue in several chapters, but decided that one single paragraph in the *General Policies* chapter would be sufficient to cover this issue.

#### ***Human Rights***

The human rights issue is another issue that the CIME thought to be an overarching issue for the Guidelines, despite the view of some observers that the provisions contained in the *Employment and Industrial Relations* chapter already covers many aspects of human rights, particularly in relation to MNEs. Especially BIAC hold this view, claiming that the defence and promotion of human rights other than those of the employees of the enterprise should be the responsibility of governments. Therefore, BIAC initially only wanted a reference to human rights outside the labour chapter, if such a paragraph would clearly state that it entails the human rights of their employees *in the workplace*.<sup>15</sup>

There have been however, several human rights problems that are directly related to the activities of MNEs, involving others than the direct employees of the enterprise. For example the human rights problems for indigenous people that are deprived of their land because of investments by

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<sup>15</sup> BIAC contribution on the Employment and Industrial Relations chapter, 9-10 March 1999

MNEs. This is the reason why the CIME wanted the human rights issue to be mentioned in the *General Policies* chapter, which was welcomed by the consulted NGOs and TUAC.

The Working Party has more or less left the exact formulation of this paragraph up to BIAC and the NGOs to decide, except for the fact that direct reference to the Universal Declaration of Human Rights (which both BIAC and NGOs agreed too) was not taken up. The consultations between BIAC and NGOs on this issue has resulted in what both parties have called a minimum acceptable text which reads that MNEs should '*respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments*'. NGOs were in favour of deleting the words *host government's*, because it implies that MNEs only have a duty to conform to national laws and commitments instead of abiding to existing fundamental principles as set out in the Universal Declaration of Human Rights. Thus, the compromise lies in the fact that the scope is broadened beyond the workplace *to those affected by their activities*, while *host government's* was kept in.

### ***The issue of supply chain responsibility***

Paragraph 10 of the *General Policies* deals with a much-debated issue during the Review, which is also a main theme in other debates on social responsibility initiatives and codes of conduct. This issue is also of particular relevance to developing countries. Several NGOs from the South have taken the opportunity to comment on the draft text of the new Guidelines, and have particularly stressed the need for supply chain responsibility. The issue of supply chain responsibility is of growing importance as more and more MNEs outsource the actual production of goods to suppliers and sub-contractors in developing countries. Some of the worst reported violations of minimum standards of business conduct as outlined in the Guidelines have occurred in developing countries, at the sub-contracting level.

Many voluntary company codes already entail some form of obligation for suppliers, contractors or subcontractors to live up to standards of fair employment and labour rights, in particular concerning a ban on child labour, forced and prison labour. Thus, responsibility down the supply chain is now increasingly accepted, even by business itself. Examples of this will be shown in Part III.

BIAC has been very strongly opposing any reference to the responsibility of MNEs to ensure observance of the Guidelines throughout their supply chains. They have stated that extension of the scope of the Guidelines to subcontractors and suppliers is not acceptable, because they are independent entities outside the control of the MNE. In terms of implementation of such a responsibility, BIAC representatives have pointed to the practical difficulties of fulfilling that obligation, and therefore BIAC wanted the whole paragraph to be deleted.

TUAC and NGOs have instead pointed to the growing best business practice to accept responsibility for ensuring environmental and social standards throughout their supply chains. Furthermore, they have pointed to the ability of many MNEs to influence the behaviour of suppliers through the dissemination of their codes, growing supply chain control mechanisms, and through contractual obligations.

In fact, TUAC and NGOs were of the opinion that the proposed paragraph was far too weak to guarantee that MNEs feel really obliged to ensure adherence to the Guidelines in their supply chain, as the paragraph states that MNEs should merely *encourage* business partners, suppliers and sub-contractors to apply the standards laid out in the Guidelines, *where practicable*. Experience with other voluntary initiatives in this field (as shown in Part III) has learned that an

encouragement is usually not enough to bring about actual changes of business conduct in the supply chain. Therefore, proposals were made to change the text of the paragraph so that MNEs should *expect from and enable* business partners, suppliers, and sub-contractors, to adhere to the Guidelines. The word *enable* was deemed important because MNEs should take into account the social and environmental consequences of negotiations over prices and delivery times on conditions in their supply chain. Too often, contracts between MNEs and suppliers are set at such low price-level that the suppliers cannot comply with the additional demands placed on them.

These proposals were not adopted by the CIME, but neither was the whole paragraph deleted. In order to respond to BIAC's concerns over the practical difficulties, the words *where practicable* were kept in the paragraph, which was considered as another undesirable loophole by TUAC and NGOs.

#### 2.1.4 DISCLOSURE

The *Disclosure* chapter has been radically redesigned and several important new issues have been introduced. The Working Party split up the chapter into two separate parts, thereby wishing to reflect the fact that the development of disclosure standards is quite varied amongst various disclosure areas. The Working Party argued that in the area of financial disclosure, where reporting practices and auditing standards are well developed, they could use stronger language than in other areas such as environmental and social reporting, where auditing and reporting practices are not yet standardised. This has resulted in a paragraph with material information that enterprises *should* disclose, and a paragraph on additional, non-financial information that enterprises are *encouraged* to disclose.

The first set of disclosure recommendations is identical to disclosure items outlined in the *OECD Principles of Corporate Governance*. In the first paragraph it is stated that MNEs should disclose information on material issues regarding employees and other stakeholders. This sentence led to the discussion on what could include material information. NGOs favoured a broad definition, allowing non-financial information to be included: *'The Guidelines should make it clear that information may be material to stakeholders without having any financial implications.'*<sup>16</sup>

The division of the chapter was a major problem for TUAC and NGOs. The consulted NGOs stated that this separation made the text unbalanced, placing higher expectations on disclosure of financial information and information relevant to stakeholders, than on information relevant to workers and local communities whose health and livelihoods may be at stake. TUAC welcomed the design of the *Disclosure* chapter but was also concerned with the division of the chapter, pointing to the need for consistent and coherent Guidelines. Dividing the text into the paragraphs would be inconsistent and cause operational problems.

Another issue under discussions in this chapter was the question what kind of non-financial information MNEs are encouraged to disclose. In some of the earlier draft texts, it was written that this concerns value statements or statements of business conduct intended for public disclosure, and information on social, ethical and environmental policies.<sup>17</sup> However, several NGOs have pointed out that disclosure will not be credible if companies merely state what policies they have

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<sup>16</sup> Key issues for civil society, NGO submissions to CIME, 15th May 2000

<sup>17</sup> DAF/FE/IME/WPG (99) 18/REV2: OECD Guidelines draft text and commentary, 28-1-2000

adopted on these matters, but that stakeholders are particularly interested in an MNEs *performance* in relation to its policies.<sup>18</sup>

As a result of this pressure, some additions were made in the final text, namely that *'its performance in relation to these statements may be communicated'*. Despite the fact that this is almost the weakest possible wording (being a voluntary recommendation, where enterprises are *encouraged* to disclose information that *could* include value statements on which performance *may* be communicated), it was an improvement to earlier draft texts.

## 2.1.5 EMPLOYMENT AND INDUSTRIAL RELATIONS

The chapter on *Employment and Industrial Relations* is one of the most comprehensive chapters in the instrument, and has been the object of most cases brought before the Committee and subsequent clarifications. However, there were still some major shortcomings in the old chapter. Revision of this chapter was also particularly important for the repositioning of the Guidelines in relation to the growing number of voluntary codes of conduct, a large proportion of which cover labour standards. The need for a review was also prompted by the adoption of the *1998 ILO Declaration on Fundamental Principles and Rights at Work*.

The Employment chapter before the review was lacking two core labour standards; the elimination/abolition of child labour and forced or compulsory labour. The language on another core labour standard, non-discrimination, was very weak and needed to be revised in order to be in line with the respective ILO-Convention.

At first, BIAC was against adding provisions on child labour and forced labour to the text, arguing that the ILO already adequately covers these issues, and that the addition could be seen as a duplication of work. Later submissions from BIAC show that they accepted inclusion of these provisions, but in a much weaker sense. The proposed text from BIAC on child labour read: *'not use in their workplace, and in particular refrain in business dealings from benefiting from the worst forms of child labour'*<sup>19</sup>

On the other hand, TUAC and NGOs have been pressing for wording that is more consistent with the relevant ILO-Conventions, and demanded for a stronger commitment from MNEs, in the sense that they have an important role to play in *ensuring* the effective abolition of child labour, within their operations and within their supply chain, as opposed to *contributing* to this aim.

In earlier drafts of the new text of the Guidelines, the child labour paragraph included the provision that MNEs should in particular not engage in the worst forms of child labour. This wording was taken from the recently adopted ILO Convention (182), which calls upon governments to take immediate and effective action to eliminate the worst forms of child labour. However, this is to be done within the broader context of action against the larger problem of child labour. In the context of a recommendation towards MNEs, this wording was quite inappropriate, as it could lead to MNEs still using child labour, justifying their practices by saying that these children are not working under conditions that can be classified as 'worst forms'.<sup>20</sup> The Working Party finally the part on the worst forms of child labour.

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<sup>18</sup> Rob Lake, 'Traidcraft Exchange comments on the OECD Guidelines for MNEs draft text and commentary' 10-1-2000

<sup>19</sup> Vital issues for business, -concerning text, presentation, use, and implementation of Guidelines, BIAC paper 2000.

<sup>20</sup> Global March Against Child Labour statement to the OECD Working Party, 14-4-2000.

Other important issues that are now included in the *Employment and Industrial Relations* chapter are occupational health safety and, improved language on reasonable notice (an area that has been subject of several clarifications of the Guidelines in the past), and information and consultation rights of employees. As with other chapters, TUAC and NGOs have strongly favoured direct reference to internationally accepted standards, in this case the ILO Declaration and several ILO Conventions. This issue will be elaborated more closely below.

The *Employment and Industrial Relations* chapter now covers the four core labour standards, and many important additional paragraphs to protect workers' rights. However some elements that are now widely accepted as a standard in many codes of conduct are lacking in the Guidelines. Examples of this are provisions on hours of work and living wages. Part III will look more closely at the differences between other initiatives and the Guidelines in this respect.

## 2.1.6 ENVIRONMENT

A chapter on environmental protection was first added to the Guidelines in the 1991 Review, but its content was extremely meagre. Therefore, this chapter had to be substantially rewritten. There is new text on disclosure, use of environmental impact assessments, precaution, continual improvement and environmental health and safety.

TUAC and NGOs were in agreement that the contents of the *Environment* chapter needed to be brought in conformity with the Rio Declaration and Agenda 21. In the context of the *Environment* chapter, TUAC has pointed to two important workers' rights, that is 'the right to know' (environmental education and training) and the 'right to refuse' (concerning work that is believed by the employee to be of danger to health and safety and the wider environment), on which subsequent submissions were made to the CIME.

An important issue under discussion here was the precautionary principle. The precautionary principle means that companies (or other actors to which the principle is addressed) should take measures to prevent environmental damage when such threats exists, even when there is no full scientific evidence of such damage. An important element here is that the burden of prove lies with the possible polluter.

Paragraph 4 of the *Environment* chapter deals with this issue, but there has been a great deal of discussion on how this recommendation should be formulated. The consulted NGOs have pointed repeatedly to the failure of the OECD to reflect the consensus on the precautionary principle agreed at the Earth Summit in 1992. Besides, NGOs have pointed out that the discussions about the precautionary principle no longer focuses on its content, but on the implementation of the principle, and therefore, any indirect changes to the Rio definition would be unacceptable. Particularly the first phrase of the final provision, '*Consistent with scientific and technical understanding of the risks*', was considered as a possible loop-hole for MNEs to circumvent the spirit of the principle, as this implies that threats of damage to the environment should be backed up by some sort of scientific evidence.<sup>21</sup>

On the other hand, BIAC was proposing wording that was in fact contrary to the whole meaning of the precautionary principle: '*Consistent with scientific and technical understanding of the risks*,

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<sup>21</sup> Principle 15 of the 1992 Rio Declaration on Environment and Development reads: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

*apply cost-effective measures to prevent or reduce serious or irreversible damage to the environment or human health and safety based on available scientific information and in consultation with the appropriate authorities.'* It is exactly the lack of available information that should not be used as an argument to postpone measures to prevent damage. Fortunately, the Working Party did not take up BIAAC's suggestion in this case.

