

OECD Watch newsletter

October 2004

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www.oecdwatch.org

OECD Watch News

□ OECD Watch project proposal granted by the European Commission

The European Commission has agreed to support some of OECD Watch activities from June 2004 to end of May 2005. The work is to be coordinated by SOMO in cooperation with RAID (UK), Germanwatch (Germany), IRENE (NL) and Association 4D(Fr). The project is co-funded by Novib (Oxfam-Netherlands), Miserior and EED. The project includes research, and dissemination of information regarding the OECD Guidelines. It will also fund an NGO training seminar in Berlin in October 2004 and a Roundtable in Brussels in March 2005.

The grant is limited to supporting activities that take place in Europe but participation by non-European members will be assured through other sources. The results of the project will be shared with the members of entire OECD Watch network. The grant will enable OW to improve dissemination of its work and to produce newsletters, briefings and reports in French and Spanish as well as English.

□ International Training and Strategy Seminar - 14th and 15th October Berlin

The first of the project's activities was the Berlin seminar organized by IRENE and Germanwatch. The aim of the seminar was to support and build capacity on the use of OECD Guidelines among

NGOs. During the first day of the seminar NGOs shared experiences about filing complaints and the outcome of these efforts in different countries. NGOs having little experience with the Guidelines were trained how the Guidelines could be used in their work. The second day was devoted to a discussion of ways in which the Guidelines could be strengthened and how they relate to other corporate accountability instruments. Participants included NGOs from 18 EU countries as well as Bulgaria, Norway, Macedonia, Turkey, Ghana, India, Romania, Argentina, Bolivia, Chile, and South Africa.

▣ **Multi-stakeholder Roundtable in March 2005, Brussels**

The aim of this Roundtable is to present and discuss the OECD Watch position and experiences to and with other stakeholders, including government representatives, NCPs, businesses and trade unions. The theme of the Roundtable in 2005 will be "Five years after the 2000 Review of the OECD Guidelines". The Roundtable is tentatively scheduled for the 17th of March 2005.

For pre-registration: Peter Pennartz:
PeterPennartz@irene-network.nl

▣ **Dutch Foreign Ministry to fund OECD WATCH's International Programme**

The Dutch Foreign Ministry has just agreed to fund a four-year international programme of training and education on the OECD Guidelines. The grant will facilitate training seminars and other work with NGOs in Asia, Africa and Latin America. This work should help stimulate debate in non-OECD countries about corporate accountability and provide guidance about how National Contact Points can deal more effectively with complaints about the activities of companies in non-adhering countries.

▣ **OECD Guidelines Workshop for Brazilian NGOs, August 2004, Rio de Janeiro**

In the first week of August 2004, Red Puentes (www.redpuentes.org), in cooperation with OECD Watch, organized a workshop about the OECD Guidelines in the city of Rio de Janeiro, Brazil. The aim of this workshop was to analyse the potential contribution of the OECD Guidelines to CSR in Brazil and to determine how the Guidelines can be used by Brazilian NGOs as a strategic tool for monitoring the activities of multinational enterprises.

NCP Cases

Since the revision of the Guidelines in 2000 and up to October 2004, NGOs have raised 32 cases with NCPs. The complaints have concerned alleged breaches of a wide range of provisions in the Guidelines. A breakdown of the complaints filed to date shows which provisions and chapters of the Guidelines the complaints have been invoked. Ten cases dealt with the environment chapter; five concerned the human rights provision; nine dealt with supply chain responsibilities, five with disclosure policies, three raised issues about competition, five addressed the taxation chapter, three referred to combating bribery, ten were related to labour issues, and one was linked to consumer protection.

Four complaints were filed against companies involved in the financing and construction of the Baku-Tbilisi-Ceyhan Pipeline (BTC) which, NGOs argue, risks violating the environmental and human rights laws and obligations of the three countries through which it passes because of exemptions given to the pipelines' sponsors through the host government agreements. Ten complaints concern the role of the companies listed in the UN Expert Panel's report as having breached the OECD Guidelines during the war in the Democratic Republic of the Congo.

