

## MAKING COMPANIES ACCOUNTABLE

### An NGO Report on Implementation of the OECD Guidelines for Multinational Enterprises by National Contact Points

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Assessing the second year of implementation of the *OECD Guidelines for Multinational Enterprises* is a challenge given the limited NGO experience of the procedures. Undoubtedly NGOs, especially those based in OECD countries, are becoming more familiar with the *Guidelines* thanks to the promotional efforts of National Contact Points (NCPs), the secretariat of the Committee on International Investment and Multinational Enterprises (CIME), and the dissemination efforts of the Trade Union Advisory Committee (TUAC).<sup>1</sup> NGOs like ANPED have also devoted time and energy to sharing information about the *Guidelines* particularly in the preparations leading up to the World Summit for Sustainable Development in Johannesburg. But, unlike the international trade union movement, which has filed some fifteen cases related to labour, employment and workplace issues, NGOs have been slow to present cases concerning alleged corporate misconduct to National Contact Points. To date only a handful of cases have been submitted by NGOs under the revised procedures.

It is something of a paradox that at a time of increasing demands for greater corporate accountability, the only government-backed mechanism in existence that offers civil society the prospect of a formal inquiry into company misconduct, is being cold-shouldered by activist NGOs, who seem unimpressed by the fact that the *Guidelines* remain the only comprehensive, multilaterally endorsed code of conduct for multinational enterprises. There are a number of concerns - both procedural and substantive - that may explain this lack of enthusiasm.

Many NGOs believe that simply by using the *Guidelines* and the implementation procedures, they may be accused of legitimising an instrument that is fundamentally flawed. There is a widespread concern that the *Guidelines* fail to empower affected communities and that what is required, according to Friends of the Earth and others, is a binding agreement that would incorporate “legal rights for citizens and communities affected by corporate activities incorporating the direct liability of ‘foreign’ multinationals”. These NGOs are critical of the “inherent limits of voluntary codes such as the *OECD Guidelines for Multinational Enterprises* which cannot be seen as an alternative to a binding and enforceable framework”.<sup>2</sup> Human Rights Watch, considers that “non binding initiatives like the *Guidelines* are important first steps towards achieving corporate compliance with international labour and human rights standards” but warns that “as long as National Contact Points address allegations of non-compliance through consensual non-adversarial means and by issuing unenforceable recommendations, uniform

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1 TUAC’s publication, *The OECD Guidelines on Multinationals: A Users Guide* is widely used by NGOs.

2 FOEI position paper for the WSSD, January 2002

respect for the Guidelines principles will not be achieved”.<sup>3</sup> A rapid survey of the experience with the procedures so far would indicate that NCPs and governments will have to do much more to convince their NGO critics of the value of the *Guidelines*.

The procedures for filing complaints, or ‘specific instances’ concerning possible breaches of the *Guidelines* are not well known. In line with CIME’s guidance to NCPs, the procedures are supposed to have been kept simple, as befits the non-judicial character of the mechanism. NCPs are also supposed to ensure ‘functional equivalence’ in other words though CIME recognises that although there may be some differences in the way that the NCPs are organised they should all function in “a visible, accessible, transparent and accountable way”.<sup>4</sup> Major discrepancies are already apparent in the ways different NCPs operate. NGOs have at times found themselves confronting legalistic demands from the NCPs before being allowed to file cases. A German NGO, for example, making an enquiry, was told by the NCP that it would have to produce a power of attorney before a case concerning the operations of a multinational enterprise in Indonesia could be submitted. In France, the NCP will not accept cases from NGOs unless they are channelled through a trade union.

The NCPs are usually middle ranking or junior civil servants in the investment department of the trade or finance ministries, few would appear to have legal or human rights training. NGOs do not get the impression that in the selection of NCPs, governments exert themselves to appoint individuals with relevant experience of casework or knowledge of other complaints mechanisms. This is a particular problem for single ministry NCPs (which are the majority) but even where the NCPs can draw on support from other ministries in many cases they appear to lack both resources and the necessary status to give the cases submitted much priority attention within government. It is not immediately apparent that the NCPs, drawn as they are for the most part from the ranks of government officials who work most closely with the private sector helping them secure investment advantages overseas, are best placed to carry out simultaneously a watch-dog role. If OECD governments (and other adhering governments) are serious about the value of the *Guidelines* and implementation procedures in holding companies to account, then they should consider separating out the promotional aspect of the *Guidelines* work (which could remain the responsibility of investment officials) from the investigative, watchdog function, which should be assigned to an independent, law officer (the modalities of action of other quasi-governmental quality assurance mechanisms or an Ombudsman could be adapted for this purpose).