### **2.1.7 OTHER CHAPTERS**

The key issues and areas of discussion between TUAC, NGOs and BIAAC, was centred on the revisions concerning the above chapters. There was much less discussion on the draft texts of other chapters. This is shown by the number of suggestions that were made by the different parties on each of the chapters. The key objections by TUAC and NGOs were of the same kind that were expressed in the discussions on the other chapters, relating to loopholes for MNEs and vague language. The same can be said of BIAAC's comments, which focused on the strengths of the recommendations, as BIAAC basically did not want to go beyond what is already legally required by national and some cases international law.

In general, most parties were in favour of the addition of new chapters, *Combating Bribery* and *Consumer Interests*, and the redrafting of the chapters *Science and Technology*, *Competition and Taxation*. The *Financing* chapter of the Guidelines before the 2000 Review, which comprised of one sentence, was deleted. A special chapter on bribery and corruption (which was the initial name of the *Combating Bribery* chapter) was deemed important because of the Guidelines' position vis-à-vis company codes of conduct, and other OECD initiatives in this field. The OECD has shown that bribery and related issues are amongst the most important in firms' efforts to control the social and ethical impacts of their activities (See OECD Inventory). In the *Preface* there is already mentioning of the OECD Convention on Combating Bribery of Foreign Public Officials, and the *Commentaries* to the Guidelines further outline that this chapter must be seen within the context of other OECD recommendation on bribery and corruption.

The same can be said about the *Consumer Interest* Chapter, as the *Commentaries* to the Guidelines explain why a special chapter on this issue was added, which is the fact that there is substantial mentioning of consumer interests and protections in company codes of conduct, and other initiatives, like UN, OECD and the ICC (international Chambers of Commerce). The proliferation of e-commerce, and the increasing importance of protection of personal data also justify a special chapter. Apart from health and safety issue with regards to products sold by MNEs, this chapter provides another valuable tool for trade unions and NGOs, when they wish to point to breaches of the Guidelines by certain MNEs. Paragraph four of this chapter states that MNEs *should not make representation or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair*. This could be a useful tool to point to the failure of MNEs to live up to its self-defined code of conduct, as being false advertisement and therefore misleading consumers.

## **2.2 IMPLEMENTATION MECHANISMS**

Implementation of the OECD Guidelines can be seen from two different angles. First, one can look at the procedures that accompany the Guidelines, referring to the obligations for adhering countries (i.e. to set up an NCP) and the role of the CIME and the NCPs in promotion, clarification and problem solving. The Working Party spent a lot of time and effort in drafting the Procedural

Guidance that outlines the follow-up procedures and obligations for adhering countries.<sup>22</sup> As the Guidelines are recommendations to MNEs by OECD governments, it is not surprising that the procedures are mainly aimed at the implementation from the government perspective. In other words, the attached guidance on implementation outlines what governments should do to promote and increase the use of the Guidelines by their MNEs.

A second angle to the implementation of the Guidelines is that from the perspective of the MNEs themselves. Observance of the Guidelines by MNEs should be the ultimate goal of the OECD, which raises the question how the CIME can guarantee that MNEs are going to implement the standards in their actual business practices. In discussions on codes of conduct, it is often more this type of company-focused implementation that is referred to, which is usually accompanied by systems for monitoring and verification of compliance. Such a system would allow the OECD and adhering governments to see if they are achieving their goal, namely to what degree MNEs are observing the Guidelines. In the past, the CIME has argued that counting the number of complaints raised is a measure to assess the degree of actual observance of the standards by MNEs, thereby overlooking many other factors that have resulted in a decreasing number of raised issues, such as the disappointing outcomes of earlier complaints.

Within the framework of the voluntary nature of the Guidelines, the OECD has seen no chance to develop a system that could assess and verify observance by MNEs, and therefore, the Guidelines lack clear incentives or sanctions for MNEs. However, during the review several suggestions were made to provide a very direct incentive for multinationals to observe the Guidelines, which were rejected after all. After discussing the implementation mechanism that is now adopted, some of these suggestions, like setting up a register or organising public hearings, will be shortly discussed as well.

### **2.2.1 ROLE OF THE CIME AND NCPs**

As mentioned before, BIAC, TUAC and NGOs have all put major emphasis on the implementation mechanism, and debated heavily on the question how to improve the implementation. It was obvious that merely restating the role of CIME and the NCPs would not be enough. Therefore, it is interesting to look closely at the procedures that were finally drafted, in particular at the changes that were made in the complaints procedure, because this was one of the major reason why the Guidelines were not functioning before the 2000 Review.

#### ***Role of NCPs***

The Working Party decided to revive the role and functioning of the NCP on the basis of four criteria; visibility, accessibility, transparency and accountability. Visibility includes procedures on promotion, accessibility includes issues of standing (who can raise cases at the CIME and NCPs?), transparency includes more clearly defined procedures and openness, and accountability includes reporting about activities. These four criteria have been translated into several activities that NCPs shall undertake, related to information and promotion, implementation in specific instances, and reporting.

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<sup>22</sup> During the last negotiations, The Working Party changed the name of the implementation mechanism from Procedural Annex to Procedural Guidance, which weakens the obligatory strength of the document, as a compromise to Mexico, which threatened not to sign the Declaration.

The institutional arrangements under which NCPs can be set up have been broadened, allowing NCPs to be organised as a co-operative body, including business and employee representatives and other interested parties (like NGOs), or as a government body headed by a senior official. As the Procedural Guidance is not binding for adhering governments, it remains to be seen how many NCPs will actually be set up in such a multi-stakeholder arrangement.

Some of the provisions in the Procedural Guidance are reinstatements of the role of the NCPs that could be found in the earlier procedural annex of the Guidelines. For example, the provision that the business community, employee organisations and other interested parties shall be informed of the availability of the facilities provided by the NCP is not new. What is now added is that NCP shall meet annually to share experiences and report to the CIME. The Working Party added this provision in order to improve accountability from NCPs and provide an incentive for adhering governments to take its obligation of setting up an NCP (with an active existence) more serious.

### ***Complaints Procedure***

The most important change in the implementation mechanism is the complaints procedure. Several questions concerning the complaints procedure have remained open in the review up to the last few months. The most important questions are; who can raise issues (and where), and what will be the judgement by the NCP or CIME? Will there only be clarification on the interpretation of the Guidelines, or will actual misconduct of enterprises be mentioned (name and shame)? TUAC and NGOs have strongly advocated transparency in the complaints procedure, which would include naming the enterprises involved, arguing that this would be the only incentive for MNEs to adhere to the Guidelines. NGOs have also pressed for clear standing for the 'interested public' to bring complaints to the NCP, as in the earlier drafts of the implementation procedure, this was still confined to trade unions and business.

In the Procedural Guidance it is stated that NCPs should respond to enquiries about the Guidelines from: other NCPs; the business community, employee organisations, other non-governmental organisations and the public; and Governments of non-adhering countries. Thus NCPs are now required to be open to complaints about specific instances that can be raised by NGOs as well. Even though WWF raised a case before (see Part I), only TUAC and BIAC were allowed to file a formal complaint. With the introduction of the public being able to raise complaints, TUAC and BIAC feared that NCPs might be overwhelmed by frivolous cases. However, all parties in the end agreed that NCPs could screen cases (through the initial assessment procedure) for 'admissibility' to ensure that such cases did not dominate, and NCPs could exclude cases where alternative channels of recourse existed for the individuals concerned.

In other words, NCPs that are going to follow the Procedural Guidance will be open to complaints from anybody. When a certain party raises a case, the NCP is required to make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them. As the institutional arrangement leave the decision to organise the NCP as a co-operative body or just as a government body up to the individual NCP, NCPs in different countries could make different initial assessments. The decision whether a case is frivolous or not, could become a major point of discussion among stakeholders in certain countries.

After the initial assessment, the procedures focus on problem solving, through consultation from outside (experts, stakeholders, other NCPs and CIME) and mediation between the parties involved. Wording on consultation and advice from outside experts was added because of TUAC's pressure

to add in the element of contestability in the handling of cases. Setting up expert panels on specific issues could put this into practice.

However, what is most important is that when the parties do not find agreement, the NCP should make a decision, by issuing a statement on the issue. The fact that a decision must be made at the national level means a major change in the implementation mechanism, as before the review the NCP could only ask for clarification at the CIME when a solution could not be found.

### ***Confidentiality versus Name and Shame***

This was the next issue under severe discussion during the review, with BIAC demanding full confidentiality and TUAC and NGOs in favour of full transparency of both proceedings as well as results. One of the reasons why BIAC did not consider it necessary to include the provision that the name of the company should be mentioned, was that the name would become public anyway, which is shown by the fact that all the companies that were involved in cases before are known too. It would indeed be unrealistic to suppose that the name of the company involved would not become known when a case is raised. However, a public condemnation by the NCP about the behaviour of a MNE would have much more weight.

In the Procedural Guidance it is now stated that while procedures about a certain case are underway, there will be confidentiality, 'information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosures.' However, when the parties have not agreed on a resolution at the end, all the issues can be freely discussed, and the NCP will make publicly available the results of these procedures *unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines*. This last sentence leaves some room for a NCP to keep certain cases and issues confidential.

Thus, the CIME has chosen for a partly confidential complaints procedure, to accommodate BIAC's concern over sensitive business information and too much public scrutiny, and has chosen for a presumption of transparency with regard to results and judgements, accommodating the TUAC and NGO demands. However, the outcome leaves the question open of whether or not a NCP will publicly name a company when they conclude that this company has indeed violated the Guidelines. What is most important is that these procedures are set forth in the Procedural Guidance, which means that NCP cannot be forced to follow them. Besides, it could be argued that severe condemnations would scare the business community so much that they may give up their support for the Guidelines, which is seen by the CIME as an important element of *effective implementation of the Guidelines*. The broad interpretation options of the Guidelines could result in the same disappointing outcomes as before the 2000 Review.

### ***The CIME***

In the Council Decision it is stated that the primary responsibility for clarification, Review and the instrument itself will continue to lie with the CIME. Some of the activities by CIME and the Working Party during this Review have now been institutionalised, such as the exchange of views with representatives of non-adhering countries and with NGOs on matters covered by the Guidelines.

The handling of cases is a lot less promising than that of the NCPs. First, issues can only be raised at the CIME by BIAC, TUAC or adhering countries, which will deal with the statement of the NCP at the national level. The Working Party argued that NGOs could only get direct access to the CIME in they set up an advisory body. When a complaint is filed, the CIME can consider issuing a

clarification on whether a NCP has correctly interpreted the Guidelines in specific instances. However, companies will not be named by the CIME, as the *Committee shall not reach conclusions on the conduct of individual enterprises*. Thus, it is only at the national level that a situation of name and shame could arise.

Concerning CIME's responsibility of timely review of the Guidelines, to keep them up to date with developments, the text of the procedural guidance only says that the Decision shall be periodically reviewed and that the Committee shall make proposals for this purpose. TUAC and NGOs wanted CIME to commit itself to a new review within three to four years, because of the rapid developments in the field on corporate responsibility. Recommendations on use and disclosure of social standards were often rejected by the CIME, based on the argument that standardisation of control mechanisms are not yet fully developed. TUAC and NGOs argued that this may not take much more than a few years, justifying a new review fairly soon (compared to the almost ten years it took now).

### ***Implementation of the world-wide applicability***

The consensus on the need for clarifying that the Guidelines apply to the worldwide operations of OECD based MNEs was not present at the discussion of how the worldwide applicability would be guaranteed in practice. Several suggestions were made on how the worldwide applicability of the Guidelines could be implemented. BIAC was in favour of the option that the Guidelines would be applicable only on those countries that establish a National Contact Point and accept the whole OECD Declaration on International Investment and Multinational Enterprise. As outlined in chapter one, this declaration includes the national treatment principle. TUAC and NGOs have pointed to the fact that the national treatment principle is a very sensitive issue in developing countries, and therefore, such an approach would not guarantee worldwide applicability at all.

Instead TUAC and NGOs have argued that the NCP of the home country of the enterprise involved should be open to complaints about that enterprise in non-OECD countries. BIAC raised questions about the practical difficulties, and the lack of reliable information channels from non-adhering countries. BIAC was against the presumption that the same procedures should be followed as with cases in adhering countries and suggested that the procedural annex should make clear that: *'flexible procedures may be adopted which take into account the information available and the relationship of the parties concerned.'*

However, the text of the procedural guidance now reads that the same procedures should be followed, *where relevant and practicable*. A NCP should also take steps to develop an understanding of the issues involved, in the light of differences between non-adhering and adhering countries, so the text is again a compromise. What kind of steps could be taken remains open, but during consultations it was suggested that NCPs could for example develop contacts with embassies in non-adhering countries, that could function as an entry point for inquiries and cases, and advice on local conditions and legal frameworks. The meagre explanation of how NCPs should deal with issues arising in non-adhering countries makes the actual implementation a challenge. In other words, what will happen when an Indian NGO files a complaint at the Dutch NCP about the behaviour of a Dutch MNE in India?

