



DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

**OECD Guidelines for Multinational Enterprises:
2002 Annual Meeting of the National Contact Points**

**CONTRIBUTIONS BY BUSINESS, TRADE UNIONS
AND NON-GOVERNMENTAL ORGANISATIONS**

This document contains the submissions made by business, trade unions and NGOs during the consultations held within the framework of the 2002 Annual Meeting of the National Contact Points which took place on 18 June 2002. The views expressed are those of the authors, and do not necessarily reflect those of the Organisation or of its member countries.

BIAC STATEMENT

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BIAC welcomes this important opportunity to present to you our assessment and experience regarding implementation of the revised Guidelines during the past year.

Our members very much appreciate the Secretariat's NCP Summary Report, which we find to be a fair and positive assessment of NCP activities to promote and implement the Guidelines. However, I must emphasise that BIAC's promotion of the Guidelines merited more attention in the report, especially considering the more extensive coverage of TUAC promotional activities. During the past year, BIAC members have taken active steps to publicise and promote the guidelines through various channels, including web sites, publications in trade and business journals, press conferences, seminars and workshops aimed at the business community.

Our members have also found TUAC's work on this front to be helpful, particularly its informative User's Guide on the Guidelines. That said, while the User's Guide provides a practical tool for initiating an inquiry into specific instances, equal emphasis should be placed on the promotion of good business practices. It must be remembered that the Guidelines were intended to provide a framework for good business conduct and, as part of the wider OECD Declaration on International Investment and Multinational Enterprises, to encourage a balance of responsibility between international business and governments. We invite TUAC to strengthen its User's Guide and other promotional efforts by focusing more on these positive aspects of the Guidelines.

I must also address two areas of concern to BIAC. First, our members have expressed concern that certain member and adhering countries may misunderstand the voluntary nature of the Guidelines, especially given the proposals in some circles (the European Union parliament, for example) to make the Guidelines less voluntary. Therefore, we are grateful for CIME's efforts to maintain the voluntary nature of the Guidelines throughout its efforts to promote and implement them. We urge the CIME to continue its leadership with regard to this fundamental aspect of the Guidelines.

Second, BIAC members have also raised some concern about the bullet point item on page 16 of the NCP Summary Report, which poses the question of whether the Guidelines refer only to investment or to both trade and investment. The Guidelines are annexed to the OECD Declaration on International Investment and Multinational Enterprises, and clearly apply exclusively to investment, not trade. The official and clear aim of the Guidelines is to improve the climate for foreign direct investment and promote the positive contribution that multinational enterprises can bring.

In general, BIAC is very pleased with NCPs' handling of specific instances. We have no complaints about NCP activities, and we know of no problems or conflicts concerning specific instances. We are especially appreciative of NCPs' and CIME's consistent efforts to respect and maintain the confidentiality of NCP processes.

We fully endorse the NCPs' ongoing efforts to promote the Guidelines, but recommend against using CEO knowledge of the Guidelines as a benchmark to measure the success of those efforts. On a final note, BIAC is pleased to do our part in ensuring the success of the Guidelines by continuing to actively promote and encourage good business conduct.

TUAC WORKING PAPER ON THE FUNCTIONING OF NATIONAL CONTACT POINTS AND HOW TO IMPROVE THE PROMOTION AND IMPLEMENTATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Background

This working paper is intended to stimulate trade union discussions on how to make National Contact Points (NCPs) more effective. It has been finalised in the light of the discussions at the LMP meeting on the implementation of the OECD Guidelines and the functioning of NCPs on 17 June 2002 and the consultations with the annual meeting of NCPs on 18 June 2002.

The paper is based on the replies to a questionnaire that was sent to all TUAC affiliates, Global Union Federations, regional trade union organisations and national trade union centres in Brazil, Chile, Estonia, Lithuania, Slovenia and Russia. Twenty trade union organisations in 19 countries replied: Australia (ACTU), Austria (ÖGB), Belgium (FGTB), Brazil (CUT), Canada (CSN), Chile (CUT), the Czech Republic (CMKOS), Denmark (LO), Estonia (EAKL), Finland (SAK), Germany (DGB), Italy (CISL), Lithuania (LPSK), Poland (Solidarnosc), Spain (CC.OO), Sweden (LO and SACO), the UK (TUC), the US (AFL-CIO), and Russia (FNPR).

