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The Relevance of the OECD Guidelines for Multinational Enterprises to the Mining Sector and the Promotion of Sustainable Development

Introduction

The OECD Guidelines for Multinational Enterprises were adopted in their original form in 1976 as one part of the OECD Declaration on International Investment and Multinational Enterprises. They have a wide endorsement and therefore carry considerable normative value. Not only have all 29 Member countries (and four non-OECD countries) endorsed the revised *Guidelines* (2000) and enhanced implementation procedures but they have also been welcomed by the Trade Union Advisory Committee (TUAC) and non-governmental organisations (NGOs). Crucially, multinational companies, represented through the Business and Industry Advisory Committee (BIAC), have given them their support. The *Guidelines* make explicit reference to other instruments, which are seen as complementary and relevant. These include the Universal Declaration of Human Rights (UHDR), the ILO Conventions and the Rio Declaration.

The *Guidelines* provide a set of recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from the 33 adhering countries. The new text 'reinforce[s] the economic, social and environmental elements of the sustainable development agenda'.ⁱ What distinguishes the *OECD Guidelines* from other, largely private initiatives is that adhering governments - of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises - have clearly stated that they are the **only** multilaterally endorsed and comprehensive code that they are committed to promoting.ⁱⁱ Another critical aspect of the *OECD Guidelines* is that adhering governments are

obliged to monitor their implementation and to put a mechanism in place – the National Contact Point – to carry out this important task.

This paper examines the relevance of the *OECD Guidelines for Multinational Enterprises* to the mining sector and how they might help foster investment that promotes sustainable development. It is divided into five sections: section **I** sketches the expansion of mining interests outside of the OECD area in the 1990s; section **II** looks at globalisation and the challenges facing the mining industry; section **III** sets the *OECD Guidelines* in the context of industry led and other initiatives; section **IV** provides an overview of current concerns and the relevance of the framework of the *Guidelines* and the implementation procedures; section **V** sets out some preliminary observations about recent experiences with the implementation procedure and offers some proposals about the way forward. [There are four appendices: HDI rankings; typology of cases; UDHR; summary of other initiatives.]

I Expansion of Mining Interests in 1990s

The 1990s opened up an abundance of global opportunities for the world's non-coal mining industry. The political changes that took place in the early 1990s had a far-reaching impact for the world mining sector. Companies were able to take advantage of the opening of a number of countries in the former Soviet Union and of China to foreign involvement and investment. But these prospects were dampened by the persistence of low prices for metals and minerals over the period.ⁱⁱⁱ

The issue of prices is of fundamental importance to the world's mining groups, which base their investment plans in respect of deposit and mining development upon anticipated medium-term and long-term pricing scenarios. The industry is only able to determine the anticipated viability of expensive projects, which run over many years in terms of the costs of mineral extraction and processing and in terms of the prices thought likely to be realised. The Financial Times warned in 1996 that the industry could no longer automatically assume that the recovery in prices, which was observable in 1994 would continue. With the benefit of hindsight, the FT's view that 'not too much should be made of specific short-term movements in metal prices' seems unduly optimistic. In the last 12 months the price of copper for example, has averaged 71c/lb and in addition, current estimates of world economic growth suggest that near term copper prices will continue to be materially weaker than originally envisaged'.^{iv} Despite the current recession, demand for many kinds of minerals is expected to expand.

A glance at expenditure worldwide indicate the great interest of mining companies in exploring both established and promising regions of the world for new mineral deposits. The perceived opportunities and relative merits of regions outside the OECD area is readily apparent.

Worldwide non-ferrous exploration expenditure by mining companies

	% global expenditure
Latin America	29.1
Australia	19.6
Canada	12.2
Africa	11.9
US	10.9
Pacific region	9.6
Rest of the world	6.7

Source: Financial Times, 17.11.95

According to industry analysts one of the factors driving this expansion was the laxer regulatory climate. 'Many North American and other multinationals were increasingly looking to offset the impact of environmental constraints in their domestic regions by securing resources overseas.'^v Another factor which helps explain 'the gold rush (or, silver rush, copper rush and much else) to South America and other regions' was the 'privatisation bonanza' of mining sector interests in many countries.