Seventeen cases are still pending before the NCPs - one has been stalled for two and a half years. Fifteen cases have been concluded taking on average thirteen months. In four cases, the complaints were rejected on the grounds that they did not relate to investment issues. One case was dropped and another (RAID, Afronet versus Binani/RAMCO) was withdrawn after the company went into liquidation during the process. One case has resulted in a joint statement: ICN (India Committee Netherlands), Adidas and the Dutch NCP publicly agreed on the need for monitoring of codes of conduct. Despite the lack of joint statements, a number of cases have had positive outcomes. In the case ATTAC (Sweden) and Friends of the Earth (FOE Sweden) vs. Atlas Copco and Sandvik the NCP came to the conclusion that the companies had not failed to comply with the OECD Guidelines.

But the NCP did encourage the companies to remedy the lack of knowledge of the Guidelines among their subsidiaries and their staff in Ghana. This can be seen as an acknowledgement by the NCP that the company could have done more to ensure compliance with the OECD Guidelines among its business partners. Of course it remains to be seen to what extent this recommendation has led to actual changes of behaviour. The case against MOPANI/First Quantum Mining (filed by Oxfam Canada, RAID, Afronet and Decop) was concluded when the company agreed to remove the threat of forcible evictions from mine land and to restart negotiations about a phased resettlement programme for settlers with help from the World Bank. Centro Ecoceanos, which jointly with FoE Netherlands and trade unions filed a complaint against Nutreco and its Chilean subsidiary, Marine Harvest, felt that the case has set an important precedent for the future handling of civil society concerns about corporate behaviour.

Martje Theuvs, SOMO

▣ DRC cases filed in the USA

Friend of the Earth-United States (FoE) and the UK-based group Rights and Accountability in Development (RAID) filed a formal complaint with the U.S. State Department in August against three American companies. In October 2002, a United Nations (UN) Panel of Experts accused the companies of helping to fuel the war in the Democratic Republic of the Congo (DRC).

The Panel named Cabot Corporation, Eagle Wings Resources International and OM Group, Inc. as having violated the OECD Guidelines for Multinational Enterprises in its October 2002 report. FoE and RAID filed an official complaint because the State Department has declined to undertake an independent investigation into whether these companies might have contributed to the war in the DRC.

In the Panel's final report, all U.S. companies were placed in the 'resolved' category (i.e. requiring no further action), but the grounds for this determination were left publicly unspecified. The

NGOs explain that they are calling for the cases to be reopened on the grounds that the Panel itself made clear that "resolution should not be seen as invalidating the Panel's earlier findings with regard to the activities of these actors". In his response, the US NCP, while acknowledging that "other NCPs may have acted differently", claims that the information available "consists of allegations that have not been adequately substantiated" and "denied by the firms concerned". The NCP is to make further inquiries with the UN regarding the availability of more information on the US firms. The NGOs are ready to provide additional information about the companies to facilitate the process.

(For further information go to: <http://www.foe.org/new/releases/84drccomplaint.html>)

▣ Recent NCP Decisions

NGOs Critical of NCP's Position on Coltan Traders

Dutch and Congolese NGOs were disappointed by the Dutch National Contact Point's decision that the OECD Guidelines were 'not applicable' in the complaint concerning Chemie Pharmacie Holland (CPH) which had been heavily implicated in the coltan trade from eastern Congo during the war. According to the NCP, the relationship between CPH and Eagle Wings Resources International (its US partner) and its Rwandan-backed associates could only be regarded as a 'trade' and not an 'investment' relationship. In the view of the Dutch NCP, the complaint did not, therefore, fall within the remit of the OECD Guidelines. However, the NCP added in its final Statement 'following the common values for responsible business conduct that are reflected in the Guidelines, CPH could have conducted more enquiries to find out the origin of the ore and the circumstances that surrounded ore mining. Companies should be proactive in asking these questions, particularly in a conflict zone'. Since 2003, the existence of an 'investment nexus' has been regarded by some NCPs as an essential requirement for the acceptance of a case under the Guidelines, but many other NCPs believe

that the distinction between trade and investment is hard to define and that decisions on admissibility should be taken on the merits of particular cases. The NGOs maintained that CPH had an investment relationship and warned that the implications of the Dutch NCP's decision would in effect undermine the relevance of the Guidelines for global business.