Summary

The results of the survey are mixed. There have been some positive developments and improvements in the functioning of NCPs since the 2001 TUAC survey. This includes the establishment of NCPs in Chile, Estonia, Lithuania and Slovenia, and the successful handling of cases by the Czech NCP. But there are also problems in several countries. A NCP has yet to be set up in Brazil, some NCPs take a passive approach and cases are not being handled according to the procedural guidance, if at all. For example, five cases have been raised by trade unions in the US NCP, of which not a single one has led to conclusions by the NCP. Only a few trade unions report that their NCP has improved since the review of the Guidelines.

This paper puts forward a number of proposals to raise awareness of the Guidelines, improve their implementation and increase the effectiveness of NCPs. These include:

- Set targets on efforts to promote the Guidelines;
- Launch an OECD newsletter on the Guidelines;
- Establish an outreach programme on the Guidelines with non-members;
- Identify eventual problems facing new adherents;
- Agree on a time frame in which cases are to be handled;
- Create a register for cases;
- Review the experiences with the Procedural Guidance and particular chapters of the Guidelines;
- Develop best practices on how to deal with cases;
- Increase peer pressure;

- Evaluate individual NCP performance and
- Create linkages to other policy areas such as bilateral investment treaties.

Visibility

The OECD and adhering governments have yet to succeed in making the Guidelines sufficiently visible. According to Dara O'Rourke, Assistant Professor at the Massachusetts Institute of Technology, the Guidelines are less known than many of the newer initiatives in the area of corporate social accountability. The OECD and adhering governments have a duty to do more to raise their profile. Brazil has not even set up a NCP. Governments in Argentina, Australia, Italy, Japan, New Zealand and Poland are seen as having low profiles. Despite requests from the Italian trade unions, the Italian NCP appears not to have made any real efforts to promote the Guidelines. *NCPs should at least write to companies operating in their country and inform them about the Guidelines.*

Even among the active NCPs, difficulties are being encountered in making the Guidelines more publicly known, which can be seen in the reply from CUT in Chile. They suggest that work has been too focused on an élite. Yet some NCPs have prepared useful promotional material on the Guidelines. By contrast, the OECD booklet on the Guidelines is not very user-friendly. The Canadian NCP will for example produce a brochure on the Guidelines. The Spanish NCP has agreed to print the Spanish translation of the TUAC Users' Guide. The Swedish NCP's initiative "Global Responsibility" should help increase the visibility of the Guidelines as well as the creation of three new NCPs in Estonia, Lithuania and Slovenia.

One important way to promote the Guidelines is to organise seminars. This has been done in Chile, Denmark, Finland, Germany and Sweden, and it is being discussed in the Czech Republic and Spain. However, trade unions in Australia, Belgium, Canada, Estonia, Italy, Lithuania and the US among others were unaware of any such activities.

While NCPs are expected to inform prospective inward and outward investors about the Guidelines many fail in this. Only trade unions in Finland, Germany, the Czech Republic and the UK have stated that their NCPs provide investors with information regarding the Guidelines.

To encourage information and promotion, the CIME should set targets on efforts to promote the Guidelines. Raising awareness requires widespread dissemination, both nationally by governments (in adhering and non-adhering countries) and internationally, by the OECD, and also in other pertinent intergovernmental fora. TUAC welcomes the inclusion of a session on the Guidelines in this year's OECD Forum and the reference in the OECD Ministerial Declaration, but at other occasions the Guidelines are still ignored. *The Guidelines should be systematically included in relevant OECD meetings and activities, the Secretary-General's speeches, and press briefing material.*

To further promote the Guidelines the Secretariat should launch a newsletter on the Guidelines, or alternatively make use of the newly published OECD Corporate Affairs Newsletter to issue regular information about the Guidelines. It could include NCP activities, changes in NCPs, information on new adherents, FDI reviews, information on cases being raised and their outcome etc.

