

OECD WATCH

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OECD Watch – the provisional name for a body to help facilitate NGO activities around the OECD Guidelines and the work of the Committee on International Investment and Multinational Enterprises (CIME) – was established at a meeting in Amersfoort, the Netherlands on 20-22 March 2003 organised by FOE Netherlands, IRENE and EED (with support from SOMO, Germanwatch and Novib) and with 50 NGO and trade union participants from about 20 developing and developed countries.

One of the main purposes of OECD Watch is to inform the wider NGO community about what is happening at the OECD's Committee on International Investment and Multinational Enterprises (CIME), to ensure that a wide range of NGO views are represented in key debates at the regular CIME meetings and to assist NGOs, who may wish to bring complaints under the OECD Guidelines for Multinational Enterprises' implementation procedures. FOE-NL has prepared a guide on using the Guidelines which should be available on their website (www.milieudefensie.nl/accountability). A steering committee has been formed with the following members: Farhan Anwar, CBE, Pakistan; Tricia Feeney, RAID, UK; Paul de Clerk, FOE, the Netherlands; Pieter van der Gaag, ANPED, the Netherlands; Cornelia Heydenreich, Germanwatch, Germany; Patrick Mbewe, DECOP, Zambia; Joris Oldenziel, SOMO, the Netherlands; Peter Pennartz, IRENE, the Netherlands; Ciro Torres, IBASE, Brazil.

This is the first in what is intended to be a regular series of briefings from OECD Watch

Supply Chain and the Investment Nexus

*CIME seems about to restrict the scope of the Guidelines by limiting the types of complaints that may be filed in connection with supply chain responsibility. OECD WATCH sent a letter to CIME, just before the April consultations, which expressed concern that despite clear references to supply chain responsibility in the Guidelines, some NCPs were unwilling to accept such cases.*¹

One of the many important additions to the revised text of the OECD Guidelines for Multinational Enterprises (2000) that was achieved as a result of NGO lobbying during the review was the explicit inclusion of supply chain responsibility (see *Chapter II, Paragraph 10*).

OECD governments, who were anxious to win back some of the credibility they had lost as a result of the failure of the Multilateral Agreement on Investment (MAI) negotiations, were willing to accommodate a number of NGO concerns in the new text. But from the outset, it was clear that the business group (BIAC) was unhappy with the inclusion of supply chain responsibility as a separate provision in the Guidelines as were a number of governments, in particular Germany and the USA. Difficulties soon appeared once cases started to be filed that concerned problems with the supply chain.

The divisions within CIME came to a head at a Roundtable held in Paris in June 2002, which was devoted to supply chain issues. A German delegate, who declared that supply chain issues were “trade related” and therefore had no place in the Guidelines, which was an instrument concerned solely with investment, persistently interrupted the presentations by the trade unions and the NGOs. This position was supported by the USA and only the Swedish NCP intervened and read out passages from the text of the Guidelines, which made clear that it covered both trade and investment issues. The Secretariat pulled back from its promise to publish the written contributions from the participants and instead issued a heavily edited version of the Roundtable discussions.

Hans Kausch, the German National Contact Point (NCP), has taken the position that the Guidelines are not applicable to “true trade cases”. The Germans are anxious to prevent all international business transactions coming within the purview of the Guidelines. The Dutch NCP, who dealt with a complaint in which it was alleged that retailers were sourcing Indian footballs that were the product of child labour, also came to the conclusion that only certain types of supply chain issues should be dealt with under the Guidelines. The NGOs accept that sometimes there may be practical limitations that prevent enterprises from influencing the conduct of their business partners such as the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers or business partners. Companies

¹ Letter to Marinus Sikkel, Chair of the CIME, on the Scope of application of the Guidelines (I) and NCP Procedures regarding Specific Instances (II), 8 April 2003

should not only be willing to accept responsibility for product quality in the supply chain, but also for ensuring compliance by their suppliers to the other standards and principles contained in the Guidelines. The NGO position is that enterprises should apply the principles of the OECD Guidelines to all their activities throughout the entire production process.