### **2.2.2 INCENTIVES AND SANCTIONS**

The above shows clearly that the CIME does not present many positive incentives for MNEs to adhere to the Guidelines. In the light of the question what the added value of the Guidelines is in the field of corporate responsibility initiatives, it is important to assess what the added value is for

enterprises to abide to such a set of standards. The current procedures only provide a minimal sanction through the risk of business reputation that decisions of NCPs may cause. During the review suggestions were made to increase the incentives (register) as well as the sanctions (public hearings).

### **Register**

The idea of a register was introduced in order to provide an incentive for MNEs to actively implement the Guidelines, by publicly stating their acceptance of and adherence to the Guidelines. There were several versions of this idea, but according to one version, a company decides to put itself on an OECD register in order to benefit from the OECD label. A verification mechanism run by the OECD or outside experts would ensure that the company complies with the Guidelines. In case of non-compliance, the company is given a chance to correct its behaviour and if not, the OECD label would be withdrawn.

The discussion that followed between BIAC, TUAC, NGOs and the OECD Governments resulted in the final rejection of this idea. According to NGOs and TUAC, the idea of a register was worth pursuing, but in order to be effective, the register should be accompanied by a system of independent verification.<sup>23</sup> One idea that was posed was that companies would have to subject to this independent verification before they are put on the so-called 'white list'. Another idea was that a certain sample of companies that publicly state to adhere to the Guidelines would be subject to independent verification, based on a random selection of listed companies. To further complement such a register, TUAC proposed to introduce an element of contestability, by creating an expert panel that could provide an independent judgement over specific cases.

BIAC considered the register as an additional layer of accountability which might be seen as a semi-binding mechanism and bring opposite results. They argued that companies would not be very tempted to subscribe to the list, if they know they can be subject to verification by a third party. BIAC was only in favour of such a register if the monitoring and verification of compliance would be based on self-regulation, and left to businesses themselves, which in turn was unacceptable to TUAC and NGOs. Apart from that, BIAC feared the costs that would be involved.

The general concern regarding the verification of the proposed register is the lack of clear and consistent practice on verifying some of the standards in the Guidelines, and the sheer number of possible registered companies. Because of the discussion on the verification of compliance to the Guidelines that would be needed to come to a credible register, the Working Party did a study on verification of codes of conduct and the relevance of such practices for the Guidelines. That paper concluded that organisations that could be hired for the external verification are growing and that (auditable) standards are developing in some areas, but that they are not yet fully developed.<sup>24</sup> An across the board verification of all Guidelines recommendations would entail significant logistical and practical difficulties, given the breadth of the issues covered in the Guidelines, the cost of verification and the lack of available standards. In order to solve these problems, an incremental approach was suggested by the Working Party, meaning that an initial verification scheme should focus on verifying those Guidelines that are quantifiable, while incrementally extending further. As experience with verifying more elements in the Guidelines would increase, the verification process could be expanded. This would allow the OECD to keep up to date with recent development in the field of monitoring and verification without starting a completely new review.

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<sup>23</sup> DAFFE/IME (2000) 2, 15-2-2000, Aide-mémoire of the informal consultations between BIAC, TUAC NGOs and the CIME on investment issues and the review of the OECD Guidelines for MNEs, held on 8-12-1999

<sup>24</sup> OECD internal document.

However, based on the considerations and the objections from the consulted parties, the CIME decided not to further pursue the idea of a register. This was one of the reasons why TUAC and NGOs have pressed for a new review within a few years.

### **Public hearings**

The idea of holding public hearings on the behaviour of individual enterprises was introduced as another way to encourage MNEs to abide to the Guidelines. Although this idea was not extensively worked out by the Working Party, it is worth mentioning because of the similarity with the initiative at the European Parliament, which has become known as the Howitt Resolution. This initiative will be discussed in Part III.

There was some discussion about introducing a further procedure for cases, which could not be settled by conciliation - that of a public hearing hosted by the NCP. It was agreed that public hearings could be useful to any of the parties in a case, and the concept was not rejected, although concerns were raised about the potential discouraging effect on corporations involved. It was suggested that public hearings could be applied to issues as well as specific cases. The idea of opening up the possibilities of public hearings hosted by the NCP would increase the role of the NCPs, in particular related to the implementation in specific instances. The value of a judgement on the individual conduct of a certain company based on a public hearing would be stronger than in the case of a decision made by the NCP. Not surprisingly, it was this kind of fear for public scrutiny that made BIAC to strongly reject the idea. Thereafter, the proposal was not further outlined.

## **2.3 VIEWS OF THE CONSULTED PARTIES ON THE REVISED GUIDELINES**

Although most of the important remarks made by BIAC and TUAC and NGOs have been mentioned, a brief summary of the views on the consulted parties on the outcome of the Guidelines in terms of text and implementation mechanism seems appropriate here. Each of these parties has submitted final statements at the Ministerial in June when the review was finalised.

### **TUAC**

TUAC has repeatedly stated that their main aim in the review was to strengthen the implementation mechanisms of the Guidelines, and that they are in favour of a limited revision of the text.<sup>25</sup> An important element in the revision of the text is the reference to other internationally agreed standards. This reference can now be found in the Preface of the Guidelines, in rather general terms. Further references can be found more specifically in the Commentaries, which are not a formal part of the Declaration, so TUAC demands have only be partly fulfilled in this respect. TUAC has also pointed to the need for consistent and coherent Guidelines. Particularly concerning the use of *encourage* and *should* is seen as problematic from an operational perspective. TUAC argued that it would be difficult to query the implementation of those issues that MNEs are only 'encouraged' to do. Concerning the overall textual outcome, TUAC has stated the following:

*'We welcome changes in the text calling for respect for the core labour rights set out in the ILO Declaration on Fundamental Rights at Work. We would have liked it to have gone further on child labour and other issues, but it represents a compromise.'*<sup>26</sup>

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<sup>25</sup> TUAC initial submission on the 1999 Review of the OECD Guidelines for Multinational Enterprises.

<sup>26</sup> TUAC statement at the OECD Ministerial Conference on the adoption of the OECD Guidelines for Multinational Enterprise, 27 June 2000, by John Evans.

Concerning the implementation mechanism, TUAC is quite hopeful. During the consultations, emphasis has been put on strengthening the role of the NCPs, and to create a new framework for discussions of cases by the CIME. One of the main points raised by TUAC was the introduction of an element of contestability. This point can be found in the Guidelines' implementation procedure in one way or another. Therefore, TUAC sees opportunities for improvements in the implementation, but warns that governments will have to show the political will to implement this instrument.

## **BIAC**

When discussing BIAC's view on the outcome of the Guidelines, it is important to note that BIAC, through the course of the Review, has managed to 'weaken' the text of the Guidelines in many respects. In all of the chapters of the Guidelines more and more additions were made that leaves room for different interpretation, after protests from BIAC on earlier drafts. This made TUAC and NGOs to express their doubts on BIAC's real intentions. On the other hand, some provisions and recommendation were kept in the new text and procedures that BIAC has been strongly opposing: *"The new text and commentary are far from ideal or 'user friendly', as we might say"*<sup>27</sup>

BIAC's concerns on the outcome of the review focus on three critical areas: supply chains, labour-management consultations, and implementation in non-adhering countries. The recommendation on supply chains remained one of the most disliked provisions: *'Business should not be held accountable for the actions of separate and unrelated companies that are contractors and subcontractors in increasingly complex supply chains.'*<sup>28</sup> Thus, BIAC is not satisfied with the recommendation to encourage observance of the OECD Guidelines in their supply chain, even though one could argue that this encouragement is not the same as 'holding business accountable'.

The opposite of what happened with the text during the review, happened to the implementation procedures: they became 'stronger', in terms of accountability and transparency. Confidentiality was a major issue for BIAC: *" the implementation structures and procedures must provide for adequate safeguards that breaches of confidentiality or public judgements do not damage one of the most important assets of a private enterprise, its reputation."* It is exactly this reputation that may be harmed when an NCP issues a negative statement on the behaviour of an individual enterprise. The new Guidelines and procedures leave the possibility open for this to happen.

Finally, the implementation in non-adhering countries has remained problematic for BIAC. BIAC kept pressing that the Guidelines should remain part of the Declaration as a whole, that the implementation should be grounded in an adherence to the Declaration. In non-adhering countries, BIAC kept emphasising that the variety of legal and economic circumstances should be taken into account, hoping for a weaker interpretation of the Guidelines in these countries: *"Your Decision today will be interpreted on the basis of the assurance that you have given us, in text and word, that Guidelines will be implemented in the context of the Declaration, in good faith and without prejudice."*<sup>29</sup> This part of BIAC's final statement shows that apparently BIAC has been given the assurance by the CIME (in text and word!) that implementation in non-adhering countries will not be taken too seriously.

## **NGOs**

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<sup>27</sup> BIAC Remarks for Chairman Ihamuotila at the Ministerial Special Session on the Revision of the OECD Guidelines for Multinational Enterprises, 27-6-2000.

<sup>28</sup> Statement of BIAC to the OECD on the Revision of the Guidelines, 11-4-2000.

<sup>29</sup> BIAC Remarks 27-6-2000.

Despite the many additions that were included during the Review, the Guidelines still fall short of the aspirations of the consulted NGOs, both in tone and content. The detail in most chapters is weak and there are many loopholes, which make these voluntary expectations even weaker. It is not so much the standards and recommendation themselves that NGOs are concerned about, but the way these recommendations are formulated. The argument for such vague language was often said to be local circumstances in non-member countries, for which discretion in the applicability of certain parts of the Guidelines were needed. However, NGOs suggested removing these discretionary elements from the actual text, and placing them in a consolidated form in the Decision on procedures for NCPs to follow. This would ensure that these opt-outs are not used by MNEs as a reason to circumvent the Guidelines, but for the flexibility in the decision-making by the NCP.

In the end, the consulted NGOs stated (through their final statement, signed by 75 NGOs from all over the world) that they are disappointed that the OECD Governments chose a combination of voluntary low level standards with a weak implementation mechanism. What is of particular concern to the consulted NGOs is that too much is left to the discretion of individual NCPs, especially in the content of reporting on specific instances. One of the most important demands of the NGOs, that is transparency when it comes to specific cases, has been partially fulfilled. However, as outlined before, it will largely depend on the will of the OECD Governments -through their NCPs- to deal openly and effectively with specific cases. There is quite some scepticism among NGOs about the future openness from NCPs. On the other hand, there is also hope that if the NCPs are going to follow the Procedural Guidance, the OECD Guidelines may become a valuable tool.



## **PART III THE OECD GUIDELINES IN PERSPECTIVE**

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In recent years, an increasing number of actors have been involved in the debate about corporate social responsibility: business federations, (confederations of) trade unions, international solidarity groups, consumer groups, governments, international institutions, and pension and investment funds. As a result, a proliferation of codes of conduct can be seen at different levels: national, international, sectoral and corporate level. This part will address some of these initiatives in relation to the OECD Guidelines. Given the fact that discussions on these initiatives have gone beyond their content, it is particularly important to assess the implementation and verification mechanisms that were designed to ensure adherence. The relevance of the revised Guidelines depends ultimately on the added value that the Guidelines can provide in relation to other initiatives, in terms of guaranteeing good corporate behaviour.

Initiatives in the field of corporate social responsibility are often differentiated into several categories. What is often heard is the term voluntary initiatives, which usually refers to private initiatives by companies and/or trade unions and NGOs. This term is somewhat misleading because at present there are no codes of conduct that are binding for companies, so every initiative has been voluntary up to date. Therefore, a distinction is made here between governmental codes (UN code of conduct for MNEs, the ILO Tripartite Declaration, OECD Guidelines) and non-governmental codes.

Because of the changes in the scope and implementation of the Guidelines, this part will also discuss the legal character of the new instrument. It is often said that the proliferation of codes of conduct are due to the decreasing ability of governments to regulate the behaviour of MNEs. Processes like globalisation and liberalisation have left a regulatory void in the international business environment.<sup>30</sup> The OECD Guidelines have an interesting place in this respect, which is shown by the fact that during the Review there was discussion on the 'more binding' character of the Guidelines.