Even if the Guidelines' visibility could be raised, there is a growing interest among trade unions in non-adhering countries. The Russian trade union centre FNPR has for example translated both the Guidelines and the TUAC Users' Guide, which they have made available both to the government and the employers' organisation. The Guidelines and the Guide have also been translated into Latvian in connection with a seminar TUAC organised in co-operation with the Council of Nordic Trade Unions. To give more countries the possibility to adopt the Guidelines, *the OECD should establish a CCNM outreach*

programme with non-members on the Guidelines, which should contain regional meetings or seminars to raise awareness.

Accessibility

The majority of NCPs are individual government departments even if some consult business, trade unions and NGOs. None of the new adherents have set up tripartite or quadripartite bodies, though the Lithuanian NCP has consulted the unions and the Estonian NCP has agreed to establish a tripartite advisory committee. The revitalised Chilean NCP has become quadripartite and some previously inactive NCPs have now at least held a few meetings with the social partners. But some NCPs do not have any contacts with trade unions. Solidarnosc reported that it has been impossible to get in touch with the Polish NCP. A more effective social partner, and where appropriate, NGO input is required. NCPs should not underestimate the positive effects this would have on promotion and awareness raising of the Guidelines. NCPs are also reminded that they are supposed to be easily accessible and that they are responsible for developing and maintaining relations with the social partners and other interested parties.

It is important that new adherents set up effective NCPs. The involvement of TUAC in the review process would help ensure a prospective adhering government commitment to take the Guidelines and the NCP role in this more seriously. The CUT in Brazil suggests that governments should be obliged to consult business, trade unions and NGOs before they can adopt the Guidelines. The CIME and the OECD Secretariat should better help and support the NCPs in performing their tasks. Not all new NCPs seem to have understood what is expected of them in terms of developing relations with the social partners etc. The Secretariat should evaluate their experiences and identify if they have any special needs.

Governments also need to become more pro-active in problem-solving. It should be remembered that NCPs can raise cases themselves. If they are aware of a problem they do not need to wait for a trade union or a NGO to raise it.

Implementation in specific cases

Almost 20 cases have been raised by trade unions since the review of the Guidelines was completed in 2002 and more are underway. It is important that NCPs have an open attitude to cases and encourage dialogue with the parties concerned in order to resolve the problems. This has been the case in the four cases that have been settled and the operations of two French companies in Burma. But it is far from true in many of the other cases. On the contrary, some NCPs are extremely slow to respond if they respond at all and often fail to set up meetings with the parties involved.

Most cases have been raised in the US and the French NCPs. While the French NCP has settled at least two of the four cases raised, the US NCP has yet to resolve one of the five cases raised by trade unions. NCPs shall “make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them” according to the procedural guidance. Furthermore, they shall offer a forum for discussion and assist the parties in dealing with the issues raised in an efficient and timely manner. As can be seen from the following list of cases that have been raised by trade unions, this is too often ignored.

Cases raised by trade unions:

- The case of one retailer was raised by French and Belgian trade unions in spring 2001. However, the French and the Belgian NCPs reached different conclusions at the end of 2001.