(To read NIZA and NOVIB's response go to: <http://www.oecdwatch.org>), section 'Cases'

▣ "A Useful Exercise" says German Clean Clothes Campaign

"We agreed to disagree". This is the key conclusion drawn by the parties involved in the complaint brought by the German Clean Clothes Campaign (CCC) against Adidas alleging that two of its supplier factories in Indonesia were violating labour rights. CCC feels that the case is important not least because the German NCP accepted the complaint even though it concerned supply chain responsibilities. In the past the NCP has used the lack of "an investment nexus" to reject cases. The CCC was also pleased at the way the NCP called on Adidas to provide detailed answers to CCC's specific allegations and did not allow the company to shift attention away towards its global ethical programme. CCC was frustrated that the voluntary nature of the Guidelines and the mediation role adopted by the German NCP meant that there

was no mechanism to weigh up the validity of the evidence presented by the parties. This inevitably led to a stalemate. In February 2004, CCC and Adidas failed to reach agreement and the company refused to adopt any of CCC's recommendations for corrective action. However, possibly in reaction to the specific instance process, Adidas and Oxfam Community Aid Abroad, invited the Workers' Rights Consortium (WRC, a US verification body) to examine the situation at one of the factories. WRC's report, which was published in May 2004, largely upheld the CCC complaint. Adidas has agreed to implement WRC's recommendations.

In spite of the disappointing outcome of the specific instance, the German CCC considers it to have been a useful exercise. CCC make a number of recommendations about how to improve the specific instance procedure in Germany including the need to incorporate other government departments into the German NCP, which is currently run by one department of the Ministry of Economics and Labour.

(For the NCP Statement go to: www.bmwi.de/Navigation/Unternehmer/auslandsgeschaefte.html and for the full CCC Statement go to: <http://www.oecdwatch.org>)

Ingeborg Wick, SÜDWIND Institut für Ökonomie und Ökumene
Uwe Wötzel, VER.DI (German Services Union)

News from the OECD

▣ CIME and CMIT merge to form Investment Committee

In April 2004 the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) merged to form the Investment Committee.

The OECD Investment Committee is responsible for the OECD liberalisation instruments in the field of international investment and services. It interprets and implements the 1976 Declaration and Decisions on International Investment and Multinational Enterprises (which includes the OECD Guidelines for Multinational Enterprises) and is the guardian of the Codes of Liberalisation of Capital Movements and Current Invisible Operations.

▣ Marinus Sikkel leaves as Chair of CIME

OECD WATCH expressed its appreciation of the work of Marinus Sikkel, the former Chair of CIME, who left the Committee in June to take up a position with the UN Economic and Social Commission for Asia (based in Bangkok). Thanks to Mr Sikkel's boundless enthusiasm to develop and promote the OECD Guidelines for Multinational Enterprises agreement was reached after two years of negotiations between governments, business, trade unions and NGOs on the revisions needed. In June 2000 a much improved text of the Guidelines and the implementation procedures was approved thanks in large measure to his skills as a negotiator. At the first meeting of the new Investment Committee in September, Manfred Schekulin of Austria was elected Chair.

▣ OECD Policy Framework for Investment

The Investment Committee is currently discussing the OECD Initiative on Investment for Development. The aim is to build consensus on a Policy Framework for Investment. The Framework is intended as "a non-prescriptive checklist of issues for consideration by any interested governments engaged in domestic reform, regional co-operation or international policy dialogue aimed at creating an environment that is attractive to domestic and foreign investors and that enhances

the benefits of investment to society." After the controversy surrounding the Multilateral Agreement on Investment, the OECD is anxious to emphasise that the Policy Framework for Investment "recognises that the needs of countries at different levels of development call for a flexible and non-prescriptive approach that provides constructive policy guidance across a range of areas in order to maximise the contribution of investment to development".