Another related problem for NGOs is that, unlike other comparable mechanisms, the procedures do not offer clearly specified time frames for dealing with complaints. This is supposed to offer the advantage of flexibility but in reality provides a perfect cover for inaction and foot dragging. The US NCP, for example, has sat on cases for over a year claiming that he is endeavouring to assess their admissibility. He has failed to take advantage of the provision that an NCP should “seek the advice of the CIME if it has doubt about the interpretation of the *Guidelines* in particular circumstances”.<sup>5</sup> The UK is little better: a well-documented complaint against a leading mining company has been allowed to gather dust for nearly 9 months. Most NCPs, with a few honourable exceptions such as the Canadian and Dutch NCPs, are extremely deficient in the way that they communicate with NGOs. As a result, NGOs are left in the dark about what stage their complaint has reached. Inevitably the lack of feedback strengthens the impression

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3 Carol Pier, Labour Rights and Trade Researcher, Human Rights Watch Presentation to the OECD Roundtable on Corporate Responsibility – Supply Chains and the OECD Guidelines for Multinational Enterprises, 19 June 2002

4 OECD, “Commentary on the Implementation Procedures” *The OECD Guidelines for Multinational Enterprises*, June 2000

5 Procedural Guidance, Section C 2 Implementation in Specific Instances, *The OECD Guidelines for Multinational Enterprises*, June 2000

that the procedures are there to protect the interests of companies rather than to promote the welfare and rights of the workforce or the communities in which the companies operate. It adds grist to the mill of those who believe that multinational corporations have greater influence over the NCPs and the proceedings than NGOs or trade unions and undermines the core principle of ‘equality of arms’, which is the hallmark of a *bona fide* complaints mechanism.

During the review the NGO negotiating group expressed the view that the *Guidelines* would only deliver increased accountability and the desired improvements in corporate behaviour if a) public concerns about the behaviour of MNEs could be examined in a fair, timely and transparent manner; and, b) a robust and accountable implementation process was adopted by NCPs with a presumption of transparent reporting of rulings on corporate behaviour.<sup>6</sup> Of great concern to NGOs is the creeping bias towards blanket confidentiality, which far exceeds what was recommended by CIME in its Procedural Guidance to NCPs. Under pressure from the business sector, some NCPs are seeking to prevent NGOs from putting into the public domain details of their complaints about particular companies. A Dutch NGO was reprimanded for issuing a press release announcing that it had filed a complaint (‘specific instance’) concerning the alleged use of child labour in the football stitching industry in India, despite a FIFA ban. The UK NCP informed another NGO that it should not circulate the text of its submission in which a major mining company was accused of numerous breaches of the *Guidelines* in Zambia. Yet, the Procedural Guidance reiterates that ‘transparency’ is recognised as a general principle for the conduct of NCPs in their dealings with the public. It notes that there are “specific circumstances’ where confidentiality is important. Each NCP is obliged to protect ‘sensitive business information’ and other information such as “the identity of individuals involved in the procedures”. It is only after a case has been submitted and the proceedings move into the second phase (when “the issues raised merit further examination”) that ‘confidentiality of the proceedings’ will be maintained.<sup>7</sup> There are ample measures to protect business confidentiality as “information and views provided by another involved during the proceedings will remain confidential unless that other party agrees to their disclosure”.<sup>8</sup> The Commentary on the Implementation Procedures makes clear that “the proceedings associated with implementation will normally be confidential, the results will normally be transparent”.<sup>9</sup> NCPs are now in effect triggering the ‘confidentiality rule’ at a much earlier stage in the process possibly to win business confidence. NGOs might be prepared to accept this arbitrary shift in the procedures if it was leading to a swifter process and enhanced effectiveness. So far, in respect of most of the specific instances raised by NGOs and the trade unions, this is not the case.

Further evidence of creeping confidentiality emerged during the roundtable discussion of supply chain issues.<sup>10</sup> The purpose of the roundtables, which are held every year at the time of the annual meeting, is to help build the capacity of NCPs and enable them to deal more effectively with specific instances. They are also supposed to provide NCPs with the opportunity of discussing a broader range of issues of direct relevance to the *Guidelines* that are at the heart of current debates about the value of international investment. But by discouraging explicit references during the consultation on the implementation of the *Guidelines* about cases that have been filed, CIME is inevitably weakening the potential for learning from the experience of different NCPs.

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6 NGO negotiating group statement on the Revision of the OECD Guidelines for Multinational Enterprises, submitted to CIME, 15 May 2000

7 Procedural Guidance, Section C – 4, Implementation in Specific Instances, *The OECD Guidelines for Multinational Enterprises*, June 2000

8 Procedural Guidance, Section C-4

9 Unless preserving confidentiality would be in the best interests of effective implementation of the *Guidelines*

10 OECD Roundtable on Corporate Responsibility, 19 June 2002

During the June 2002 Roundtable, some NCPs and BIAC took objection to the NGO presentations. There were claims that supply chain issues were outside the scope of the Guidelines, despite references to both trade and investment in the Preface and the explicit provision in the text dealing with “suppliers and sub-contractors”.<sup>11</sup> The Commentary on General Policies devotes a whole paragraph to the importance of the Guidelines for “suppliers, contractors, sub-contractors licensees and other entities with which MNEs enjoy a working relationship”<sup>12</sup>. Others objected to the naming of companies by Human Rights Watch even though its concerns were already in the public domain and had been communicated to the companies involved.<sup>13</sup> The intervention by the International Textile, Garment and Leather Workers’ Federation, regarding the alleged abuse of workers’ rights in Guatemala in Korean-owned factories provoked a similar response. CIME then took the decision to remove all references to specific companies in its record of the meeting and outlined a draft editorial policy whereby in future references to companies would be allowed in contributions from the business sector but not from the trade unions or NGOs. Such grossly unequal treatment would have severely compromised the OECD’s objectivity and fortunately at CIME’s September 2002 consultation the proposal was dropped.