At the most recent consultations with CIME in Paris on 9 April 2003, NGOs and the trade unions were informed that a Working Party had been considering for over a year how NCPs should interpret in future the provisions in the Guidelines on supply chain responsibility. While the Chair of the Working Party, the Austrian NCP, Manfred Schekulin, accepted that the Guidelines did not only apply to investment issues, he insisted that cases ought to have “an investment nexus”. But he failed to explain the term. CIME claims that it is not reducing the scope of the Guidelines merely upholding the *status quo*. NGOs asked for a copy of the Working Party’s recommendations, which had not been circulated either before or during the consultations. The Chair of the CIME then announced that the recommendations of the Working Party would be further discussed in closed session. The clear implication is that CIME is about to adopt a definitive interpretation, which in the view of the NGOs might restrict the types of cases that could be brought under the OECD Guidelines’ procedures. NGOs are concerned that they are being denied any opportunity for commenting on the recommendations before they are adopted. NGOs take the view that the Guidelines are recommendations from governments about the way all business should be conducted and by seeking to limit their application the OECD is undermining the usefulness of the instrument and going against the spirit of the review.

OECD WATCH has drafted a letter expressing (a) concern about the lack of transparency and NGO participation in discussions about the new interpretation of the Guidelines; and (b) asking for a chance to comment on the proposed interpretation of supply chain responsibility before it is adopted by CIME.

RESPONSE TO THE UN PANEL REPORT ON THE DRC

In October 2002, a Panel of Experts appointed by the United Nations Security Council to investigate the illegal exploitation of the natural resources of the Democratic Republic of the Congo (DRC), accused 53 OECD companies of being in breach of the OECD Guidelines for Multinational Enterprises. Congolese NGOs issued a statement calling on governments whose enterprises were cited in the UN report “ to enforce compliance with the OECD Guidelines”².

When the UN Panel Report first appeared the NCPs were uncertain how to proceed. They had been completely sidelined from all the previous discussions between the Panel of Experts and OECD foreign ministries. NGOs in most of the countries mentioned in the report wrote to their NCPs calling on them to investigate the allegations against the companies. The Panel had not included in its report evidence

² Declaration by the Civil Society of the Democratic Republic of Congo Regarding the Illegal Exploitation of Natural Resources and Conflict in the Country, Kinshasa 13 March 2003

substantiating its conclusions about the conduct of the companies breaching the Guidelines. This made it easy for the companies concerned to reject the allegations and for the NCPs to claim that the accusations were without foundation. On 23 January 2003, Marinus Sikkel, the Chair of CIME, wrote to the UN Secretary General, Kofi Annan, to correct, “Inaccuracies in relation to the interpretation of the Guidelines” and to request “access to the information on which the Panel based its conclusions”.³ Many NCPs seemed unwilling or unable to take any steps, even to instigate some preliminary enquires, in the absence of a formal complaint. NGOs in a number of countries are preparing to file cases.

On 8 April 2003, members of the UN Panel visited the OECD and briefed CIME in private on the conduct of OECD companies operating in the DRC. The Panel emphasised that it had evidence to back up its conclusions about the companies. An agreement has been reached that the information on the individual companies will now be sent to the CIME and to the relevant NCPs. The CIME has asked the Panel in view of the large number of cases that some NCPs, like the Belgians, would need to investigate, “to prioritise” otherwise the severely under-resourced NCPs would be swamped and completely unable to handle the case load. Once the NCPs have the information they will then decide whether they should regard them as “specific instances” (i.e. as formal complaints). Additionally, as the companies named in the UN Panel Report are registered in 10 OECD countries, CIME has decided to form a working party so that the relevant NCPs can work on the issues jointly so as to avoid discrepancies in the way the cases are dealt with. What concerns NGOs is that this process, if unchallenged, will be closed to any outside scrutiny.