A number of non-OECD government representatives attended the first meeting of the Task Force in June. They voiced a range of concerns about current investment agreements. A Latin American delegate spoke out about the exorbitant costs to governments of investor-state arbitration; an African delegate referred to the problem of mining royalties being fixed at an initial low rate, which means that as the market price for minerals rises, governments are unable to renegotiate a fairer share of the profits. An Asian delegate referred to the fact that it was impossible for them to push down labour costs further, and called on investors to recognise the fact that governments needed to meet the social aspirations of their populations. BIAC, extolled the benefits of the Guidelines to non-adhering delegates. But NGOs warned that the implementation procedures as currently operated by NCPs offered few prospects that such problems would be addressed. Behind the scenes there is a struggle by some EU countries to resist the more the aggressive US approach to investor protection. Much of the debate on the work of the Task Force will be undertaken through electronic consultations. Task Force co-chairs will take advantage of events held outside Paris to arrange consultations and make presentations of the Framework as it evolves. The next meeting of the Task Force will be held immediately after the OECD Global Forum on International Investment in Delhi. The Task Force will hold one annual plenary meeting in Paris, usually in conjunction with regular meetings of the Investment Committee. RAID and IISD will monitor developments and participate in the Task Force.

▣ Annual meeting of NCPs 2004

The Annual Meeting provides NGOs and social partners with the opportunity of giving their views

about the work of the National Contact Points (NCPs). OECD Watch presented its second review of NCPs which was circulated at the meeting. The consultation in June lasted three hours and was focused largely on the decisions and procedures of NCPs. There was also discussion between the stakeholders. BIAC (the Business and Industry Advisory Committee) claimed that TUAC was misusing the Guidelines by bringing labour issues under the implementation procedures. In BIAC's view such cases should be left to the ILO mechanisms. BIAC suggested that NGOs were inconsistent: "They criticise the way in which the Guidelines are being implemented but nevertheless keep on using the specific instance procedures".

OECD Watch welcomed efforts to increase transparency in the Annual Reports. One important improvement is the inclusion of a table of cases in the Annual Report. But OECD Watch pointed out that the accuracy of the information in the table needed to be improved if it was going to be a really useful tool. The Annual Report calculates that 78 specific instances have been presented since the revision of the Guidelines but the table only refers to 44 cases. An example of these omissions in the table is the Netherlands where only one of the eleven cases dealt with by the Dutch NCP is mentioned. OECD Watch and TUAC have recommended that in future the table should include the names of the company and include those cases NCPs have not been accepted with the reasons for their rejection.

A number of NGOs report that they have found the specific instance procedures helpful irrespective of the outcome. But the main impression from the June consultations is that some NCPs have succumbed to pressure from companies and have started to roll back the scope of the Guidelines and reduce their potential as a tool to guide and, where necessary, curb corporate behaviour. This trend is evident from the current debate about supply chain responsibility and the "investment nexus" which is being used to prevent some complaints being filed. It is also apparent in the decision by a few NCPs to use the existence of "parallel legal procedures" (i.e. where a complaint may have been filed against a company that is also involved in legal proceedings) to dismiss the case. [The Secretariat is to prepare a paper on Parallel Legal Proceedings for April 2005 Meeting.] OECD Watch and TUAC called for improvements in the procedures for handling 'specific instances'. They noted how the least cooperative NCPs fail to

acknowledge receipt of complaints, delay for months before deciding on eligibility; reject cases on arbitrary or spurious grounds, or go out of their way to avoid any discussion with the complainants about the merits of the case before reaching a decision. The pro-company bias comes across in the way NCPs are re-defining their role. Some NCPs claim that the Guidelines are 'future-focused' and are not an instrument to hold companies to account for past breaches. Yet NCPs regularly use their Statements to clear companies of alleged 'past' breaches while at the same time arguing that they have no investigative function nor any powers to assess whether a breach has occurred. Some NGOs believe that the commentary to the Guidelines needs some revision. If adhering governments are serious about the Guidelines being an effective corporate accountability tool then the NCPs will need to be given greater capacity, resources and training in order to function in a fair and effective manner. The Investment Committee decided not to hold formal consultations in September.