As mentioned before, issues concerning corporate social responsibility are the most pressing in developing countries. Again, this discussion is even more relevant due to the changes in scope and implementation of the Guidelines. In order to be effective, any development of a code of conduct should take into account the perspectives from stakeholders in the South. Therefore, the views and experiences of the developing world with other -voluntary- initiatives will be particularly taken into account.

### **3.1 NON GOVERNMENTAL CODES**

There are a wide variety of codes in the private sector, drawn up by a wide variety of actors. The differences between these codes in terms of content and implementation are large, and result from the different actors who have issued the codes of conduct, the standards to which they refer to and to the different sectors to which they apply. Some of the most commonly used and referred to will be discussed. Emphasis lies on codes of conduct that deal with labour rights issues, as experiences in this field are most extensive. This can be explained by the fact that standard setting

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<sup>30</sup> De Souza, Ines, (2000), 'Codes of Conduct and monitoring systems', BPSC Amsterdam

in this area was much easier because of the work done by the ILO, and because of the involvement of trade unions in the debate on codes of conduct.

### **3.1.1 MODEL CODES**

Model codes have been drafted by trade unions, NGOs and more recently by business associations. Model codes from trade unions and NGOs were primarily drafted as campaigning tools, to promote awareness and acceptance of international standards and supply chain responsibility. One of the most important ones is the model code of the ICFTU (International Confederation of Free Trade Unions), which was adopted in 1997. Being a trade union code, it deals with labour issues only and covers the following standards:

- freedom of association
- right to collective bargaining
- no forced labour
- no child labour
- no discrimination
- maximum hours of work
- health and safety
- a living wage
- security of employment

The purpose of this code is to promote the primacy of international labour standards, the inclusion of trade union rights in codes of conduct, and to encourage consistent language in codes. The code refers directly to ILO conventions and applies to contractors, sub-contractors, and licensees involved in the production and distribution of products. The interpretation of the standards (working out the specific standards in further detail) is meant to be worked out on a sector level. This concerns particularly provisions on health and safety, which are of course different from sector to sector. The model code further has some provisions concerning implementation and monitoring, but this is also left largely to be worked out on a sector-by-sector basis.

Direct reference to ILO standards is considered a crucial element of this code as the use of internationally accepted wording limits the possibilities of misinterpretation. As shown Part II, direct reference to internationally accepted standards can only be found in the Commentaries (that have no legal status) to the OECD Guidelines, which can be considered as a minor flaw in the instrument. Vaguely defined standards and self-definition makes verification of compliance to the standard very difficult, which is why the ICFTU tries to increase standardisation of content and wording in codes of conduct with the model code.

Looking at the labour chapter of the OECD Guidelines, it is clear that the ICFTU code includes several important standards that are lacking in the Guidelines. These are maximum hours of work, security of employment and living wage. The package of standards in the ICFTU code is the result of intensive and long debates between many trade unions and NGOs. This means that there is broad consensus over the fact that these are the minimal standards that a code should contain. The reason for adopting more than just the four core labour standards in this code is the fact that some of the worst labour related offences cannot be solved without the inclusion of the additional standards. It has been argued, for example, that the abolition of child labour cannot be realised

without provisions on a living wage. If parents don't earn enough to support their family, their children will be forced to work to supplement the household income.<sup>31</sup>

The ICFTU code has become a commonly accepted point of departure for drafting codes of conduct among NGOs and trade unions, and to a certain extent businesses. That means that in terms of content in relation to labour standards, the OECD Guidelines fall short of some important, increasingly accepted elements of many codes of conduct.

### **3.1.2 COMPANY CODES OF CONDUCT**

In reaction to public pressure and the model codes, many MNEs have started to draft their own code of conduct. From NGOs, trade unions and other stakeholders there is generally a great deal of scepticism towards such company-controlled codes of conduct, based on the concern that these codes are merely a public relations tool which makes any real change of business behaviour doubtful. The reason for this scepticism is the lack of an implementation scheme, or the lack of transparency about such a scheme and mechanisms to monitor and verify compliance by the company. Also, it is often not very clear how far the accountability of the company goes and if the code applies to suppliers and sub-contractors as well. Other criticism towards company codes of conduct focuses on the fact that often they are vaguely defined and incomplete. The ILO and the OECD have both made inventories of codes of conduct, which show that most of the company codes fall short in terms of content and reference to internationally accepted standards.<sup>32</sup> For example, the OECD inventory shows that out of the 223 inventoried codes, only 18 percent refer to international standards.<sup>33</sup> With regard to the core labour standards, the right to collective bargaining and freedom of association are often lacking in codes.

The inventory of the OECD also shows that there is a very high degree of variance in code characteristics, transparency, implementation and verification provisions. That makes it difficult to make a general analysis of these codes in relation to the OECD Guidelines, apart from the fact that none of the codes cover as many areas as the Guidelines. However, it is interesting to look at some of the more comprehensive company codes of conduct and subsequent implementation and verification mechanisms, issued by companies that have been taking part of the social responsibility debate for a while, usually after accusations of misbehaviour (Shell, Nike, etc). Apart from the majority of MNEs that have drafted vaguely formulated codes, statements, business principles, or nothing at all, there are a number of companies that have acknowledged their social responsibility to a larger degree than recommended by the OECD through its Guidelines. This is particularly the case with some retailing MNEs in the labour intensive industry, which directly or indirectly controls large amounts of production sites, most of them located in developing countries.

For example, several of these MNEs have now drafted their codes of conduct along the lines of the ICFTU model code, with direct reference to the relevant ILO Conventions. That means that even the notion of a living wage is now slowly emerging as an accepted part of the set of labour

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<sup>31</sup> The notion of a living wage has often been rejected by business based on the argument that it would be impossible to implement such a demand, because of the difficulty of calculating a living wage and the enormous regional differences between them. However, numerous studies have by now been conducted that have calculated adequately living wages on a regional basis. The ICFTU definition of a living wage is as follows: wages and benefits paid for a standard working week shall meet at least legal or industry standards are always be enough to meet basic needs for workers and their families and to provide some discretionary income.

<sup>32</sup> ILO, 'Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues', November 1998, and OECD Working Party of the Trade Committee, 'Codes of Corporate Conduct: An Inventory,' 29-4-99.

<sup>33</sup> OECD Working Party of the Trade Committee, 'Codes of Corporate Conduct: An Inventory,' 29-4-99.

standards that should be ensured. Not surprisingly, the companies with the most comprehensive code of conduct are those that have been under severe public criticism for many years now. Criticism towards these companies now focuses on the way they implement these standards, and the degree of 'independent' verification they allow. With these kinds of retailers, outsourcing their production, the issue of supply chain responsibility is of particular importance. After intense campaigning by consumer and solidarity groups, these companies have increasingly accepted their responsibility for the working conditions under which the products they sell are being made. An upward development can be seen in the degree of acceptance of this responsibility. At first, companies claimed that they were not able to influence the behaviour of their suppliers. Then they claimed to have sent their code to all their suppliers, and that their responsibility ended there. Nowadays, some retailing companies check the work-force of their suppliers, or hire an external bureau for a 'social audit', and are involved in corrective action plans.<sup>34</sup> This kind of supply chain responsibility goes much further than the encouragement that the OECD recommends its MNEs to undertake.

### ***Implementation***

A wide variety of measures can be deployed by MNEs for the implementation of their codes. In an analysis by the OECD Working Party on the Guidelines of management approaches in implementing voluntary codes the following measures were found to be in use: internal monitoring, reports to Boards of Directors, use of compliance manuals, whistle-blowing facilities, signatures of directors, training, periodic compliance reviews by managers, employee signatures, external auditing, disciplinary action and active communication and external verification.<sup>35</sup> But the analysis also shows that only 32 percent of the inventoried codes discuss any such implementation measures in one way or another.

External monitoring and verification measures to check companies use compliance to their self-proclaimed ethical norms in order to gain credibility from the public. Shell's annual report for example, includes a 'Verification Statement' by accounting firms KPMG and Price Waterhouse that includes human rights issues. Other than that, external verification can mostly be found in codes of MNEs that address working conditions at their suppliers and sub-contractors as well. External verification in this sense means that someone from outside the production site must try to assess on the basis of records, interviews and observations what working conditions at the site are like. The Dutch clothing retailer C&A for example, has set up its own monitoring firm SOCAM that yearly audits numerous suppliers and sub-contractors on compliance to C&A's code of conduct. Other retailers increasingly hire accounting and audit firms, or traditional quality controllers for verification of compliance.

NGOs and trade unions have criticised this kind of 'external' verification on the basis that it would not be independent enough, and that the results of such audits may not reflect the actual situation at the production site. They argue that the commercial relation between the auditor and the company that is audited is fundamentally withholding an independent assessment of the situation. Another argument is that auditors that are qualified to assess financial records or quality may not necessarily be well qualified to be interviewing workers from developing countries for labour

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<sup>34</sup> When violations of a code are found at the supplier or sub-contracting level, the retailing company could decide to finish the contract. However, cases of children ending up in prostitution because of this, has made people realise it would be better to work on improvements of the situation, usually within a certain timeframe: a corrective action plan.

<sup>35</sup> Working Party on the OECD Guidelines of MNEs, Verification, Voluntary codes and the Guidelines: Background issues for discussion, 10-2-2000.

standards violations.<sup>36</sup> Experience has shown that gaining trust from the workers involved is necessary for a reliable assessment of the situation, and these commercial auditors are often too much associated with the management of the production site to gain such trust. Thus, these kinds of external verification methods have not brought the credibility from a stakeholder that was sought by these companies. That is the reason why several companies have now started up a dialogue with stakeholders to find credible solutions for the implementation of codes through partnerships and other agreements. (see 3.1.3)

The CIME has not chosen to equal the content and scope of the 'best practice' codes of the labour intensive industries, like the garment, sportswear, and toy industry. At the early stages of the Review, the CIME asked itself the question whether the Review should seek to set a standard that is 'best practice', 'good practice' or 'minimally acceptable practice' relative to other public or private norms.<sup>37</sup> The answer was that the objective should be to set the Guidelines at a level that leaves room for individual companies (with no code of conduct) to catch up. Otherwise, only the so-called front-runners, who have been taking part in the corporate responsibility discussion for a while now, would accept and observe the Guidelines. This is understandable given the fact that wide acceptance from businesses is sought by the OECD. From the viewpoint of trade unions and NGOs however, the fear exists that businesses will not be tempted anymore to go further than the Guidelines. It may be more difficult for NGOs and trade unions to campaign for standards (living wage), scope (throughout the supply chain, including home workers) and implementation mechanisms (independent verification) that go beyond what is covered by the Guidelines, when companies are going to declare that they are already observing the Guidelines.

In conclusion, some important elements can be pointed out that highlight the relation between the OECD Guidelines and company codes of conduct. First, the Guidelines have a much broader coverage of issues, but are less comprehensive with regard to labour standards than some of the current 'best practice' codes. The OECD inventory has identified five broad areas of ethical conduct that are often included in codes; fair business practices, observance of rule of law, fair employment and labour rights, environmental stewardship, and corporate citizenship. All of these issues can be found in the OECD Guidelines, while none of the company codes of conduct address them all. This is due to the fact that most company codes of conduct have been drawn as a result of public pressure, which in turn is often directed to a single issue. Few NGOs are currently addressing companies from a 'cross-sectoral' approach or with regard to their complete performance on ethical issues, like labour, environmental and human rights issues.<sup>38</sup> As a result, companies are often able to secure an ethical image based on limited achievements in isolated areas. The added value of the OECD Guidelines is that they provide a more integrated approach to address the social responsibility of MNEs.

Second, government sponsorship and labour -and to a certain extent NGO- support for the OECD Guidelines is often lacking in the case of company codes of conduct, which decreases the overall credibility of these codes. Therefore, the potential of the OECD Guidelines to become an internationally known, accepted and used standard is greater than those codes of individual companies. On the other hand, company codes of conduct have of course, the advantage of being fully endorsed by the company that drafted it, making it more likely that the standards mentioned in such codes will become an integrated part of the company's policy and management system.

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<sup>36</sup>Even a business association like "Business for Social Responsibility" is concerned about the competence of financial auditors to audit social issues

<sup>37</sup> OECD, Framework for the Review, 21-5-1999

<sup>38</sup> Ineke Zeldenrust and Nina Ascoly, 'Codes of conduct for Transnational Corporations; An Overview', IRENE publication, July 1998.