- The French trade unions in spring 2001 asked the NCP to investigate if French companies operating in Burma observed the Guidelines. This resulted in a set of recommendations to these companies in spring 2002.
- In May 2001, the AFL-CIO wrote to the US NCP and asked for a meeting to discuss US enterprises' activities in Burma. The US NCP has yet to reply.
- The Dutch trade unions approached the Dutch NCP in July 2001 concerning the use of forced labour by a dredging company. Eventually the NCP convened a tripartite meeting in March 2002, where it was decided that the social partners would meet separately to try to resolve the issue.
- The conduct of a maritime company was raised in the US NCP in February 2001. The trade unions supplied the NCP with further information, but they have not heard anything from the NCP.
- The cases of two manufacturing companies were raised in the Czech NCP in 2001. Both cases were handled according to the procedural guidance and they were resolved satisfactorily.
- The French trade union centre CFDT filed a case on a manufacturing company in the French NCP in 2001. The case was closed because the NCP did not receive the information requested from the company concerned and the company had already been taken over.
- The Free Trade Zone Workers' Union in Sri Lanka approached the Korean NCP in November 2001 about the anti-union behaviour of one company. The case has yet to be resolved.
- In November 2001 the International Transport Federation (ITF) asked the US NCP to look into the conduct of a maritime company. Six months later, in May 2002, the NCP replied that "the United States Government is addressing the issues that you raised through appropriate means through direct contacts with [company name]".
- A case regarding two subsidiaries in Guatemala was brought forward to the Korean, US and Dutch NCPs in the beginning of 2002 by the International Textile, Garment and Leather Workers' Federation (ITGLWF). The subsidiaries are owned by the Korean company. They produce clothes for the American retailer, which makes both the Korean and the US NCPs responsible. It was also raised in the Dutch NCP as government funds had been used for an organising programme at these plants. In May, the US NCP replied that it had contacted the Korean NCP for information on the handling of the issue. The following day TUAC was asked for advice by the Korean NCP. According to the Korean NCP, it has undertaken a preliminary investigation and held an arbitration meeting among the concerned parties. But the trade union organisation raising the case (ITGLWF) was not invited to this meeting.
- The closure of a subsidiary of a Finnish company located in the Netherlands was raised in the Dutch NCP in December 2001. Informal contacts took place between the Dutch and Finnish NCPs. The Finnish NCP also contacted the company. In negotiations with the company, the Dutch trade union agreed to withdraw part of the case in return for saving 440 jobs. However, as regards the transfer of government funds to this company, the trade union is still waiting for the NCP's recommendations.
- A case regarding a Malaysian subsidiary of a Danish company was filed by the Danish LO in the Danish NCP in February 2002. The case has yet to be resolved.

- The Polish trade union centre Solidarnosc contacted the Polish NCP in March 2002 regarding a company which is US-owned. The NCP has yet to respond.
- The ITF approached the Norwegian NCP in April 2002 concerning a Norwegian insurance company. The case has yet to be resolved.
- In April 2002, Force Ouvrière raised a case concerning a Finnish multinational in the French NCP. It will also be discussed in the Finnish NCP.
- The anti-union conduct of one company, a subsidiary to a French-based multinational, will be raised simultaneously in the US and French NCPs.

One lesson from this is that it takes too long for NCPs to deal with cases. The issues that are being raised are often very serious and cannot risk being delayed, *e.g.* when workers are being physically threatened or abused or when they are fired and lack the means to support themselves and their families. Cases concerning transfers or closures of entities are also delicate. NCPs should remember that a prompt and effective intervention can safeguard jobs.

A NCP ought to be able to conclude early on if a case merits further examination or not. To avoid cases dragging on for years, NCPs need guidance on what should be considered a reasonable amount of time for managing a case. *The CIME should therefore set a time frame on how long a case is normally expected to take.* This would put pressure on those NCPs trying to avoid their responsibilities.

Transparency

A second lesson is that NCPs must improve co-ordination among themselves. Several of the cases show that effective co-operation among NCPs is a prerequisite of resolving an issue. The case of one company could for example have been handled more smoothly if the French and Canadian NCPs had co-operated more effectively. *In order to improve transparency and co-ordination, the CIME should set up a registry of cases where NCPs should provide information as soon as a case is being raised.* The registry could be posted on the OECD website and NCPs should immediately be informed when a new case is being filed. The registry should also include the published NCP recommendations and outcomes of cases.

There seem to be some ambiguities on how to interpret aspects of the Guidelines. It appears that some NCPs are ignorant of how to deal speedily and effectively with cases arising. *It would therefore be helpful to review the experience with the Procedural Guidance and other particular chapters of the Guidelines.*

Another ambiguity exists around how NCPs should interpret “whether the issues raised merit further examination”. How much evidence must a party provide so as not to risk having a case rebutted and what responsibilities does a NCP have in trying to find out what is going on? In some cases, especially those in non-adhering countries, a trade union or a NGO may not be able to find out exactly what has happened or may be uncertain about the reliability of the information. NCPs with access to foreign embassies are better placed than trade unions or NGOs to elicit the details of a case. *It would be useful if the CIME could clarify what should be expected as a minimum in this regard.* Naturally, every case is different and what is plausible in one case may not be the same in another, but the CIME still needs to give guidance on what should be feasible.