The Privatisation Bonanza

The main beneficiaries of this 'bonanza' appear to have been the mining companies. As the Chief Executive of the Zambia Privatisation Agency put it - in an attempt to justify the generous stability provisions and other concessions obtained by mining companies in countries like Peru, Uzbekistan and Kyrgyzstan - 'mining companies focus their investment in countries which combine prospectivity and a mining tradition, with a willingness "to fix the rules of the game"'. All the countries listed above, the ZPA Chief Executive explains, 'were seeking to privatise mining assets at the same time as Zambia Consolidated Copper Mines was being marketed. Zambia thus needed to demonstrate its competitiveness with them.'^{vi}

According to Transparency International this has brought another set of problems: 'by overlooking the parallel existence of corrupt practices in commercial business, ...donors who pushed for speedy divestment and companies that invested in former parastatals have been complicit in the creation of greater opportunities for private corruption.'^{vii} An official inquiry into the privatisation of Zambia Consolidated Copper Mines, for example, found disturbing evidence of irregularities: "The process of privatising the mines was characterised by personal differences amongst key players, and not by observance of due process in the best interest of the nation. In some cases, political considerations appear to have overridden public interest, transparency and even the law."^{viii}

Despite some signs of improvements throughout the 1990s in corporate awareness of sustainable development, there is still a long way to go. Many mining companies continue to find themselves embroiled in controversy. One thing is clear that those companies that are slow to adapt to the new agenda would be ill-advised to assume that they will be freed from environmental, social or human rights constraints even where they develop operations outside the OECD area.

II Globalisation and Challenges for the Mining Industry

Historically mining companies have had a poor reputation. They have been seen as despoilers of the countryside, polluters of water sources, usurpers of ancestral lands, exploiters of cheap labour and accomplices to, if not instigators of, gross human rights abuses.

Recent studies by Oxfam America and others show that mineral [and oil] dependence is strongly associated with unusually bad conditions for the poor.

- Overall living standards in oil and mineral dependent states are exceptionally low – lower than they should be given their per capita incomes
- Oil and mineral dependent states tend to suffer from exceptional high rates of child mortality

- Mineral dependence is strongly correlated with income inequality.
- Both oil and mineral dependent states are exceptionally vulnerable to economic shocks.^{ix}

Most of the world's mineral dependent states are concentrated in sub-Saharan Africa. Few of these countries are performing well: twelve of the world's most mineral dependent states are classified as highly indebted poor countries. There is a strong negative correlation between a country's level of mineral dependence and its Human Development Index – HDI - ranking: the more that states rely on exporting minerals, the worse their standard of living is likely to be. [see Table in Appendix 1: Mineral Dependent States and HDI Rankings]

As the Oxfam America study states, extractive industries can provide benefits to the local population if they spur the development of related, non-extractive industries. One way is by promoting linkages with upstream industries that supply goods to the industry. Another is through the development of downstream industries that process and add value to the products. A third way is if the government uses export revenues to promote other, unrelated sectors of the economy. In practice these linkages tend to be weak. When states undergo resource booms, their currency tends to appreciate at the same time; the resource sector tends to draw labour and capital away from other sectors of the economy – a phenomenon known to economists as 'Dutch disease'. These effects can reduce the international competitiveness of the country's agricultural and industrial exports, making it harder for the country to diversify its exports and generate pro-poor forms of growth. Once states become dependent on mineral exports they have difficulty diversifying their economy, and promoting sectors like agriculture and manufacturing, which provide greater direct benefits to the poor.

- Mineral dependent states have significantly higher levels of inequality than other states with similar incomes; the more that states rely on mineral exports, the smaller the share of income that accrues to the poorest twenty per cent of the population. This suggests that once impoverished states become dependent on minerals exports any subsequent economic growth tends to do little to alleviate the conditions of the poor.

For the last century, the international prices for primary commodities – including minerals – have been more volatile than the prices for manufacturing goods. Since 1970, this volatility has grown worse. This means that as countries become more dependent on mineral exports, the more vulnerable to economic shocks they become.

Mineral dependent states have done a dismal job of protecting their economies against international market volatility. One survey found that mineral exporting states used their mineral revenues so poorly that export booms have led to higher levels of external indebtedness and less diversification than before.

