



Business and Industry Advisory Committee to the **OECD**

Comité Consultatif Economique et Industriel Auprès de l' **OCDE**

BIAC Statement on OECD MNE Guidelines Linkages

September 12, 2001

Introduction

In preparation for the September 18, 2001 BIAC consultation with members of the OECD Committee on International Investment and Multinational Enterprises (OECD CIME), BIAC would like to reiterate its views regarding the OECD Declaration on International Investment and the Guidelines for Multinational Enterprises (Declaration), and in particular the question of “linking” the OECD MNE Guidelines (Guidelines) to national government instruments.

As we noted during our intervention at the First Annual Meeting of the National Contact Points (NCPs) on June 18, 2001, the official and clear aim of the Declaration is to improve the climate for foreign direct investment and promote the positive contribution that multinational enterprises can bring. The Guidelines were welcomed as an appropriate instrument to promote this objective, and BIAC has continued to stress that implementation must go forward in good faith by all parties.

Since the June CIME meetings, BIAC Chairman Bruno Lamborghini received a very disappointing letter from the Dutch Minister for Foreign Trade, Mr. Ybema, in response to our communication to the CIME regarding linkage of the Guidelines with export credit coverage and other government subsidies in the Netherlands.

A cornerstone principle of the Guidelines is that they are voluntary. In the course of the discussions which have followed the June 18 meeting, including the June 19 OECD Roundtable on Global Instruments, BIAC has heard a number of comments suggesting linkages between the Guidelines and certain government programs. With respect to such linkages, in our opinion, there is a clear distinction between “coerced” compliance and their promotion as voluntary instrument.

Thus, on the issue of preserving the voluntary nature of the Guidelines and proposed linkages to eligibility for export financing or similar instruments, BIAC asserts the following points:

- **Broad International and Multi-Stakeholder Support for the Guidelines**

On the basis of their being a voluntary instrument, there was general support for the revised Guidelines among the OECD membership. That basis has been fundamental to the broad base of international support in the business community for twenty-five years.

- **Linkages and the Voluntary Nature of the Guidelines**

While the business community supports promotion and continued education regarding the Guidelines, it rejects any explicit or implicit linkage with the availability of export financing or similar instruments.

In our view, the Dutch Government's proposal to link official "acceptance" of the Guidelines with eligibility for government export and investment promotion instruments as well as export credit insurance, is indeed such a linkage. This policy clearly obviates the voluntary nature of the Guidelines.

Furthermore, as the proposal calls for the Dutch NCP to "play an important role in *enforcement* in the event of serious breaches of the principles of the Guidelines"¹ we are led to believe that precisely the elements of "eligibility" and "enforcement" included in the Dutch Government's proposal are at odds with the voluntary nature of the Guidelines.

We are concerned that with this policy, the constructive role that the Dutch NCP should play in the promotion and implementation of the OECD Guidelines may suffer if it also becomes involved in the monitoring and enforcement of government programmes. The NCPs are specifically designed to raise awareness of and promote the Guidelines, as well as to offer a forum for discussion and assistance with respect to specific instances related the Guidelines. The Guidelines and Procedural Guidance were agreed on the premises that the NCP does not and should not have quasi-judicial powers.

This breach of the agreement negotiated between all parties involved in the Guidelines Review process will make promotion efforts more difficult and can cast the implementation phase in a much more legal light than should be expected from an aspirational text such as the Guidelines. Such a development, confirms fears of some that the Guidelines do not contain sufficient safeguards against unintended use.

- **The Right to Regulate: Criteria for Subsidies**

In order to avoid any misinterpretation, BIAC clearly recognises that national governments may, as a matter of national legislation, attach certain conditions to the granting of subsidies etc. But the Guidelines have a role that is larger than any single national program and they must retain their negotiated integrity.

With respect to criteria for subsidies, there should be a clear connection between any criterion to qualify for a subsidy and the objective of the subsidy involved. Furthermore criteria for subsidies should be concrete, measurable and enforceable so as to allow for ex-ante and ex-post evaluation. In BIAC's view it is clear that the language of the OECD Guidelines does not meet these requirements as a possible criteria for subsidies. This is logical since the Guidelines were never meant to be used as a binding instrument.

¹ Quotation from English translation of the Dutch Foreign Trade Minister letter of May 4, 2001 to the Dutch House of Representatives; italics added. p. 3.

- **The Supposedly Voluntary Nature of Subsidies and Export Credit Insurance**

The point has been made by some that companies are free to decide whether or not to apply for export or investment subsidies or export credit insurance. Such a statement obviously underestimates the importance to companies of these instruments in highly competitive markets, including in those markets where there is a high level of governmental participation, or where high levels of risk or uncertainty must be offset.

Companies are subject to competitive “forces.” In a competitive marketplace, denying oneself use of these instruments would mean that one becomes uncompetitive and loses business. In the case of export credit insurance, it has become such an integral part of financing for export and investment related transactions, that it can hardly be called voluntary. Without it, there simply is none of this type of business.

The choice between rendering oneself uncompetitive and losing business or rendering voluntary guidelines de facto mandatory is nothing short of coercion

- **Linkage and Investment Promotion**

A perverse effect of linkage action by Governments is that, instead of promoting positive trade and investment, it might actually dissuade companies from doing business in countries that are considered high business risks. In difficult business environments where all constructive involvement of the private sector should be encouraged, companies might interpret a Guidelines linkage as an added vulnerability and source of potential liabilities. Companies do not treat a signed statement (as required in the Dutch proposal) as simply a piece of paper, even if governments state that they do not intend to monitor or enforce compliance.

Conclusion

The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They serve as an important benchmark or frame of reference for company management to enhance their management systems. To this end, BIAC has continued to encourage and highlight the positive work its members have undertaken with their respective NCPs to promote the Guidelines in their home countries.

With this in mind, the business community regrets that one of the most important principles of the revised Guidelines – that it is a voluntary instrument -- has been the first one to be breached in the implementation process. This will interfere with the promotion and implementation activities now underway.

In the interest of the effectiveness of the OECD Guidelines in strengthening the environment for foreign investment BIAC strongly recommends that this issue be dealt with in the OECD CIME. It is of the utmost importance that the CIME act to see that this abridgement is addressed.