The functioning of the NCPs is crucial to the effectiveness of the Guidelines and ultimately their credibility. The CIME should therefore benchmark all NCPs against the best performers. This could be done by developing best practices.

Accountability

The key to the implementation of the Guidelines is NCP accountability. The CIME must put much more pressure on non-functioning NCPs. This could include sending letters from the Secretary-General of the OECD to Ministers responsible for NCPs.

The CIME should more effectively monitor the performance of the NCPs. The current annual NCP report is not sufficient as it does not analyse the NCPs, but merely compiles the NCPs' own reports. *Now is the time for the CIME to instruct the Secretariat to prepare a special report on the functioning of NCPs, which should evaluate their performance, identify problems and weaknesses and make recommendations, so as to improve their performance.*

Linkages

No government has yet made observance of the Guidelines a binding condition for the receipt of public subsidies, although Dutch companies have to comply with the Guidelines in order to receive export credits. French enterprises have to sign a letter saying that they are aware of the Guidelines. Furthermore, trade unions in the Czech Republic, Finland and Sweden have noted that discussions with their governments on linkages between the Guidelines and export credits are still ongoing.

There are also other areas where a linkage to the Guidelines should be explored. References to the Guidelines could for instance be made in bilateral investment treaties between adhering and non-adhering countries. This would make non-adhering countries aware of the expectations multinational enterprises are facing. In addition, the European Union has a number of instruments operating under the direction of the European Commission that the Guidelines could be associated or linked to, so as to create some conditionality or leverage on European based multinationals. TUAC has requested DG Trade to do an audit of these mechanisms as a first step towards this goal.

Some trade unions are using the Guidelines in a broader context of corporate social accountability. They have been used in connection with shareholder resolutions in Canada and the US. The Lithuanian Trade Union Confederation is using the Guidelines in their discussions with multinational enterprises and in collective bargaining. The Finnish trade union confederation SAK is planning to raise the Guidelines in European Works Councils in Finnish-based companies. The Guidelines have been used as a criterion for studies on multinational enterprises operating in Brazil carried out by the Social Observatory. LO in Denmark has let the Guidelines form the basis for some discussions on corporate social accountability.

On broader discussions in the NCPs, the CMKOS, reported that the NCP had started discussing supply chain issues. The Belgian trade unions have in their NCP raised the issue of when employees have the right to be consulted, an outstanding issue in many countries.

In Sweden, NCP meetings are also used to prepare for the CIME meetings. The Nordic NCPs meet regularly every year to discuss the Guidelines. The Lithuanian NCP was also present at the last meeting in Oslo. The Nordic Council adopted two resolutions in 2001 urging the Nordic governments to promote the Guidelines. The resolution said that state-owned companies and financial institutions should observe the Guidelines as well as their clients. This should also be promoted in the EU.

MAKING COMPANIES ACCOUNTABLE

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

Patricia Feeney, Rights and Accountability in Development (for the OECD NGO focal point)

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).¹ 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”.² 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

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”.³ 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”.⁴ 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”.⁵ 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

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.⁶ 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.⁷ 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”.⁸ The Commentary on the Implementation Procedures makes clear that “the proceedings associated with implementation will normally be confidential, the results will normally be transparent”.⁹ 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.¹⁰ 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.

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 – 2, 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

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”.¹¹ The Commentary on General Policies devotes a whole paragraph (paragraph 10) to the importance of the Guidelines for “suppliers, contractors, sub-contractors licensees and other entities with which MNEs enjoy a working relationship”. 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.¹² 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.

During the June 2002 Roundtable 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”.¹³ 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”.¹⁴ But 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

11 Preface paragraph 4; General Policies, Chapter II, paragraph 10, *The OECD Guidelines for Multinational Enterprises*, June 2000

12 Human Rights Watch, *Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador’s Banana Plantations*, April 2002

13 Preface paragraph 4; General Policies, Chapter II, paragraph 10, *The OECD Guidelines for Multinational Enterprises*, June 2000

14 Commentary on General Policies, paragraph 10 *The OECD Guidelines for Multinational Enterprises*

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, its “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)”.¹⁵

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.¹⁶ 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”.¹⁷ 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.*¹⁸

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

15 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

16 *Financial Times*, February 7 2002

17 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

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