But the issue has not gone away. CIME’s role as the authority on the interpretation of the Guidelines is being undermined by this obsessive secrecy. There is no central register of cases that have been submitted to NCPs. In their annual reports, with a few notable exceptions, NCPs fail to provide details about the nature of the cases that have been raised and the companies involved. Even in closed meetings, NCPs ‘hold their cards close to their chests’. In such an atmosphere it is hard to see how progress can be made and consistency in the application and interpretation of the Guidelines achieved.

The contention that the Guidelines (because they were drawn up under the auspices of the Committee on International Investment and Multinational Enterprises) must not be used in relation to trade goes beyond concerns about the exposure of large retailing and merchandising companies over supply chain issues. Globalised production systems and intra-company trading make it impossible to draw a meaningful distinction between trade and investment. But the issue is clearly a response to the demands by NGOs for their governments to follow the lead of the Dutch Government and condition the award of export credits and guarantees on a company’s adherence to and implementation of the Guidelines.

But as the TUAC report shows and as the case raised by Oxfam Canada suggests in certain circumstances and with a degree of political will on the part of the NCPs, the procedures can help forestall or resolve some problems. The timely intervention of the Canadian NCP removed the immediate threat of violent evictions of peasant farmers from mine land in Zambia. The Dutch NCP has been active in facilitating dialogue between companies and their NGO critics about ways of tackling the complex problem of child labour in India in the sports sector. It is too early to say whether these are the first, faltering steps in a process that will eventually make a significant impact on company behaviour or whether the problems with the implementation procedures are symptoms of a deeper malaise that will inevitably consign the Guidelines to irrelevance?

The Guidelines have yet to prove their worth in addressing the major challenge of corporate behaviour. As yet, NGOs have little reason to feel confident that breaches of the Guidelines will be taken seriously by governments even in conflict zones or countries with a poor human rights record. When the French NCP had to consider the involvement of a French company and the issue of forced labour in Myanmar

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- 11 Preface paragraph 4; General Policies, Chapter II, paragraph 10, *The OECD Guidelines for Multinational Enterprises*, June 2000
- 12 Commentary on General Policies, paragraph 10 *The OECD Guidelines for Multinational Enterprises*
- 13 Human Rights Watch, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador’s Banana Plantations*, April 2002

his “recommendation” was to urge companies “to do everything possible in order to avoid direct or indirect recourse to forced labour in the normal course of their operations, in their relations with sub-contractors”. CIME was equally pusillanimous and in its paper “Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses” it merely invites companies “to improve management in the immediate vicinity of their operations (especially of security forces and resettlement operations)”.<sup>14</sup>

Recent high-level pronouncements have raised expectations about the ability of CIME and the NCPs to use the Guidelines to curb the most unacceptable and egregious corporate behaviour. The G8’s Africa Action Plan launched at the 2002 Summit, referred to the role of the Guidelines in “intensifying support for the adoption and implementation of effective measures to combat corruption, bribery and embezzlement”. The UK Prime Minister Tony Blair, after a tour of West Africa, called for a clampdown on exploitative company behaviour and strongly supported the use of the Guidelines as a means of promoting responsible behaviour of companies in conflict zones in Africa.<sup>15</sup> These exhortatory statements will now be put to the test. In a report to the Security Council, an expert panel appointed by UN Secretary General, Kofi Annan, to investigate the illegal exploitation of natural resources and other forms of wealth from the Democratic Republic of Congo, concluded that steps need to be taken against multinationals that in its view “are in violation of the OECD Guidelines for Multinational Enterprises”.<sup>16</sup> The Panel lists 85 multinational companies many of them based in the UK, Belgium, Canada and the US that have violated the Guidelines in their dealings with “criminal networks” that have pillaged the country.

*OECD Governments have the obligation to ensure that enterprises in their jurisdiction do not abuse principles of conduct that they have adopted as a matter of law. They are complicit when they do not take remedial measures.*<sup>17</sup>

The future of the Guidelines now hangs in the balance. NGOs in Canada and Britain have already called for a full investigation they will be watching closely to see how the OECD governments respond to the charge that their major multinationals have aided and abetted the plunder of the Democratic Republic of Congo.

October 2002

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14 Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises: Overview and Summary of Information contained in NCP Reports DAF/IME/NCP(2002)2

15 *Financial Times*, February 7 2002

16 UN Security Council, Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, [ S/2002/1146] 16 October 2002

17 Final report of the UN Panel of Experts, paragraph 178