Reading: 36-41 in the OECD booklet "OECD Guidelines for Multinational Enterprises, 2011 Edition)

OECD Fact Sheet

What is the OECD?

Established in 1961, and made up of 34 countries today, the Organization for Economic Co-operation and Development (OECD) is an inter-governmental body providing a forum for governments to work together to achieve more effective public policies (much more detail available at oecd.org). The mission of the OECD is "to promote policies that will improve the economic and social well-being of peoples around the world." The organization traces its roots to the Marshall Plan, the U.S. initiative launched in the late 1940's to help war-torn countries in Europe reconstruct. Today, the OECD seeks to shape practices around the world.

Which nations belong to the OECD?

Among the 35 member nations are the U.S., most countries in Europe, Australia, Canada, Chile, Israel, Japan, and Turkey. For a full listing, go to http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm

What are the "OECD Guidelines for Multinational Enterprises"?

The OECD Guidelines for Multinational Enterprises set out the expectations of member governments for responsible business conduct by MNE's headquartered or operating in the territory. Their full title is: "The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context."

We will turn to the subject matter of the Guidelines in a moment. Perhaps most significantly, the Guidelines include a government-backed complaint mechanism to achieve greater compliance with the Guidelines. Under that system, when a party believes that an MNE has violated any of the Guidelines on labor, human rights, the environment, etc., that party can file a complaint against the MNE (see below for fuller description. Just as importantly, the OECD member countries agreed in 2011 to expand the Guidelines to incorporate two groundbreaking concepts: 1) a responsibility on the part of MNEs to perform due diligence, meaning that they are expected to proactively avoid and address potential adverse impacts; and 2) application of the Guidelines concerning employment and industrial relations to an MNE's supply chain.

Before we go further, please clarify something: Do the Guidelines apply to governments or to corporations?

They apply to governments in their relation to corporations. That is, each of the 35 member countries of the OECD has pledged to adhere to the Guidelines. And that means they have pledged to work to get MNE's operating within their territory to abide by the Guidelines in their territory. With even wider impact, governments also pledge to work with MNEs headquartered in their territory to abide by the Guidelines everywhere in the world. However, the Guidelines do not directly bind corporations.

Have any countries in addition to OECD member nations chosen to adhere to the Guidelines?

Yes, eight of them have, and, together with the 34, they make up the 42 OECD-member and non-member countries "adhering" to the Guidelines. Those additional nations are Argentina Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.

On what subjects do the Guidelines make recommendations?

They address the following areas of corporate activity: human rights, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition, and taxation. In the rest of this fact sheet, we focus on the Guidelines addressing human rights and employment and industrial relations.

Let's take, for example, the topic of employment and industrial relations. What do the Guidelines require of MNE's?

They require corporations headquartered or operating within the adhering country to:

- Respect the right of their employees to form unions of their own choosing (Guidelines, V., 1a), to be recognized for purposes of collective bargaining, and to engage in constructive negotiations over terms and conditions of employment (1b) (citations are to our reading for this Lesson);
- Contribute to the effective abolition of child (1c) and forced labor (1d);
- Honor equality of opportunity in employment (1e);
- Provide to workers' representatives the information needed for meaningful negotiations (2b);
- With respect to pay, benefits, working conditions, etc., observe standards that are either: i) "not less favourable than those observed by comparable employers in the host country" (4a); or ii) where no

comparable employers operate in the country in question, the "best possible wages, benefits, and conditions, within the framework of government policies" (4b);

- Take adequate steps to ensure occupational health and safety in their operations (4c);
- Employ, to the greatest extent practicable, local workers and "provide training with a view to improving skill levels," all in cooperation with workers' representatives and governmental authorities (5);
- When considering changes to their operations which would have major employment effects (for example, closures involving collective layoffs), provide reasonable notice of such changes and cooperate with unions and government to mitigate to the extent practicable the adverse effects (6).
- When negotiating with worker representatives, refrain from threatening to transfer any part of an operating unit outside the country to influence those negotiations unfairly or hinder the exercise of a right to organize (7).

What if the law of a particular country requires one thing, while the Guidelines urge another?

Here is what one of our readings says about this situation:

"Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law." (id., p. 17, para. 2)

I understand that the Guidelines establish in each adhering country an office called a National Contact Point. What exactly is a National Contact Point?

The OECD Guidelines called into begin what has been referred to as a state-based non-binding grievance mechanism. Each adhering country establishes a "National Contact Point," often composed of government representatives, but in some cases including representatives of civil society organizations. A National Contact Point supports the "complaint mechanism" described further in the next question. It is the contact point designated and authorized by the government to accept and act upon "specific instances" (complaints) alleging that an MNE has violated the Guidelines. Note the curious approach of the OECD here: although the OECD promulgates the Guidelines, the OECD itself does not implement them. It leaves that

task to the national contact points designated by the governments of its member nations.

How does the "specific instance" (complaint) mechanism of the OECD Guidelines work?

If someone or some organization believes an MNE has violated the Guidelines, it files a specific instance (or complaint) with an appropriate National Contact Point. (Our next question will expand on the "appropriate" point). Upon receipt of the complaint, the NCP will notify the MNE, investigate the matter, and make a preliminary determination whether the complaint warrants further attention. If it determines that it does, the National Contact Point will request the MNE named in the complaint to engage in mediation aimed at resolving the matter. An MNE is free to accept or refuse this offer of mediation. Whatever the outcome of the case, the NCP issues a "final statement" reporting on the disposition. Those final statements are available at the OECD website.