A third difference exists in the implementation mechanism. Even though some company codes have, as shown, a much more detailed implementation and verification mechanism whereby the business behaviour in practice is assessed, the complaints procedure of the OECD Guidelines is an important added value. When a company allows a third party to verify their compliance, and non-compliance is found in certain cases, the result may be that the company changes its behaviour in relation to that specific case, without changing its overall business policy. For example, when health and safety in a certain entity of the company is found to be insufficient, the company may improve that particular situation. Or, when child labour is found in a certain factory producing for the company, the relationship may be broken or corrective action may be taken in that particular case. A public judgement by a government body (the NCP) about the behaviour of a company may have a stronger effect on the overall behaviour, out of fear of being publicly criticised again.

### 3.1.3 NEGOTIATED CODES

Another category of non-governmental codes that is growing are codes that came into being through agreements and partnerships between companies, trade unions, NGOs, and sometimes government bodies, in many different set-ups. This usually involves a form of commitment from the parties involved to work together in finding solutions in the field of standard setting and effective implementation. These initiatives can be found in several areas covered by the OECD Guidelines, such as environment, labour rights and human rights. The difference between company codes, model codes and negotiated codes is increasingly blurring, as more and more companies that already had a code, are now involving stakeholders in one way or another in the process of implementation, monitoring and verification of their codes.

For example, four Swedish clothing retailers, which all had their own code, have signed a declaration of intent with the Swedish Clean Clothes Campaign with the aim to 'obtain experiences as to how a credible independent verification system for the compliance with codes of conduct can look like'.<sup>39</sup> This experience is gained through pilot studies in which verifications systems are tested that include different stakeholders and different types of auditors to collect reliable information. For example, in such a system commercial auditors may check the financial and employment records, while local NGOs, trade unions, or independent researchers interview the workers. This initiative is still very much in a developmental phase and the emphasis lies on trust building among the stakeholders involved and on learning collectively.

A rather similar initiative is the government sponsored Ethical Trading Initiative (ETI) in the UK, which was established in January 1999.<sup>40</sup> The ETI is an alliance of companies, NGOs and trade unions that are 'committed to working together to identify and promote good practice in the implementation of codes of labour practice, including the monitoring and independent verification of the observance of code provisions'.<sup>41</sup> The ETI Base Code is similar to the ICFTU code, but slightly more extensive. Member companies are expected to participate in a pilot programme, along with trade union and NGO members of ETI, to test different ways of monitoring labour standards. Such pilot projects include the supply of wine from South Africa, horticultural products from Zimbabwe and clothing from China. An increasing number of UK retailers are joining the ETI, and valuable

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<sup>39</sup> The Swedish project on independent verification of compliance of codes in the garment industry, 'Pilot study: Implementation and criteria', October 1999.

<sup>40</sup> Ethical Trading Initiative, 'Learning from Doing Review', April 1999.

<sup>41</sup> ETI Purpose, Principles, Programme, Membership Information, September 1998.

lessons are learned on how to implement, monitor and verify codes of conduct in complex global supply chains.

The added value of these initiatives lies in the multi-stakeholders approach that is used, and the fact that experience is gained at the practical level. The experience up to date learns that only such initiatives that enjoy the acceptance from all stakeholders, including the workers involved, will be able to gain credibility. A common element in many of the initiatives on corporate social responsibility is the lack of involvement of the South in each phase of the development of the initiative. Codes of conduct are often presented to the developing world by the time the content and implementation mechanism is almost worked out completely, which means the views and expectations of development NGOs in the South have not been taken into account. For an initiative on corporate social responsibility to become effective the workers whose rights and conditions are concerned should be involved from the start, otherwise such initiatives are likely to be considered as yet another imposition from the rich countries on developing countries.

### **SA 8000**

The SA (Social Accountability) 8000 standard is an important initiative that was launched in 1998. The SA 8000 was developed by the Council on Economic Priorities Accreditation Agency (CEPAA), a subsidiary of the US based NGO CEP. The standard is designed to enable companies to assess the social and employment standards prevailing in their own and in their suppliers' facilities. SA 8000 is developed analogue to other international standards such as ISO 9000 (quality) and ISO 14000 (environment). The package of conditions outlined in the standard itself is very similar to the ICFTU model code, and thus, as opposed to the OECD Guidelines, includes provisions on living wages and working hours.

CEPAA can accredit firms and organisation to become certification bodies. The certification body can then be hired by a company to check if the company complies with the SA 8000 standard. After the company has been audited and approved, they receive the SA 8000 certificate. Companies that have been accredited to be SA 8000 monitors are quality-control firms such as the Swiss SGS, the Norwegian DNV and the British BVQI. In theory, NGOs could be accredited to become monitors, but up to date it is only the large quality control firms that perform the SA 8000 audits. This has brought about the same criticism from NGOs and trade unions as with the external verification that individual companies use: the commercial relationship may not be trustworthy.

The advantage of SA 8000 is that the basic package of standards is thoroughly translated into 'auditable' standards. Even though the standard only covers a few of the Guidelines' areas, the Guidance document that is used to verify compliance is more than 60 pages long, and consists of extensive checklists and examples of methods for verifying compliance.<sup>42</sup> Examples of objective evidence to assess compliance or non-compliance by auditors are given, as well as suggestions for corrective actions to be taken in cases of non-compliance. This means that SA 8000 is much more comprehensive than the OECD Guidelines in terms of actual implementation of ethical standards at the work floor. Another advantage of this system can be seen in the effect on standardization on norms and implementation practices. Different auditors may now check a supplier that produces for different retailers for different norms. When a supplier would apply for SA 8000, this certificate would be enough to prove compliance to social standards to all its business relations.

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<sup>42</sup> CEPAA, Guidance Document for Social Accountability 8000, # 5

This system, where the individual supplier has to apply for the SA 8000 certificate has received criticism on the basis that the responsibility of the buying companies (retailers) is not defined. Retailers too may want to apply for the SA 8000 certificate, but obviously the supplying companies in production countries will have to make the most changes to become certified. The SA 8000 system does not require the company at the 'top' of the chain to enable their suppliers to make the additional changes, so the burden is placed on the supplier and sub-contractors.<sup>43</sup> Another disadvantage SA 8000 could be seen in the fact that there is no transparency for the consumer, because SA 8000 does not result in a social label for certain products or companies. In other words, when a certain enterprise declares to be working with SA 8000, it is not clear to what degree the complete supply chain is certified. In the developing world, the SA 8000 initiative was conceived with much suspicion because it was developed with little involvement from the South.<sup>44</sup>

### ***Initiatives in other areas***

The above-mentioned initiatives are examples of negotiated codes, related to labour rights issues in developing countries. They aim to provide examples of the most comprehensive and far-reaching developments that are now taking place at various levels. These examples should not be considered as a complete overview, since there are many more initiatives taking place in many different areas. Such initiatives have contributed to the standardisation of norms that is required to be able to assess compliance. They are of added value to the OECD Guidelines in the sense that issues covered by the Guidelines are translated into auditable standards and solutions in the field of implementation, monitoring and verification are sought on a multi-stakeholder basis.

The Global Reporting Initiative (GRI) for example has developed guidelines for sustainability reporting by firms, within a broader framework that includes economic social and environmental issues. GRI is a co-operative arrangement involving companies, business associations and NGOs and has received funding from the United Nations. The GRI guidelines are now being tested internationally using pilot companies from a number of OECD countries.

Since 1995, the private, international standards setting organisation ISO has developed the ISO 14000 series of environmental standards, including ISO 14001, an auditable standard for environmental management systems. The ISO 14001 is widely used among businesses. However, the standard only concerns environmental management practices and commitment to continuous improvement. As a result, the certain company may have a poor environmental performance in terms of industry benchmarks for energy efficiency or effluents and still be certified for ISO 14001.

## **3.2 GOVERNMENTAL CODES**

Since the 1970's, governments have tried to influence corporate behaviour, mostly through various initiatives at international organisations. More recently, such initiatives can also be seen at the

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<sup>43</sup> For example, the Dutch clothing retailer 'WE International' has applied for the SA 8000 certificate, because the company wants all their suppliers to become SA 8000 certified in the future, and figured it would be appropriate to have the certificate themselves then as well. For the WE International, with its headquarters in The Netherlands, applying for the SA 8000 meant making a few minor corrections. For WE's suppliers, most of them located in developing countries, the changes that are needed to be approved for SA 8000 may have considerable financial consequences that the suppliers will have to bear themselves.

<sup>44</sup> Labour Rights in China (LARIC), No Illusions Against the Global Cosmetic SA 8000, May 1999.

national level, such a development of a model code by the Dutch Ministry of Foreign Affairs.<sup>45</sup> Another example is the development of a law in the UK that demands pension funds to report about their ethical standards and selection methods. This section will focus on some intergovernmental initiatives, as the international dimension of the corporate social responsibility debate requires an international approach.

### **3.2.1 THE ILO DECLARATIONS**

#### ***The ILO Tripartite Declaration of 1977***

In reaction to the OECD Guidelines, the ILO came up with its own 'code of conduct' a year after the first adoption of the OECD Guidelines: *The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. This code was intended to become part of a broader United Nations (UN) code, but that code was never ratified (see below). The ILO Declaration is addressed to the tripartite parties of the ILO structures and to the MNEs operating in their territories. Governments, employers and workers, as well as MNEs themselves, are recommended to observe those principles. A major difference between with the OECD Guidelines is that the ILO Declaration again only covers labour related issues, such as employment, training, conditions of work and industrial relations.

The implementation procedures to monitor and verify adherence to the Declaration by MNEs are very limited. The Committee on Multinational Enterprises is to oversee the Declaration's implementation. One of the implementation procedures includes a system of questionnaires, asking Governments and employers' and workers' organisations for information about the implementation of the ILO Tripartite Declaration. The ILO Secretariat compiles the results in a report, which is then discussed by the Board of Directors of the Committee on MNEs. These reports are written in general terms though, as individual companies are not mentioned. Apart from that requests can be made for interpretation of the code at the Committee. But again, individual cases are not identified in the procedure, and the interpretation procedure on MNEs has only rarely been used. After 20 years of existence, the ILO Tripartite Declaration failed to progress into a systematised dialogue and has treated a total of only seven cases.<sup>46</sup>

#### ***The ILO Declaration on Fundamental Principles and Rights at Work (1998)***

The ILO has adopted more than 180 Conventions on labour issues, which have been ratified by member states to various degrees. In order to emphasise the importance of the four core labour standards as laid out in seven core Conventions (nos. 29, 87, 100, 105, 111 and 138), the 1998 ILO Declaration was designed. As the Commentaries to the OECD Guidelines explain, the Employment and Industrial Relations chapter echo the relevant provisions of the 1998 Declaration as well as the ILO's 1977 Tripartite Declaration. However, the 1998 ILO Declaration is only addressed to Governments, not to MNEs directly.

The added value of the Declaration to the already existing Conventions is that the members of the ILO, even if they have not ratified the Conventions in question, have an obligation to respect and promote in good faith the principles and fundamental rights which are object of these

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<sup>45</sup> Ministerie van Economische Zaken, 'Maatschappelijke aspecten van zaken doen in het buitenland, Staatssecretaris G. Ybema, 18-01-2000.

<sup>46</sup> European Parliament, Report on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, Committee on Development and Cooperation, Richard Howitt, 16-12-1998.

Conventions.<sup>47</sup> In terms of implementation, this ILO Declaration is far less comprehensive than the new implementation mechanisms accompanying the OECD Guidelines. The Declaration is 'promoted' through a follow-up process involving reports by Member States and technical cooperation.

Both ILO Declarations are meaningful points of reference, shown by the OECD Guidelines' Commentary, but their effectiveness has suffered from the lack of implementation and enforcement mechanisms. The lack of an accessible and transparent complaints and appeals procedure is clearly the most important flaw of the ILO Declarations. The OECD Guidelines could fill this gap by reviving the role and functioning of the NCPs.

### **3.2.2 OTHER UN INITIATIVES**

Apart from the initiatives undertaken by the ILO, other UN organisations have been involved in the debate and several initiatives have started ranging from more twenty years ago to very recent; the UN Code of conduct and the Global Compact.

#### ***UN Code of Conduct***

In 1974, the UN Centre for Transnational Corporations (UNCTC) was established with the purpose of drawing up a set of guidelines, which defines the rights, and responsibilities of MNEs in their international operations. Until 1993, the UNCTC carried out research and worked with the Commission on Transnational Corporations, an intergovernmental body with the mandate of developing a code of conduct for TNC's. This code would cover all aspects of transnational business activities, including political, economic, financial and social affairs, and therefore, bears many similarities with the OECD Guidelines. At first, the idea was to come up with a binding code, but when it became clear that this would not be feasible, the aim was to come up with a voluntary code instead.