Cornelia Heydenreich, Germanwatch

(See the Annual Report of the NCPs at:

www.oecd.org/dataoecd/5/36/33734844.pdf)

■ OECD Roundtable on Environment June 2004

This year's OECD Roundtable on Corporate Responsibility, which was held on June 16, 2004, at the OECD Headquarters in Paris, had the theme "Encouraging the positive contribution of business to environment through the OECD Guidelines for Multinational Enterprises". It was organised jointly by two OECD Committees: the Committee on International Investment (CIME), and the Environment Policy Committee (EPOC). This meeting was a follow-up to the March 5 meeting which was attended by Association 4D on behalf of OECD Watch. During the March meeting, a first draft text on the "environmental aspects of the Guidelines" was discussed, and the comments 4D made fall into 3 general categories:

- the strengths and opportunities regarding the "soft law" approach of the OECD Guidelines;
- the key role of local authorities play in implementing sustainable development through the corporate sector;
- and life cycle assessments through industrial ecology.

The objective of the June roundtable was to further discuss the environmental components of the OECD Guidelines. The day was broken up into

three parts: Session I focussed on recent developments in current business practices toward the environment; Session II dealt with environmental risk; and Session III addressed corporate contributions to environmental policy. A new text entitled "Encouraging the positive contribution of business to environment through the OECD Guidelines for Multinational Enterprises" had been prepared for the meeting, but unfortunately, no time was reserved during the meeting to further discuss and review the text. Also, regrettably, not a single proposal which Association 4D had made in March was added to the new version of the text. See: <http://www.oecd.org/dataoecd/12/31/31967866.pdf>.

Despite this oversight, the text is quite good, and can be a very useful tool for a number of stakeholders if it is distributed widely and easily accessible. The purpose of the report is twofold: it aims to draw the attention to corporations, government and civil society to the OECD Guidelines for Multinational Enterprises, particularly on their environmental aspects; and it provides in-depth information about the tools and approaches that are available to companies that seek to upgrade their environmental performance. The report is divided into main parts: "The Guidelines and their environmental components", which introduces briefly the OECD Guidelines, and brings to the attention of the reader the different sections that deal with the environment; and "Available Tools and Corporate Approaches", which is divided into eight general sub-sections: Environmental management systems; Public information and stakeholder consultation; Life cycle assessment; Exercising precaution; Emergency prevention, preparedness and response; Continuous improvements in environmental performance; Environmental education and training; and Contributing to the development of environmental policy.

To date, it is unclear how the "Encouraging the positive contribution of business to environment through the OECD Guidelines for Multinational Enterprises" text will be utilized.

Emmanuel Prinet, Association 4D

(A full report is available through the OECD Watch secretariat: J.Oldenziel@somo.nl).

■ OECD Draft Study on DRC Backs Findings of UN Expert Panel

Unlike the Secretariat's previous study on Myanmar (see OECD: 'Multinational Enterprises in Situations of Violent Conflict and Situations of Human Rights Violations', Working Papers on International