For any given complaint, when is a particular NCP the "appropriate" place to file?

Given that the world is a big place, it is not always true that the operations of a multi-national enterprise will be subject to the Guidelines. Let's examine this question first from the perspective of an OECD member nation.

Once a member country has established a National Contact Point, its "NCP" is authorized to receive complaints involving MNEs *headquartered* or *operating* in that country. So, for example, if Japan's NCP were to receive a complaint against Toyota for its conduct anywhere in the world, that would likely be an appropriately placed filing, because Toyota is a corporation headquartered in Japan and the Guidelines require subject MNEs to observe their standards throughout the operations of their main and subsidiary organizations.

And that brings us to the word "operating." So long as an MNE has an operation in an Guidelines-adhering country, a complainant can file a challenge to that operation with the NCP for the country where the operation is located.

It might be useful to approach the above rules from the perspective of the IHRM Department of an MNE: if the MNE is headquartered in an adhering country, the MNE must be prepared to be approached by the NCP of its headquarters nation about alleged violations of the Guidelines no matter where in the world they may be alleged to have occurred. At the same time, if the violations are alleged to have occurred outside the headquarters country but in another OECD adhering country, the complainant then has a choice between 1) filing in the headquarters country; or 2) filing in the (adhering) country of operation.

To take but one of many possible examples, consider a Chinese-headquartered MNE operating in South Africa. Because neither China nor South Africa has adopted the Guidelines, no one could use the Guidelines to challenge activities at that operation.

When one considers the above rules, it becomes clear that, although not all activities of all MNEs are covered, the Guidelines achieve coverage over a great deal of world commerce.

Can you give a couple of examples of actual OECD complaints?

Yes, here are two examples.

In a recent case, several labor organizations in U.S. and elsewhere alleged that the Japanese automaker, Nissan, had violated the OECD Guidelines as a result of its actions at its car-making facility in Canton, Mississippi. Specifically, the "notifiers" alleged that Nissan had, in response to workers' union organizing efforts, made implied threats of plant closing and committed other forms of management interference with the workers' rights. After receiving the complaint, the U.S. National Contact Point (in the U.S. State Department) declared "the issues raised…are material and substantiated and merit further examination." However, it must be remembered that the U.S. National Contact Point (as would be true of any NCP) has no power to compel Nissan to cooperate in any way to resolve the issues. conduct anything more than voluntary mediation with Nissan to resolve the issues. After the State Department contacted Nissan to determine whether it would participate in mediation under the State Department's uspices, Nissan announced that it would not consent to mediation. The State Department had to issue a "final statement" closing the case without further action.

In another case that began in June of 2011, a group of non-governmental organizations filed a "specific instance" against the Netherlands-based global agricultural firm Nidera (pronounced "Nye-deer-uh"). A "specific instance" is a complaint alleging that someone has violated the OECD Guidelines, and this case went to the Netherlands NCP. The complaint charged that Nidera had violated the employment and industrial relations Guidelines at the company's industrial-sized farms in Argentina. More specifically, the complaint alleged that Nidera had mistreated seasonal (and largely migrant) agricultural employees who worked and lived on Nidera's property. In this instance, after the Netherlands NCP contacted the company, Nidera entered into mediation and face-to-face discussions with the complaining parties, and out of that process, Nidera announced extensive changes in its industrial relations policies for the affected Argentinian agricultural workers. We will examine the Nidera case in the readings assigned for this Lesson (12).

Gee, that suggests a mixed picture. In one case, Nissan refuses to do anything and the case ends. In another, Nidera engages in a process and some things happen. If you look at a wider variety of cases under the OECD guidelines, what is the broader picture on results?

The experience is mixed. Celebrated cases of high impact include the global security firm, GS4, and the Netherlands-based agricultural firm, Nidera. However, for every one of these relatively high impact cases, there are a good many more where the "targeted" MNE simply refused to enter into mediation, braced itself for some negative publicity, and moved on.

I notice that the Guideines make frequent mention of a business enterprise's duty to take a "due diligence" approach to its compliance with the Guidelines? What does that mean?

Under the Guidelines, an MNE should conduct "due diligence" to avoid being involved in the occurrence of adverse impacts to people's rights as set forth in the Guidelines. In this context, "due diligence" is a proactive concept. When a firm engages in due diligence that is faithful to the letter and spirit of the Guidelines, it weaves its compliance with the Guidelines into its overall risk management processes. In other words, for an MNE to comply with the due-diligence directive of the Guidelines, it can hardly succeed by taking an entirely passive or "head-in-the-sand" approach regarding its compliance with the Guidelines. Such an attitude would fall well short of the due diligence standard.

For example, we might consider how the due diligence concept would apply to a major "brand's" relationships with firms in its supply chain. Our readings and Activity delve into this matter much further than here (See , for example, the reading entitled, OECD Guidelines for Multinational Enterprises – 2011 Edition, pp. 17-26, and pp. 37-38.) Due diligence calls upon the brand to prevent adverse impacts created by suppliers. (id., p. 20, para. 12). More specifically, a global brand would be expected to use what the Guidelines refer to as the firm's "leverage" with its business partners (suppliers, franchisees, license-holders, etc.) to produce compliance with, among other things, the employment and industrial relations standards of the Guidelines *throughout the supply chain*. When one considers the full implications of this, one realizes that, at least in the case of U.S. corporations familiar with how U.S. law governs their American-based operations, the OECD Guidelines challenge those firms to do more than U.S. law requires.

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