

The OECD Guidelines for Multinational Enterprises: Promotion of the Guidelines and the Role of National Contact Points in Handling Specific Instances

Why OECD Watch promotes the OECD Guidelines for Multinational Enterprises

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

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

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

Overview of OECD Watch's promotion activities

● Publications

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

- "Five Years On: A review of the OECD Guidelines and NCPs", which was distributed to over 2,000 recipients;
- "Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints", published in June 2006;
- "The Confidentiality Principle, Transparency and the Specific Instance Procedure", published in March 2006; and
- "2006 Review of National Contact Points and Bi-Annual Newsletter", which was disseminated to over 500 recipients.

● Training workshops

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

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

● Other promotion activities

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

- actively participated in the work of the Investment Committee, including making contributions on the Risk Awareness Tool, the Policy Framework for Investment and the Corporate Governance Principles;
- participated in government consultations in Australia, Canada, the Netherlands and the UK to examine corporate social responsibility (CSR) issues and/or how to improve NCPs' handling of specific instances;
- hosted a multi-stakeholder roundtable in Brussels in March 2005 that was attended by more than 100 government, business, NGO, trade union and ethical investor representatives;
- engaged in extensive multi-stakeholder discussions facilitated by the UK All Party Parliamentary Committee for the

Great Lakes Region in Africa concerning investment in weak governance zones;

- organized a multi-stakeholder roundtable in Paris with FAFO and International Alert to discuss investment in weak governance/conflict zones in late 2005;
- hosted a dialogue in the Netherlands, which brought together representatives from ABN AMRO, Heineken, Nutreco, Berenschot, NBC Vermogensbeheer and the Dutch Ministry of Economic Affairs; and
- participated in several consultations with the UN Secretary General's Special Representative on Business and Human Rights.

How NCPs should promote the Guidelines

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

- Every NCP should have an accessible and informative web site. Links should be provided to relevant OECD papers, OECD Watch, the Trade Union Advisory Committee and the Business and Industry Advisory Committee's publications. The web site should be promoted by embassies and government ministries such as export credit agencies, trade and investment departments, including with web links. The NCP should also promote the web site within the business community. Ideally, statements should also be published in either English or French (the OECD's working languages). In addition, NCPs' web sites could link to a central web site maintained by the OECD Secretariat that provides the public with reliable information on cases, issues and procedures.

- NCP informational booklets should be developed by adhering governments in consultation with all stakeholders. These booklets should provide guidance to companies on the importance of adhering to the Guidelines, especially in those sectors and countries with weak governance where breaches are more common.
- Adherence to the Guidelines should be a precondition for all companies seeking export credits, subsidies, procurement contracts and political risk insurance.
- At a minimum, NCPs should hold multi-stakeholder meetings annually. These consultations should allow participants the opportunity to contribute to the NCP's agenda. All papers should be disseminated in advance and accessible from the NCP's web site.
- NCPs should provide information on the Guidelines to prospective internal and external investors. NCPs could actively promote the Guidelines as part of risk management and good governance strategies with external investors.
- Embassies and other government ministries should play a stronger role in promoting the Guidelines, including disseminating information on a regular basis and providing guidance to companies on how to better implement the Guidelines. Embassies should also provide information on the Guidelines to groups wishing to bring complaints against companies. To avoid confusion or duplication, embassies and government departments should use the Guidelines as the minimum benchmark for assessing or promoting CSR.
- NCPs could work more closely with industry associations and professional bodies to promote adherence to the Guidelines, including by organizing training sessions that include presentations by companies, trade

unions and NGOs. NCPs could promote the Guidelines among major multinationals such as the top 100 companies and those certain sectors at higher risk of breaching the Guidelines, e.g. the extractive industries, textiles and prison management.

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

NCPs' handling of specific instances

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

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

- NCPs should be trained by experts in the area of dispute resolution and NCPs should learn from procedures adopted by other alternative dispute resolution providers.

- The key to successful mediation is the undisputed independence of the mediator in relation to the parties concerned. Housing the NCP within a government department (Economic, Trade, Industry) inevitably raises a conflict of interest – or the appearance of a conflict of interest – between the NCP’s role as impartial adjudicator and its role as promoter of national business. To avoid the NCP being placed (or perceived to be) in a compromised or compromising position in complaints involving enterprises linked to government-funded projects or public private partnerships, a process is required to fast track mediation.
 - Complainants should be treated as full and equal partners. Therefore, in specific instance procedures, all correspondence and documents should be shared with all parties.
 - Unless the NCP is prepared to make a determination, then final statements will remain meaningless.
 - If it is clear that mediation will fail to produce a resolution, NCP statements should not be issued before all parties have been properly consulted.
 - NCPs need training by mediation experts in the area of dispute resolution, and informed about other dispute resolution providers.
 - If mediation is agreed to by all parties, sufficient time must be allocated.
 - All parties should contribute to an agreed agenda.
 - All documents must be exchanged in advance to allow maximum opportunity for dialogue and debate. The company must be encouraged to respond to the complaint in writing. Subsequent counter claims by all parties should also be in writing.
 - Legal representation should be avoided.
 - Both parties should be given the opportunity to provide supplementary written evidence for mediation purposes, however, this must be distributed in advance.
 - All parties should be given the opportunity to present an opening and closing statement at mediation.
 - Minutes of the mediation must be kept and all agreed outcomes documented and “signed off” by all parties.
 - Final mediation should occur within four months, or a maximum of eight months, with the consent of both parties. The extension of time must be on the basis of gathering information relevant to the specific instance.
 - A follow-up process is required to ensure that undertakings and agreements reached in mediation are implemented and observed.
 - The NCP needs to issue a clear statement on the outcomes of the mediation, including identifying any breaches of the Guidelines and the recommendations for remedy.
- **If mediation fails**
- For those complaints where mediation fails, the final statement should record a breach of specific provisions of the Guidelines or exonerate companies where there is no breach. The recommendations to the company contained in the final statement must clearly relate to the issues that are the subject of the specific instance. Specific recommendations are necessarily based on the NCP’s opinion of whether or not a company’s conduct complies

with the Guidelines and they should therefore set out what a company must do to bring its conduct in line with specific provisions. The NCP's statement should also include recommendation to the OECD Investment Committee concerning areas in which the Guidelines could be clarified or improved.

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

A large, stylized graphic of an eye, consisting of a grey outer semi-circle, an orange ring, a white iris, and a black pupil, positioned above the Acknowledgements section.

Acknowledgements

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

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

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

This publication has been made possible through funding from the European Commission, DG Employment and Social Affairs, the Dutch Ministry of Foreign Affairs and Oxfam NOVIB (Netherlands)

Editors: Joris Oldenziel (SOMO), Joseph Wilde (SOMO), Colleen Freeman (RAID)

Contributions have also been made by Serena Lillywhite, Brotherhood of St. Laurence and Peter Pennartz, IRENE.