Employment and Mining

Extractive sectors tend to be capital intensive and use little unskilled or semi-skilled labour. They are geographically concentrated and create small pockets of wealth that typically fail to spread; they produce social and environmental problems that fall heavily on the poor; they follow a boom and bust cycle that creates insecurity for the poor. Critics of the mining industry point to the fact that it does much less than other industries to generate employment while its energy consumption is prodigious and the costs, in terms of environmental degradation and social disruption, are disproportionately severe.

Opposition to Aluminium Industry Expansion in the Eastern Amazon

A coalition of NGOs from Brazil, Europe, and the United States are calling on three of the world's biggest mining and aluminium companies to drop plans to build a huge dam in the Brazilian Amazon. In November 2001 the coalition wrote to the heads of Alcoa of the US, BHP Billiton of Australia, and Cia. Vale do Rio Doce (CVRD) of Brazil, urging them to pull out of an auction for the concession for Santa Isabel, the first dam planned for the Araguaia River, a major Amazon tributary. The Santa Isabel dam would flood an ecological reserve, displace 7000 people and destroy the culture of the Surui indigenous group. The groups also question whether building large dams to fuel the aluminium industry promotes regional development, as the industry claims. Studies show that the food and beverage and textile industries together produce 18-25 times more jobs than the aluminium industry for the same amount of electrical energy consumed.

Environmental Problems

Part of the globalisation process involves wider market competition and the adoption of universal standards. In the 1990s purchases by mining companies in local markets have declined in favour of suppliers from other regions and from abroad. These changes are reflected in the scale of mining operations in a country like Peru that are now three to five times the magnitude of a decade ago, as preference is increasingly given to open pit mining. As a result of these technological innovations there has been a dramatic change in the nature and degree of environmental impacts. Conflicts between mining companies and local communities, particularly over access to land, have intensified.^x

While greenfield sites are not unproblematic, more intractable are the problems associated with the 'privatisation bonanza': the financial burden of making safe or refurbishing the dangerously dilapidated former state-owned mining assets; remediation of past environmental damage. In some countries this has become a highly contentious issue. Reviewing the environmental legacy of hardrock mining gives an indication of how far removed the industry still is from sustainable development.

- **Acid Mine Drainage (AMD):** a solution that originates at a mine site, carried off by rainwater or surface water and deposited in nearby streams, rivers, lakes and groundwater. It is generally extremely acidic in nature and contains high concentrations of toxic metals.
- **Groundwater and surface water depletion**
- **Heap leaching:** using cyanide or sulphuric acid poisons rivers, streams and groundwater and kills fish and wildlife.
- **Tailings:** tailings are the coarsely and finely ground waste from the mined rock remaining after the target minerals from the ore have been removed. Often tailings are stored in ponds behind an earth fill dam. They can leak polluting nearby water and soil. There is the potential for catastrophic dam or embankment failure.
- **Air Pollution:** smelter operations have the potential to emit heavy metals, sulphur dioxide and other pollutants into the air. Some air pollutants have toxic effects, such as causing cancer in humans from direct inhalation.

Excessive Air Emissions in Zambia

According to the World Bank, atmospheric emissions from smelting activities at Nkana, Mufulira and Chambishi mines on the Copperbelt are a priority issue. Emissions of sulphur dioxide range from between 300,000 and 700,000 tons per year. Toxicological data collected worldwide suggest that human fatalities can arise from short-term exposure to atmospheric sulphur dioxide levels in excess of 1000 ug/m³.

It is increasingly accepted that corporate social responsibility is a key requirement for creating a prosperous and ecologically and socially sustainable world. But many companies fail to live up to their own definition of good corporate citizenship. All too often, mining operations, continue to be out of step with accepted international standards: for example, the World Bank guidelines on pollution abatement and WHO Air Quality Guidelines. There has been insufficient public debate about the exemptions that mining companies have negotiated with governments which release them from compliance with national and international environmental standards for lengthy terms. This is largely because there is no disclosure of the social and environmental components of the development agreements, even after a sale has been concluded and the crucial importance of commercial confidentiality no longer prevails.