However, differences of opinion between the developing and the industrialized countries led to a stalemate with regard to the adoption of the UN code of conduct. By March 1993, the CTC had been converted in to a smaller agency within the weakened UN Conference on Trade and Investment (UNCTAD). The UN Code of conduct deserves mentioning here, even though it was never realised, because of the similarities of the UN code with the OECD Guidelines. What is interesting about the draft UN code is it's universal application and the provisions on disclosure of information. The universal application of the code was unprecedented up to the 2000 Review of the OECD Guidelines. On the other hand, there is a major difference between the UN and the OECD, given the simple fact that many more countries are member of the UN, and therefore, any code of conduct drawn up by the UN would in potential be more universal. Worldwide acceptance of the standards would be more likely than in the case of the OECD Guidelines. Obviously, worldwide consensus on the fundamental elements of codes of conduct does not exist as yet, which is why the ' rich' countries of the OECD have managed to come to an agreement and the UN, as a whole, has not.

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<sup>47</sup> Blanpain, R., 'Review of the OECD Guidelines for Multinational Enterprises: Possible Revisions to the Chapter on Employment and Industrial Relations.'

## ***Global Compact***

Another more recent initiative by the UN that was launched on 5 July 1999 by the UN Secretary General Kofi Annan is called the Global Compact. The Global Compact should be seen as an international covenant between the UN and the world business community, as it came into being through a joint statement from the UN and the International Chambers of Commerce (ICC).<sup>48</sup> The ICFTU has also endorsed the Global Compact. The Global Compact is an attempt by the UN to deal with issues in the areas of environment, labour standards and human rights in a more integrated manner. It consists of a set of nine principles in these three areas; two human rights principles, the four core labour standards, and three environment principles, including the precautionary principle. The Global Compact statement refers to the Universal Declaration of Human Rights, the 1995 Social Summit in Copenhagen, and the 1992 Rio's Earth Summit, but wording remains vague and general.

As the Global Compact contains labour rights, human rights and environmental issues, the respective UN institutions that deal with these issues are currently involved in the initiative: the ILO, the High Commission for Human Rights and the UN Environment Programme (UNEP). The ILO, for example, has launched the 'Private Voluntary Initiatives Programme', which serves as the ILO's Secretariat for the Global Compact. However, it has only a promotional function through 'knowledge sharing, research, technical services, education and advocacy.'

The initiative has been heavily criticised by many NGOs for a number of reasons. The Global Compact appears to have been developed without any consultation of organisations other than those agreeing to it.<sup>49</sup> The most important critique is that the Global Compact is completely non-binding, has extremely meagre implementation provisions and no enforcement mechanisms whatsoever. MNEs are merely asked to respect the nine principles while the UN institutions are to 'encourage global corporate citizenship and to foster the translation of these principles into corporate practice'. The launching of a website on global corporate citizenship is the most important activity up to date.

The non-binding approach that is now being taken by the UN through the Global Compact contradicts with the conclusions of another UN institution, the UN Development Programme (UNDP). The 1999 Human Development Report concludes that "tougher rules on global governance, including principles of performance for multinationals on labour standards, fair trade, and environmental protection, are needed to counter the negative effects of globalisation on the poorest nations."<sup>50</sup>

In conclusion, it can be said the UN has failed to develop a credible system to address corporate social responsibility up to date, and the Global Compact is not filling that gap. Compared to the OECD Guidelines, the Global Compact is much less comprehensive and detailed and it is much more voluntary and optional. It has gained hardly any acceptance from NGOs and other stakeholders due to the lack of consultations during the development of the initiative and the lack of a credible implementation mechanism. Therefore, it seems unlikely that the Global Compact will become of any relevance in the corporate social responsibility debate, and more importantly, it seems unlikely to result in improvements of corporate behaviour.

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<sup>48</sup> Hoedeman, O. 'The Global Compact: The UN's new deal with global corporate citizens', Corporate Europe Observatory-Issue# 5, 2000.

<sup>49</sup> Mather, Celia, NGLS Development Dossier: 'Can Companies Be "Good Citizens"?', January 2000.

<sup>50</sup> Hoedeman, O. (2000)

### 3.2.3 EUROPEAN PARLIAMENT

From 1996 onwards the European Parliament has been taking part in the corporate responsibility discussions as well, and has adopted several reports in which it called for a code of conduct for European MNEs operating in third world countries. In January 1999, the European Parliament adopted the Report on *EU standards for European Enterprises in developing countries: towards a European Code of Conduct*, prepared by the Committee on Development and Co-operation. This report was written by the European Parliamentarian Richard Howitt, and thus became known as the Howitt Resolution. The report recommends the creation of a Model European Code of Conduct, which should contribute to greater standardisation of voluntary codes of conduct. It would comprise existing international standards in the field of human rights, labour standards and environmental standards. The aim of this code is to allow the impact of codes to spread beyond a limited number of companies with the necessary motivation and capacity to develop their own system. The report states that although it is directed towards voluntary codes of conduct, it should not be used as an excuse to refrain from international regulation.

Since the legal base for a binding European Code and monitoring system does not yet exist, the report proposes the establishment of a European Monitoring Platform, including provisions on complaint procedures and remedial action. Howitt also proposes that the European Parliament itself could organise public hearings about the business practices of European MNEs in developing countries. This idea is shows similarities with the rejected proposal during the OECD Guidelines Review of holding public hearings hosted by the NCP. Public hearing at a European level would have more standing than those held by the NCPs. Up to date, there has not been such a hearing, but a first hearing is planned in 2001.

The most important element of the Howitt Resolution lies in the call for standardisation of voluntary codes of conduct. Another important element is that Howitt's report is based on consultation with southern NGOs, which is rather unique for a governmental initiative. Richard Howitt consulted several southern NGOs from Africa, Asia and South America.<sup>51</sup> This consultation showed that these southern NGOs supported the concept of a European code, and in particular somewhere where complaints can be brought. These findings were backed up by new research in the Philippines, Pakistan, India, Bangladesh, and Sri Lanka, which were co-funded by the European Commission. Codes were supported, as long as there was freedom to organise. The strong emphasis on the freedom to organise can be explained by the fact that this right is regarded as fundamental and indispensable for further structural improvements and long-term empowerment.<sup>52</sup> The right to collective bargaining and freedom of association creates a space for workers to articulate their own needs and concerns, and to define their own movement. Such findings show the importance of consulting and involving southern NGOs in the early stages of development of an initiative.

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<sup>51</sup> Richard Howitt, *EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct and Monitoring Platform*, October 1998.

<sup>52</sup> Hong Kong Christian Industrial Committee (HKCIC) 'Report from China: Producing for Adidas and Nike', by Alice Kwan, April 25, 2000.

### 3.3 THE LEGAL CHARACTER OF THE OECD GUIDELINES

The concept of corporate social responsibility has grown in an era where regulations to control corporate behaviour have decreased due to the process of globalisation and economic liberalisation. Initiatives on codes of conduct are often seen as an answer to the decreasing regulatory framework to control the power and behaviour of MNEs. However, in discussions on the value of voluntary codes, trade unions and NGOs have repeatedly indicated that voluntary initiatives must be considered as a second-best option, and a supplementary approach to a broader range of binding regulatory measures. The value of voluntary codes are seen in (1) setting minimum standards and raising the level of general TNC behaviour; (2) raising consciousness about the need for standards; and (3) in providing guidance for laws that can be adopted at the national level.<sup>53</sup>

Legal issues have come increasingly under attention in the discussions about corporate social responsibility. The increasingly global impact of MNEs today and their complex structures of control make MNEs extremely difficult actors with regards to legal aspects. The basic principle that every natural or legal person operating within the territory of a state must act in compliance with the national laws and policies of the host state is complicated with MNEs. It can be difficult to determine the relationship between an MNE and its subsidiary in another country, and the subsequent degree of (legal) responsibility.

The need for legal regulation of the behaviour of MNEs in one way or another has become even more apparent since the failure of the WTO negotiations in Seattle. The failure of the WTO negotiations has shown that at present there may be no political viability to enforce global standards through a binding dispute settlement mechanism. This seems to be the case even more where social or environmental standards are at stake as the means to enforce these standards are limited to unbalanced trade-retaliation.

The fact that an international binding framework seems unfeasible in the current political environment is, amongst others things, due to an important issue of debate between developed and developing countries regarding social and environmental responsibility of MNEs. International initiatives to regulate corporate behaviour are often seen as protectionist measures from the North imposed on the South. The fear exists that only the rich and large companies from the North will be able to meet the high standards and companies from the South will be refused market access on the basis of not complying with the standards. Southern governments are sometimes the most vehemently opposed to social protection measures in international agreements, seeing them as either imperialistic or protectionist. However, initiatives like codes of conduct and the OECD Guidelines hold to account companies, not countries. The standards in codes of conduct are (at least should be) based on international standards, signed up to by Southern governments already.

Besides, what needs mentioning is that the view of the governments of southern countries does not necessarily reflect the view of the other stakeholders in MNE activities. Some of the southern adhering Governments, like Mexico, South Korea and Brazil were particularly opposed to strong and more binding Guidelines. For example, Mexico was strongly opposing the inclusion of the child labour provision in the OECD Guidelines, as well as the provisions on transparency of NCPs. This attitude against standards is a constant of the Mexican Government in negotiations on the MAI and at the WTO in Seattle. However, most development NGOs in Mexico have pursued the inclusion of labour and environmental provisions since NAFTA. In other words, many stakeholders in

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<sup>53</sup> Zeldenrust, I & Ascoly, N, 'Codes of conduct for Transnational Corporations; An Overview', IRENE publication, July 1998.

developing countries do favour more binding international regulation, as they see their Governments using poor enforcement of human rights, labour rights and environmental standards and bad salaries as their competitive advantage in the international sphere.

### ***The role of the Guidelines***

It is important to assess the place of the OECD Guidelines in this respect, even though they have remained voluntary, non-binding recommendations. The 2000 Review of the OECD Guidelines has brought issues concerning jurisdiction and extra-territoriality under renewed discussion, because of the clarification that the Guidelines apply to the worldwide operations of MNEs and because of the stronger implementation mechanism.

Not surprisingly, it was BIAC in particular that has been pointing to the more binding effects of the changes in the Guidelines' text and implementation mechanisms, and the respective problems this would imply concerning extra-territoriality. BIAC stated that the extra-territorial application of the Guidelines raises complicated problems of international law. Furthermore, BIAC pointed to the sensitivity from developing countries about issues affecting their sovereignty. Some of the provisions of the Guidelines may be in contradiction with national legislation or may lead to what they would consider interference in their national affairs. This fear is ungrounded given the fact that both within the Guidelines itself, as well as in the OECD Declaration as a whole, it is clearly stated that the Guidelines should not lead to conflicting requirements. The OECD Guidelines place national laws first. The obligations they place on MNEs can only supplement, never contradict obligations stemming from national laws.

On the other hand, TUAC and NGOs believed that some binding elements had to be included to ensure observance by MNEs. The discussion about the 'more binding' character of the OECD Guidelines refers to two different processes that can be seen in the development of international standards, that is the development of customary law, and the development of a normative force.

The fact alone that the OECD (and adhering) Governments have adopted the OECD Guidelines accords them a legal authority and qualifies them as potential sources of law. In the course of time, the principles could acquire the legal character of custom.<sup>54</sup> In this respect, it is important to note that in international law, the status of customary law is not inferior to other sources of law. Apart from that, there has been a steady increase in occasions where international law has become relevant and integrated into national law. With this in mind, it is understandable that BIAC has feared the more binding elements in the Guidelines, as they increase the chances of the Guidelines becoming customary law, and thus, increasingly adopted in national jurisdiction. Such a development does not necessarily have to occur with each provision in the Guidelines. In other words, legally non-binding instruments may contain provisions, which are legally binding, because they are either rules of customary international law, general principles of international law or restatements of provisions of treaties to which the parties to the instrument have acceded.<sup>55</sup>

Apart from this, there is a normative force of the Guidelines, which implies that the addressee of the norm is willing to accept it as a guideline for his behaviour. The general acceptance of the Guidelines by Governments and employers' and workers' organisations implies that it constitutes standards which society, as a whole requires to be upheld. In this sense, the Guidelines could be

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<sup>54</sup> Amnesty International and Pax Christi, 'Multinational Enterprises and Human Rights', Utrecht, November 1998.

<sup>55</sup> S.C. van Eyk (1995), 'The OECD Declaration and Decision Concerning Multinational Enterprises: An attempt to tame the Shrew.

considered to have morally binding aspects, even though they cannot be enforced by a court of law.