OECD Watch submitted a Memorandum in which *inter alia* it has asked for NGO participation in CIME’s deliberations on the DRC cases.⁴

PROCEDURAL ISSUES

The distinctive feature of the revised OECD Guidelines for Multinational Enterprises is that while they are “voluntary”, adhering governments are obliged to establish a National Contact Point (NCP) to deal with all matters relating to the implementation of the Guidelines, including undertaking specific enquiries regarding the activities of companies against who complaints (called “specific instances”) have been filed. It is currently the only monitoring mechanism that is in existence and that offers some means of curbing company behaviour.

But there are a number of obvious weaknesses with the current procedures, not least the close association between the NCPs and the business community. The trade unions have been testing different NCPs for some time to gauge their responsiveness to complaints that are filed. NGOs, who have been slower to present cases, have now acquired a degree of experience and have started to pinpoint those NCPs, which are the least helpful. Even the business group, BIAC, voiced its concern that not all

³ OECD, UN Panel Report Regarding the Democratic Republic of Congo: CIME Chair’s Letters, DAFFE/IME (2003) 2

⁴ OECD Watch, Memorandum to CIME on The Applicability of the OECD Guidelines to the Democratic Republic of the Congo, A Preliminary NGO Assessment, April 2003

NCPs were functioning properly. The Brazilian delegate announced that his government had just moved the NCP to a different Ministry, the Ministry of Finance. In the UK, where the NCP had scarcely been functioning for the past year, the Department of Trade and Industry, has appointed a new NCP, Duncan Lawson.

The NGO meeting in Amersfoort identified a number of problems with the implementation procedures, which were transmitted to CIME by letter.⁵ The main problems were (i) the absence of any clear timeframe for dealing with complaints; (ii) the lack of transparency; (iii) the failure of the NCP to conduct proper investigations and to seek information additional to that provided by the complainants and the company concerned. In its letter to CIME the NGOs proposed a number of measures to guide and improve NCP performance.

The Austrian NCP, Manfred Schekulin announced that a questionnaire had been sent out to all NCPs to collect information on their implementation procedures. Once the questionnaires have been returned, CIME will prepare an overview report by June 2003. The NGO letter will be taken into consideration. But improvements in the way NCPs handle cases will only come about from peer pressure and lobbying by NGOs.

⁵ Letter to Marinus Sikkel, Chair of the CIME, on the Scope of application of the Guidelines (I) and NCP Procedures regarding Specific Instances (II), 8 April 2003

INVESTMENT

The importance of CIME as the main forum for shaping international investment has declined partly as a result of the failure of the MAI. After the Doha meeting, CIME was told to keep a low profile. But it seems as though as the WTO negotiations become more fraught in the run up to the Cancun meeting, CIME appears to be taking new initiatives on investment. NGOs should keep a watchful eye on developments.

A number of papers were circulated for the CIME meeting which can be obtained from the OECD website: Public Sector Transparency and International Investment Policy (DAFFE/IME(2002)16/REV2); Investment for Development: Improving Synergies between Official Development Aid (ODA) and Foreign Direct Investment (FDI) (DAFFE/IME(2003)7); Bilateral Investment Treaties, Regional Agreements and Multilateral Investment Disciplines (DAFFE/IME(2002)9/REV3); Agenda for Promoting Investment in Africa: Recommendations The Tokyo International Conference on Investment to Africa (DAFFE/IME/RD(2003)8). TUAC (the Trade Union Advisory Committee) was extremely critical of the Public Sector Transparency and International Investment Policy in part because of the absence of any reference to the OECD Guidelines. The NGOs commented on the lack of reference to other transparency initiatives such as the Publish What You Pay campaign and the Extractive Industries Transparency Initiative, which has the backing of a number of OECD governments, including the British Government.

The next Ministerial Council meeting (29-30 April 2003) will discuss Growth and Investment in Developing Countries (C/MIN (2003) 5).

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