Good Governance and the Mining Sector

As the Oxfam America report states 'government corruption tends to harm the poor, since the poor are least able to pay the bribes necessary to obtain government services. Several recent studies have found that states with large oil and minerals sectors tend to be abnormally corrupt – perhaps because these sectors periodically flood the governments with revenues, creating heightened opportunities for the misuse of funds. Resource rich governments tend to use low tax rates and patronage to dampen democratic pressures and spend an unusually high fraction of their income on internal security'.^{xi}

Conflict

Countries that are dependent on oil and mineral wealth face a much higher danger of civil war than states that are resource poor. A state that depends heavily on the export of oil and minerals faces a risk of civil war of 23 per cent for any given five year period; an identical country with no natural resource exports has a civil war risk of just 0.5 per cent.^{xii} 'Two major conflicts in Angola and in the Democratic Republic of Congo continued to embroil states in the Southern Africa region during 2000 – 01. Both wars have been fuelled by a scramble for natural resources by government elites, generals, rebels and foreign companies'.^{xiii}

DRC - Conflict diamonds

At the end of last year, the report of the UN Security Council Expert Panel provided details on the smuggling of diamonds from the Democratic Republic of Congo (DRC) into almost every neighbouring country, and of collusion throughout the entire region. An estimated one third of the total rough diamond production of the Democratic Republic of the Congo, valued at \$300 million a year, is smuggled out of the country.^{xiv}

Oil and mineral wealth heightens the risk of civil wars in several ways. Poorly-governed mining operations can lead to the expropriation of land, environmental damage and human rights violations; these factors, in turn can create grievances that lead to armed conflicts as in the Bougainville rebellion in Papua New Guinea and the West Papua (Irian Jaya) rebellion in Indonesia. Rebel groups may also finance themselves by looting or selling off natural resources, as in the cases of Liberia, Sierra Leone and the Congo Republic. Mineral [and oil] dependent states also tend to be more heavily militarised. These states spend a larger fraction of their entire government budgets on the military. In 1997 the typical government spent 12.5 percent of its budget on the military.^{xv}

Mining and the Crisis in Investor Confidence

UNEP reports that the financial performance of mining companies has in recent years been affected by a whole series of mining-related accidents and community problems. The risks associated with mining have started to influence access to capital and shareholder value. The

multiple problems that beset the mining companies in almost every mineral rich country has scared off the commercial banks. Confrontations with indigenous peoples, the workforce and with local communities concerned about environmental impacts have contributed to this drastic decline in investment. It is something of an understatement to say that 'Mining, with very few exceptions, does not enjoy widespread support'.^{xvi} Some companies are experiencing delays in project implementation and are having difficulties in recovering invested funds. At the same time mining companies, 'seemingly as never before', are concerned 'to bear down on overheads, to take the cost out of the production process'.^{xvii} The cash costs of Anglo's Zambia operation for example had come down substantially from \$1 per pound of copper to about 80 cents over the 18-month period since it bought the mines.^{xviii} At the height of the 'privatisation bonanza' in the 1990s mining companies were able to dictate their terms in a buyers market. The subsequent collapse in base metal prices, the squeeze on investment and the global recession has left some companies, who scrambled to acquire these assets, over-extended. They are now displaying an equal determination to cut their losses and withdraw. 'The decision by one of Zambia's major employers and investors [Anglo] to pull out is likely to throw the country into crisis and have harsh consequences for its economy'.^{xix} If there is no buyer and the mines close some 11,000 people will lose their jobs.

III Response from the Mining Industry and Other Initiatives

The exposure of the sector to reputation risk means that leading companies have been in the forefront in developing codes of conduct. There are wide divergences in the approaches taken by extractive industries even in the relatively narrowly defined areas such as the environment, human rights and fighting bribery. Similarly management practices in support of these commitments vary significantly. As the OECD's own review found some firms have adopted advanced practices, while others have yet to translate their codes into management controls.^{xxxxi} Disclosure of information is a key aspect of corporate citizenship since the disclosure policies render the firm accountable to outside assessment. But only a minority of the codes contain text on financial disclosure. Most texts deal with financial accounting and disclosure in an extremely general way. Companies promise to disclose information documenting what they are doing to implement their codes and their performance relative to the standards and aspirations set out in their codes. But this is not uniform practice; many company codes do not mention a commitment to disclose relevant information. Also disclosure can be to a select audience. The majority of company codes mention procedures to inform employees, managers and, at times, the board of directors but they are more reticent when it comes to transparency towards the general public. The OECD study concludes that the codes do not constitute a *de facto* standard of commitments in the areas they cover.