Van Eyk has pointed out four criteria's to assess the possible normative force of standards.<sup>56</sup> First, the precision of the formulation of the expected behaviour may increase the normative force. Vaguely drafted norms may be said to have less normative force. Secondly, the insertion of similar Guidelines in other codes of conduct may also increase the normative force because this demonstrates the importance of the norms. Thirdly, the normative force of a behavioural norm is enhanced by the existence of an effective supervisory mechanism. Finally, the fear of possible sanctions in case of non-compliance with the norm may have a positive effect on its normative force.

Looking at these criteria in relation to the Guidelines, it becomes clear that the revision OECD Guidelines has resulted in elements that contribute to their normative force, while other elements may hinder this development. The precision of formulation of the standards has increased compared to the 'old' Guidelines. However, the wording can still be considered rather vague. In particular, the chapeaus of the different chapters could lesson the normative force, as they contain wording that justifies circumvention of the standards in certain cases. To what degree the OECD Guidelines will be mentioned in other codes of conduct remains to be seen. Up to date, not many company codes of conduct or other codes mention the OECD Guidelines, but this may change as the Guidelines become more used and accepted. A supervisory mechanism, in the sense that MNEs are being actively checked for adherence is non-existent in the Guidelines, which decreases the normative force of the instrument. But, the existence of possible sanctions, public shaming, may again contribute to the normative force of the Guidelines.

The above discussion shows that the legal character of the Guidelines can be more important than their voluntary nature at first sight suggests. They can contribute to the development of customary law and they can be considered to have a normative force. However, the degree to which the Guidelines may become more and more accepted and integrated into national laws will depend on the effectiveness of the implementation mechanisms, and the use and acceptance by stakeholders.

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<sup>56</sup> Ibid, p. 229



## **PART IV                      CONCLUSIONS**

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The aim of this report was to analyse the outcome of the 2000 Review of the OECD Guidelines. The central question is whether the Review has led to a set of standards and implementation procedures that can be effective in ensuring corporate social responsibility. A number of different aspects are of importance in assessing the possible value and effectiveness of an instrument like the OECD Guidelines.

In order to answer the central question, this report has analysed:

- The key changes in content and implementation procedures that came out of the Review;
- The views of business and labour representatives and NGOs on the outcome of the Review;
- The developments and experiences with other initiatives in the field of corporate social responsibility;
- The position and added value of the OECD Guidelines in relation to these initiatives;
- The changes in the legal character of the OECD Guidelines and its role in relation to the development of an international binding framework to regulate the behaviour of MNEs.
- The views and experiences of NGOs in developing countries on voluntary initiatives such as the OECD Guidelines.

### ***Key changes in content and implementation procedures after the Review***

The 2000 Review has brought about considerable changes in the text of the Guidelines. The text has been rearranged, re-phrased and expanded in many areas. Some important recommendations towards MNEs have been added amongst the general policies concerning sustainable development, human rights, good corporate governance, effective self-regulation, protection of whistleblowers and an encouragement to apply the Guidelines in the supply chain of MNEs. Furthermore, there are significant additions in the individual chapters such as the use of environmental impact assessment, the precautionary principle, disclosure of information, child and forced labour, bribery and corruption, transfer pricing, and consumer interests like advertising and labelling. The OECD Guidelines therefore cover a broad spectrum of corporate social responsibility issues. Another important addition is the references in the commentaries to the Guidelines to key international standards such as the Universal Declaration of Human Rights, the Rio Declaration, the Aarhus Convention on Access to Information and Public Participation in Decision Making and the ILO Declaration of Fundamental Principles and Rights at Work. However, the commentaries have not been made part of the OECD Council Decision, and therefore, they have only an explanatory value.

Apart from these positive changes and additions to the text, the wording in the Guidelines remains vague and optional. Many of the recommendations to MNEs are weakened by phrases stating that MNEs should observe these recommendations: while taking into account the particular circumstances in each host country; while taking into account the prevailing labour relations and employment practices; with due regard taken of costs, business confidentiality and other competitive concerns; and 'where appropriate'. Furthermore, disclosure of information regarding the social and environmental performance of MNEs is given less importance than regular financial information. The undesirable effect of these additions is that they leave room for different interpretations, and therefore provide loopholes for MNEs to circumvent some of the most important elements of the Guidelines. Circumstances and employment practices in host countries like China and India can be quite different from the standards set forth in the Guidelines. Will these

circumstances be used by MNEs to argue that they do not have to apply the Guidelines in their operations in these countries?

Given the general unfamiliarity with and ineffectiveness of the Guidelines before the 2000 Review, the key test of the Guidelines is their implementation. The changes in the implementation procedures have focused on reviving the role of the NCPs. The NCPs are required to take their role and function in promoting observance of the Guidelines more seriously, and are asked to report yearly to the CIME about their activities and about the cases that have been handled. One of the most important elements is that apart from the business community and employee organisations, NCPs are now required to be open to complaints from NGOs and the public about specific cases as well. When such cases are raised, NCPs are required to act as a forum for conciliation and problem solving. However, when an agreement between the parties involved cannot be reached, the NCP is required to issue a statement, which should involve naming the company. When the breaches of the Guidelines occur in non-adhering countries with no NCP, then the NCP in the home country of the company is expected to be open to the complaint and similar procedures should be followed. Thus, at the national level, Governments could 'name and shame' companies that are found to be breaching the Guidelines. This threat of public exposure of their failure to adhere to the Guidelines could become an important incentive for MNEs to change their behaviour in accordance with the Guidelines.

The question whether or not a situation of 'name and shame' will arise remains largely open however. This is due to the fact that these procedures are laid out in the Procedural Guidance to the Council Decision, which means that NCPs cannot be forced to follow these procedures. Implementation of the new procedures will therefore rely on the will of Governments to apply them, which means that implementation of the Guidelines may vary widely from country to country. Another problem is that when the case is not handled by the NCP in a satisfactory way, NGOs and the interested public have no opportunity to make representations to the CIME, and the CIME will not reach conclusions on the conduct of individual enterprises.

### ***The views of business and labour representatives and NGOs on the outcome of the Review***

It is no surprise that none of the consulted parties is completely satisfied with the outcome of the Review. BIAC's main concerns focus on the supply chain responsibility, the implementation in non-adhering countries, and the issue of confidentiality, while TUAC and NGOs have raised concerns over the loop-holes in the text and the discretion given to NCPs that may lead to damaging variation in the standards of application. Furthermore, TUAC and the consulted NGOs have stated that the adoption of the new Guidelines is seen by them as a first step to more binding rules, and that they will continue to call for a binding international instrument to regulate the conduct of MNEs.

However, the Working Party on the Guidelines has to a certain extent managed to accommodate the demands from the different parties. Even though BIAC, TUAC and the consulted NGOs still have a number of important objections and reservations about the content and implementation procedures, they have stated that the current Guidelines represent a compromise in many respects. This view is also based on the expectation that the CIME will strive for continuous improvement, in particular by starting a new Review within two to three years. Each of the different parties have declared to be willing to work with the Guidelines, either through active participation in the NCPs, or by bringing forward new cases to test the effectiveness of the complaints procedure. The reason that the Guidelines are given the benefit of the doubt is that all parties have put major emphasis on the implementation procedures that will still have to prove their effectiveness in the

future. In this respect, it is interesting to note that the different parties have different expectations with regard to the implementation. BIAC expects the CIME and the NCPs to implement the Guidelines in the context of the whole OECD Declaration, which means they expect a great deal of flexibility in the interpretation of the Guidelines in non-adhering countries. They also expect a great deal of sensitivity from the NCPs with regard to confidentiality in cases that may harm their business reputation. On the other hand, TUAC and NGOs expect a truly worldwide application, which means that NCPs should be equally open to cases in non-adhering countries. And, they expect full transparency on proceedings and outcomes, which would include naming the company involved, because the risk of a harmed business reputation is seen as the incentive to adhere to the Guidelines. Thus, the degree of support for the OECD Guidelines from business, labour and NGOs will largely depend on how NCPs are going to function and how they are going to handle cases.

### ***The developments and experiences with other initiatives in the field of corporate social responsibility***

The OECD Guidelines do not stand on their own. Initiatives to influence the behaviour of MNEs can be seen at many different levels in many different areas and are growing rapidly. This report has divided these initiatives into governmental and non-governmental as a way of categorisation, with the focus on initiatives in the field of labour rights. The overview has shown that inter-governmental initiatives like the ILO Declarations, the UN Code of Conduct or the Global Compact may have been useful points of reference for other initiatives, but that effective implementation of these standards has been largely absent, due to the lack of enforcement mechanisms and systems for monitoring and verification of compliance.

Compared to that, the developments that are taking place at the non-governmental level are more interesting. There is again a wide variety of codes in this category, like model codes, company codes of conduct and negotiated codes. The majority of company codes are extremely vague and include no reference to international standards, but some of the more progressive companies have, usually due to public exposure of misbehaviour, drafted codes similar to the ICFTU model code, and include provisions on (living) wages, hours of work and security of employment. Another interesting development is the increasing willingness of companies, trade unions and NGOs to co-operate with each other through negotiated codes and agreements. In several cases, a multi-stakeholder approach can be seen in solving problems related to MNE activities. In the field of implementation, various developments can be seen as well. Different stakeholders on implementation, monitoring and verification of compliance now gain experiences. Some individual companies hire auditing firms to verify compliance to the relevant standards through 'social audits'. In several multi-stakeholder initiatives, experiences are gained in developing systems for monitoring and verification that are considered independent by all parties involved, including the workers concerned. Lessons are learned as how to implement the standards in practice and the code provisions are translated into auditable standards. Such initiatives may be called best practice as they guarantee involvement of stakeholders in the whole process, and are therefore most likely to gain credibility and acceptance.

### ***The position and added value of the OECD Guidelines in relation to these initiatives***

The comparison of the revised OECD Guidelines with other governmental initiatives in the field of corporate accountability shows that the OECD Guidelines are the most comprehensive in terms of

content and implementation procedures at an international level. Therefore, the OECD Guidelines have the potential to become an important international instrument to promote corporate social responsibility. The question remains however, whether solutions in the field of corporate social responsibility should be sought at the OECD level. Despite the fact that the OECD Guidelines have worldwide applicability, it remains an instrument from the OECD region, with a potential distrust from non-OECD countries. Initiatives from institutions with a broader base, like the UN and the ILO, may ultimately have more credibility. However, the failure of the UN Code of Conduct in 1993 and the highly optional and voluntary road that is now chosen at the UN with the Global Compact shows that no realistic alternative from the ILO or the UN can be expected very soon.

In comparison to non-governmental initiatives, several elements can be highlighted that define the position and added value of the OECD Guidelines. The OECD Guidelines' broad coverage of issues is clearly an added value, in the sense that a more integrated approach can be used to address the social responsibility of MNEs. There are not many initiatives that addresses human rights, labour rights and environmental issues at the same time, which has made it possible for MNEs to secure a responsible image based on limited achievements in isolated areas. Furthermore, the OECD Guidelines

However, the OECD Guidelines do not equal what is now becoming best-practice, what is lacking is living wage, hours of work, which can be seen in for example the SA 8000. If the Guidelines will be reviewed within a few years this could be added. The Commentaries now refer to the 1998 ILO Declaration, which also includes only the four core labour standards. If initiatives such as the multi-stakeholder initiatives mentioned in Part III (ETI, SA 8000) becomes more widespread, the standards may be adopted in the OECD Guidelines.

The OECD Guidelines' major advantage is at the same time its major disadvantage. The broad coverage of issues is unequalled at this level, but this makes it very difficult to implement the standards and verify compliance. Therefore, the position of the OECD Guidelines to other non-governmental initiatives could be seen as complementary. The OECD Guidelines can provide a general assessment of the ethical performance of a company through an integrated approach, but the actual implementation of the standards should be worked on a sector-by-sector basis through multi-stakeholder initiatives. Hopefully, companies are going to regard the OECD Guidelines as complementary as well. The danger exists that they will be used by MNEs as an argument to refrain from further involvement in other initiatives.

Another aspect that makes the OECD Guidelines complementary to most other initiatives is the complaints procedure. If the NCP points are going to follow the Procedural Guidance, then the OECD Guidelines provide an added value, with a complaints procedure at the national level.

### ***The changes in the legal character of the OECD Guidelines***

From the beginning of the Review it was clear that the OECD Guidelines would remain voluntary. This has not changed the fact that the Guidelines can play an important role in the international juridical sphere. They are intergovernmental recommendations to MNEs and as such are potential sources of law, which means they could become customary law. They may not be binding themselves, but they may become increasingly adopted into national laws.