Investment No. 2002/1, May 2002), a new draft paper, "Conducting Business in Weak Governance Zones: Issues for Discussion and a Case Study of the Democratic Republic of Congo", sets out to examine only those issues about which the OECD's 'integrity package' can shed light. It includes a case study of the business operations in the Democratic Republic of the Congo, that were publicly criticised by a UN Expert Panel in its report to the Security Council on illegal exploitation of natural resources in the DRC. The 'integrity package' consists of the OECD Guidelines for Multinational Enterprises, the Corporate Governance Principles, the Guidelines for Managing Conflict of Interest in the Public Sector, the Convention on Combating Bribery of Foreign Public Officials and the Revised Recommendation on Combating Bribery in International Business Practice. The aim of the study is to devise a checklist for companies that are 'thinking about investing in weak governance countries or that are currently managing such investments.' The study states that corporate responsibility goes beyond the core function of creating value for suppliers of capital. "Businesses are expected to obey the various laws that apply to them and, as a practical matter, have to respond to societal expectations that are not written down in law books (e.g. to respect human rights, even if these are not protected by law)". It notes that most large multinational enterprises exited during the 'pre-reform period' (i.e. between 1990 and 2001). The DRC's 'extreme investment climate' meant that the mining investors were "skewed toward second tier investors (small privately held and junior mining companies)". The risky environment offered juniors "the prospect of moving up into the ranks of major mining companies". Nevertheless, some major multinationals had financial investments in the DRC mining sector. Investors in the DRC responded to threatened or actual abuse of political power by cultivating political ties so as to establish a kind of "home made" investment protection. "While the pre-reform DRC may have been one of the least transparent policy environments in the world, corporate practice did relatively little to shed light on key business dealings". The study notes that privately held companies operating in the DRC are extremely opaque "often it is not possible to determine even who owns them". The OECD study concludes that junior companies are much less transparent than the large multinationals and "with their lower public profiles" they are less subject to scrutiny. The study finds that the boards of junior mining companies are "more insular and provide little scope for bringing in influences and information from outside the mining sec-

tor". The sample of companies active in the DRC highlights the problem of local conglomerates. Two African focused companies were found to be truly global having followed a strategy of "extreme diversification in a small market". They now span the entire DRC business sector. "It is doubtful that such a strategy would be viable if competitive processes were working normally in the DRC". The fact that groups of companies are owned by holding companies or trusts "which straddle several continents and, in some case, off-shore financial centres" contributes significantly to the lack of transparency in the DRC mining sector. The study refers to the weak governance of the DRC's state owned enterprises, which meant that companies that "posed clear integrity risks were accepted as business partners". It cites a 2001 IMF report, which noted that "taxation of SOEs did not conform to ordinary law – it was negotiated" and that "revenue was diverted to specific accounts outside the control of the Treasury. In 2000, an amount equivalent to at least 1.2 per cent of GDP was kept outside the treasury account of the central bank".

A consultation on the draft paper is planned for December. The draft study broadly endorses many of the general findings of the UN Expert Panel but it is unlikely to be well received by the business community. But it may be welcomed in the DRC, where an outside management team has been appointed to take over the running of Gécamines, the state-owned mining company. One of the team's first tasks will be to review all of Gécamines existing contracts and joint venture agreements. The study alludes to the Extractive Industries Transparency Initiative. OECD WATCH will be interested to see what the OECD's integrity package can contribute to the rather more robustly promoted seeming efforts by DFID, the World Bank and the IMF to reform revenue management in resource rich developing countries.

Patricia Feeney, RAID

(The draft paper, "Conducting Business in Weak Governance Zones: Issues for Discussion and a Case Study of the Democratic Republic of Congo" can be downloaded from the OECD's website: www.oecd.org.)

COLOPHON

This is the OECD Watch Newsletter. This newsletter will be published three times a year in English, and translated into Spanish and French. For more information, contact any of the coordinators of OECD Watch below:

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CALENDAR OF EVENTS

14 - 15 October

Berlin

- OECD Watch NGO training and strategy seminar

15 - 19 October

London

- European Social Forum

19 October

Paris

- 6th Informal Consultation between the OECD Trade Committee and Civil Society Organisations

19 - 22 October

Delhi, India

- 2004 annual conference of the OECD Global Forum on International Investment

22 October

Geneva

- **Consultation on Business and Human Rights**
Office of the High Commissioner for Human Rights, in cooperation with the Global Compact Office

7 - 9 November

Maastricht

- EU Corporate Social Responsibility: Competing for a Sustainable Future
- Conference organised under the auspices of the Dutch Presidency
- Monday, 8th November: 14.15-15.30 The critical role of NGOs and trade unions: **launch of OECD Watch**, organised by Dutch Ministry of Foreign Affairs
More information: www.CSR2004.nl

14 - 16 December

Paris

- Investment Committee Meeting and Consultation on Draft Paper
- Conducting Business with Integrity in Weak Governance Zones: Case Study of the DRC OECD