This lack of consistency and the continuing problems besetting the industry has led to efforts at consolidation. The Global Mining Initiative (GMI) was launched about two years ago at a meeting of mining CEOs at the World Economic Forum in Davos. The underlying rationale for the GMI is to provide leading companies a platform to address the low esteem that the industry is has in the eyes of the public. Despite its concern with the beleaguered status of the mining companies, the initiative has spurred a number of interesting developments.

Mining companies have formed a new international trade association, the International Council on Mining and Metals (ICMM), and it will act as a lobby group to give the minerals industry a global voice in debates about the environmental and social impact of its activities. The aim of ICMM is to meet 'rising expectations' by making a coherent case for the industry's contribution to sustainable development and the environment in which they work. Meeting these challenges is central to the future commercial and political viability of the industry. ICMM is a response by the industry to persistent regulatory, political and reputation challenges that threaten its sustainability and which it feels that it has been unable to adequately respond to. Some NGOs are critical of the Mining Minerals and Sustainable Development (MMSD) global research programme commissioned by the GMI companies. They see it as an industry-driven process and concerns have been expressed about the selection of the researchers, some of whom, because of their work as consultants for the mining companies, are not regarded as fully independent by the NGOs. MMSD will develop a set of principles and guidelines for the industry and review the role and responsibilities of key stakeholders. The MMSD's corporate sponsors include Alcoa, Anglo American, Anglovaal, Barrick Gold, De Beers, Freeport-McMoran Cooper and Gold and Summit Metal Mining.

- NGO Initiatives

The daunting number of individual company codes is matched only by the volume and complexity of civil society initiatives, which range from practical management tools, (e.g. 'A New Approach to Risk Mitigation in Zones of Conflict') and financial incentives (socially-responsible investment indexes) to burgeoning proposals for new regulatory frameworks in Europe and North America. Proposal for reporting requirements are becoming more sophisticated. It is hardly surprising that companies are 'overwhelmed by the sheer number of environmental and social initiatives being foisted on them by activists, stockholders, customers and senior managers'^{xxii}.

Numerous NGO campaigns concern particular mining operations across the globe from Angola to West Papua. Many focus on the negative social and environmental impacts of mining that destroy local livelihoods, most seek redress for affected communities. Others aim to set benchmarks that will promote sustainable development more generally or protect vulnerable ecosystems. What the campaigns have in common though is the desire to reform the mining industry, making its operations more transparent and eliminating or modifying its most harmful practices. Many, if not the majority, of NGOs accept that, despite its negative impacts, mining will continue to represent - for the foreseeable future - an important source of revenue for developing countries.

IV What is the relevance of the OECD Guidelines in current context?

In the face of so many competing initiatives it is appropriate to consider what contribution can the *OECD Guidelines* make? Many NGOs remain sceptical about the value of the *OECD Guidelines* and view them as recommending 'minimal social and behavioural practices for multinational

enterprises'.^{xxiii} As the NGO Statement to the June 2002 Ministerial explained, so far the response has been 'guarded', but interest in the revised guidelines is growing.^{xxiv} Industry may feel that the *OECD Guidelines* are too generic to be of much practical value. But as the OECD study made clear the effectiveness of codes and other voluntary initiatives depend on the effectiveness of the broader system of private and public governance from which they emerge - private initiatives cannot work well if other parts of the system work poorly.^{xxv} The value of the *Guidelines* ultimately will be judged by the seriousness with which governments handle the implementation procedures. The *Guidelines* cannot operate in isolation from the other, multiple initiatives that have arisen as a response to the public's increasing anxiety about the power and conduct of multinational companies in the globalised economy. As interest in the implementation procedures grows, so governments will have to improve the resources available to the NCPs

In all of this, the work of the NCPs is critical. The decisions the NCPs reach in particular cases will need to be informed by sector specific standards, industry benchmarks, global reporting requirements and other international human rights and environmental norms. It is only by referring to benchmark standards that the NCPs will be able to define acceptable and unacceptable actions. As part of the OECD Declaration on International Investment and Multinational Enterprises adhering Governments 'jointly recommend to multinational enterprises operating in or from their territories in the observance of the *Guidelines*...having regard to the considerations and understandings that are set out in the preface and are an integral part of them' Reference is made in the Preface to the international legal and policy framework in which business is conducted. The Universal Declaration of Human Rights is cited as part of this framework and its relevancy to corporate conduct duly noted. As an integral part of the International Bill of Human Rights, the Universal Declaration is implemented via the two corresponding International Covenants on Civil and Political and Economic and Social and Cultural Rights.^{xxvi} [See Appendix 3 for an analysis of the obligations on companies arising from the Universal Declaration of Human Rights]