Whether or not the OECD Guidelines will bear a normative force, in the sense that MNEs feel obliged to observe the standards, depends on the world-wide use and acceptance by different

stakeholders, including trade unions, NGOs, national Governments, and other international institutions. This in turn will depend on the effectiveness of the implementation procedures that are needed to gain this acceptance.

### ***The views and experiences of NGOs in developing countries on voluntary initiatives***

Experiences in developing countries have shown that unless there is a detailed implementation scheme for monitoring and independent verification, it is unlikely that there will be any real change. As there are no implementation procedures addressed to MNEs directly in the OECD Guidelines, it seems unlikely that they will have any direct effect on the situation in developing countries, unless MNEs complement their adherence to the Guidelines by taking part in initiatives that aim to develop systems for monitoring and verification for ensuring compliance with the standards in their supply chains in developing countries.

The implementation of the worldwide applicability of the OECD Guidelines is the major challenge for the OECD, for adhering Governments and for MNEs themselves. A complaints procedure that is open to complaints from organisations in developing countries could be an added value. However, acceptance and credibility for voluntary initiatives such as the OECD Guidelines can only be gained when real changes can be seen in the behaviour of MNEs in developing countries, and their ability to change the situation in their supply chain. With the very weak wording on supply chain responsibility and the limited provisions on implementation in non-adhering countries, the role of the OECD Guidelines in solving MNE related problems in developing countries might be limited.



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# ANNEX I FULL TEXT OF THE OECD GUIDELINES

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## PREFACE

The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. 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 improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.

International business has experienced far-reaching structural change and the Guidelines themselves have evolved to reflect these changes. With the rise of service and knowledge-intensive industries, service and technology enterprises have entered the international marketplace. Large enterprises still account for a major share of international investment, and there is a trend toward large-scale international mergers. At the same time, foreign investment by small- and medium-sized enterprises has also increased and these enterprises now play a significant role on the international scene. Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.

The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services.

The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join OECD economies to each other and to the rest of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that consumers want to buy at competitive prices and when they provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital in host countries.

The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders. Multinational enterprises have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives. The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets.

Many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Today's competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate standards and principles of conduct in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.

Many enterprises have responded to these public concerns by developing internal programs, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas. These efforts have also promoted social dialogue on what constitutes good business conduct. The Guidelines clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises. Thus, the Guidelines both complement and reinforce private efforts to define and implement responsible business conduct.

Governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The post-war period has seen the development of this framework, starting with the adoption in 1948 of the Universal Declaration of Human Rights. Recent instruments include the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21 and the Copenhagen Declaration for Social Development.

The OECD has also been contributing to the international policy framework. Recent developments include the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and of the OECD Principles of Corporate Governance, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, and ongoing work on the OECD Guidelines on Transfer Pricing for Multinational Enterprises and Tax Administrations.

The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with the many businesses, trade unions and other non-governmental organizations that are working in their own ways toward the same end. Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of firms, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the Guidelines are committed to continual improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.

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## **I. CONCEPTS AND PRINCIPLES**

The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.

Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.

A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.

The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.

Governments wish to encourage the widest possible observance of the Guidelines. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines recommendations to the fullest extent possible.

Governments adhering to the Guidelines should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.

Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise.

Governments adhering to the Guidelines set them forth with the understanding that they will fulfill their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.

The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.

Governments adhering to the Guidelines will promote them and encourage their use. They will establish National Contact Points that promote the Guidelines and act as a forum for discussion of all matters relating to

the Guidelines. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the Guidelines in a changing world.

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## **II. GENERAL POLICIES**

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.
11. Abstain from any improper involvement in local political activities.

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## **III. DISCLOSURE**

Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.

Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.

Enterprises should also disclose material information on:

- a. The financial and operating results of the company;
- b. Company objectives;
- c. Major share ownership and voting rights;
- d. Members of the board and key executives, and their remuneration;
- e. Material foreseeable risk factors;
- f. Material issues regarding employees and other stakeholders;
- g. Governance structures and policies.

Enterprises are encouraged to communicate additional information that could include:

- a. Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated;
- b. Information on systems for managing risks and complying with laws, and on statements or codes of business conduct;
- c. Information on relationships with employees and other stakeholders.

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#### **IV. EMPLOYMENT AND INDUSTRIAL RELATIONS**

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1.
  - a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;
  - b) Contribute to the effective abolition of child labour;
  - c) Contribute to the elimination of all forms of forced or compulsory labour;
  - d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies, which specifically promote greater equality of employment opportunity, or relates to the inherent requirements of a job.
2.
  - a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;
  - b) Provide information to employee representatives, which are needed for meaningful negotiations on conditions of employment;
  - c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
3. Provide information to employees and their representatives, which enable them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
4.
  - a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;

- b) Take adequate steps to ensure occupational health and safety in their operations.
5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.
  6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.
  7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.
  8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

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## V. ENVIRONMENT

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:
  - collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
  - establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and
  - regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.
2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
  - provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and
  - engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.
4. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.
5. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.
6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:
  - a. Adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;
  - b. Development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;
  - c. Promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise; and
  - d. Research on ways of improving the environmental performance of the enterprise over the longer term.
7. Provide adequate education and training to employees in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies.
8. Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.

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## **VI. COMBATING BRIBERY**

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.
3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should

also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.

4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.
6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

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## **VII. CONSUMER INTERESTS**

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide. In particular, they should:

1. Ensure that the goods or services they provide meet all agreed or legally required standards for consumer health and safety, including health warnings and product safety and information labels;
2. As appropriate to the goods or services, provide accurate and clear information regarding their content, safe use, maintenance, storage, and disposal sufficient to enable consumers to make informed decisions;
3. Provide transparent and effective procedures that address consumer complaints and contribute to fair and timely resolution of consumer disputes without undue cost or burden;
4. Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair;
5. Respect consumer privacy and provide protection for personal data;
6. Co-operate fully and in a transparent manner with public authorities in the prevention or removal of serious threats to public health and safety deriving from the consumption or use of their products.

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## **VIII. SCIENCE AND TECHNOLOGY**

Enterprises should:

1. Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.
2. Adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights.
3. When appropriate, perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an S&T capacity and encourage their training, taking into account commercial needs.
4. When granting licenses for the use of intellectual property rights or when otherwise transferring technology, do so on reasonable terms and conditions and in a manner that contributes to the long term development prospects of the host country.

5. Where relevant to commercial objectives, develop ties with local universities, public research institutions, and participate in co-operative research projects with local industry or industry associations.

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## **IX. COMPETITION**

Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should:

1. Refrain from entering into or carrying out anti-competitive agreements among competitors:
  - a) To fix prices;
  - b) To make rigged bids (collusive tenders);
  - c) To establish output restrictions or quotas; or
  - d) To share or divide markets by allocating customers, suppliers, territories or lines of commerce.
2. Conduct all of their activities in a manner consistent with all applicable competition laws, taking into account the applicability of the competition laws of jurisdictions whose economies would be likely to be harmed by anti-competitive activity on their part.
3. Co-operate with the competition authorities of such jurisdictions by, among other things and subject to applicable law and appropriate safeguards, providing as prompt and complete responses as practicable to requests for information.
4. Promote employee awareness of the importance of compliance with all applicable competition laws and policies.

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## **X. TAXATION**

It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

## **ANNEX II                      DECISION OF THE COUNCIL**

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The COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Declaration on International Investment and Multinational Enterprises (the "Declaration"), in which the Governments of adhering countries ("adhering countries") jointly recommend to multinational enterprises operating in or from their territories the observance of Guidelines for Multinational Enterprises (the "Guidelines");

Recognising that, since operations of multinational enterprises extend throughout the world, international co-operation on issues relating to the Declaration should extend to all countries;

Having regard to the Terms of Reference of the Committee on International Investment and Multinational Enterprises, in particular with respect to its responsibilities for the Declaration [C(84)171(Final), renewed in C/M(95)21];

Considering the Report on the First Review of the 1976 Declaration [C(79)102(Final)], the Report on the Second Review of the Declaration [C/MIN(84)5(Final)], the Report on the 1991 Review of the Declaration [DAFFE/IME(91)23], and the Report on the 2000 Review of the Guidelines [C(2000)96];

Having regard to the Second Revised Decision of the Council of June 1984 [C(84)90], amended June 1991 [C/MIN(91)7/ANN1];

Considering it desirable to enhance procedures by which consultations may take place on matters covered by these Guidelines and to promote the effectiveness of the Guidelines;

On the proposal of the Committee on International Investment and Multinational Enterprises:

DECIDES:

To repeal the Second Revised Decision of the Council of June 1984 [C(84)90], amended June 1991 [C/MIN(91)7/ANN1], and replace it with the following:

### **I. National Contact Points**

1. Adhering countries shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines so that they can contribute to the solution of problems which may arise in this connection, taking due account of the attached Procedural Guidance. The business community, employee organisations, and other interested parties shall be informed of the availability of such facilities.
2. National Contact Points in different countries shall co-operate if such need arises, on any matter covered by the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.
3. National Contact Points shall meet annually to share experiences and report to the Committee on International Investment and Multinational Enterprises.

## **II. The Committee on International Investment and Multinational Enterprises**

1. The Committee on International Investment and Multinational Enterprises ("CIME" or "the Committee") shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.
2. The Committee shall periodically invite the Business and Industry Advisory Committee to the OECD (BIAC), and the Trade Union Advisory Committee to the OECD (TUAC) (the "advisory bodies"), as well as other non-governmental organisations to express their views on matters covered by the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held at their request.
3. The Committee may decide to hold exchanges of views on matters covered by the Guidelines with representatives of non-adhering countries.
4. The Committee shall be responsible for clarification of the Guidelines. Clarification will be provided as required. If it so wishes, an individual enterprise will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests. The Committee shall not reach conclusions on the conduct of individual enterprises.
5. The Committee shall hold exchanges of views on the activities of National Contact Points with a view to enhancing the effectiveness of the Guidelines.
6. In fulfilling its responsibilities for the effective functioning of the Guidelines, the Committee shall take due account of the attached Procedural Guidance.
7. The Committee shall periodically report to the Council on matters covered by the Guidelines. In its reports, the Committee shall take account of reports by National Contact Points, the views expressed by the advisory bodies, and the views of other non-governmental organisations and non-adhering countries as appropriate.

## **III. Review of the Decision**

This Decision shall be periodically reviewed. The Committee shall make proposals for this purpose.

## ANNEX III PROCEDURAL GUIDANCE

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### I. National Contact Points

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

#### A. Institutional Arrangements

Consistent with the objective of functional equivalence, adhering countries have flexibility in organising their NCPs, seeking the active support of social partners, including the business community, employee organisations, and other interested parties, which includes non-governmental organisations.

Accordingly, the National Contact Point:

1. May be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organised as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organisations and other interested parties may also be included.
2. Will develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning of the Guidelines.

#### B. Information and Promotion

National Contact Points will:

1. Make the Guidelines known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about the Guidelines, as appropriate.
2. Raise awareness of the Guidelines, including through co-operation, as appropriate, with the business community, employee organisations, other non-governmental organisations, and the interested public.
3. Respond to enquiries about the Guidelines from:
  - (a) Other National Contact Points;
  - (b) The business community, employee organisations, other non-governmental organisations and the public; and
  - (c) Governments of non-adhering countries.

### *C. Implementation in Specific Instances*

The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
  - (a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts;
  - (b) Consult the National Contact Point in the other country or countries concerned;
  - (c) Seek the guidance of the CIME if it has doubt about the interpretation of the Guidelines in particular circumstances;
  - (d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.
4.
  - (a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.
  - (b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.
5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

### *D. Reporting*

1. Each National Contact Point will report annually to the Committee.
2. Reports should contain information on the nature and results of the activities of the National Contact Point, including implementation activities in specific instances.

## **II. Committee on International Investment and Multinational Enterprises**

1. The Committee will discharge its responsibilities in an efficient and timely manner.
2. The Committee will consider requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the Guidelines in particular circumstances.
3. The Committee will:
  - (a) Consider the reports of NCPs.
  - (b) Consider a substantiated submission by an adhering country or an advisory body on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances.
  - (c) Consider issuing a clarification where an adhering country or an advisory body makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances.
  - (d) Make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines.
4. The Committee may seek and consider advice from experts on any matters covered by the Guidelines. For this purpose, the Committee will decide on suitable procedures.