Supranational applicability

A key question is whether a company is expected to apply standards, which go beyond national requirements in the conduct of its business. Three observations are pertinent. They relate to the supplementary nature of the *Guidelines*, the prior influence of companies in framing legislation, and the recognition within firms of corporate-wide codes of conduct First, it is recognised in the *Guidelines* that '[e]very State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction'; yet this right is qualified as 'subject to international law and to the international agreements to which it has subscribed.' Hence explicit recognition is given to the application of overarching obligations. At the same time, '[t]he entities of a multinational enterprise located in various countries are subject to the laws of these countries.' However, the perception that companies need only comply with national laws is based on a partial interpretation of the *Guidelines*. While they are not viewed as a substitute for national law and practice, the recommendations within the *Guidelines* are perceived in *supplementary* terms and the firm expectation is that companies will adhere to them.

Adherence to the *Guidelines* may necessitate that a company complies with standards over and above those required in the host country's domestic law; it does not mean that the company, by doing so, is in direct conflict with or contravenes national law. This is precisely what is meant when the *Guidelines* are viewed as a supplement to national law and practice. After all, their *raison d'être*

is the need for standards applicable across national boundaries to mirror the organization and operation of multinationals. Second, to accept that companies are automatically absolved of responsibility for their conduct as long as they are in compliance with host country domestic law and the terms of development agreements is profoundly misplaced because it ignores the question of prior influence. National laws in many developing countries are framed according to the stipulations of the private sector, together with the World Bank, IMF, and other advocates of deregulation. Furthermore, firm or industry-level agreements reflect the strong negotiating position of companies in their individual or collective capacity. The original *Guidelines* recognise the influence of private companies on Government policy and the regulatory environment and caution enterprises to take into account, *inter alia*, economic, social, and environmental policy objectives. There are instances when the terms *first* agreed in negotiations are *subsequently* reflected in law. Under the revised *Guidelines* there is explicit recognition of the principle that multinational enterprises should refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework.^{xxvii}

Typology of Cases [Specific Instances]

An examination of mining industry-related problems that have arisen since the *Guidelines* were revised (though not all have been presented to NCPs as specific instances) reveals a wide range of concerns:

- Failures to disclose material information to local communities
- Forced evictions
- Air Pollution and/or contamination of water resources
- Occupational health and safety
- Abuse of market power
- Corrupt dealing
- Obstruction of inquiries into serious human rights abuses

V. Initial Experience with the Implementation Procedures

There has very little practical experience of the implementation procedures so far. But the overall impression of the work of many NCPs is positive. They have made genuine attempts to disseminate the *Guidelines* and improve their outreach. NCPs who have been approached about specific instances have shown a willingness to advise and to assist in problem solving. Mining cases will often occur outside the OECD area and the limited information gathering capacity of most NCPs may prove to be a problem. This should not be insuperable; if for example, the trade missions of OECD countries or the EC delegations take an active stance in promoting the *Guidelines* and monitoring its implementation. There is a concern that the position of the NCPs – who are public officials often based in Trade Ministries – may make them vulnerable to political or commercial pressure. The implementation procedures would gain in credibility if the NCP became an independent watchdog. This issue will certainly be something for any future review to consider. NGOs have been alarmed by the attempts of some NCPs to raise the barriers for admissibility by, for example, insisting that NGOs have full power of attorney before they can raise a case. Others

are requiring that the cases should be filed by NGOs based in the country where the problem has occurred. There are a number of undesirable outcomes from the creeping imposition of more complicated procedural rules. It may slow the process down and delay reconciliation between the parties. Certainly, while a case should have the support of local NGOs, it may not always be appropriate to make it a hard and fast rule that they must present the case to the NCP. In countries, which have governance problems and where human rights are routinely violated, such a requirement could expose complainants to risks to their personal security or other forms of harassment. It is not unusual in some countries for local NGOs to be branded unpatriotic if they file complaints. Finally, the general public will only start to place greater faith in the process, if NCPs can be strengthened. NCPs have to be able to demonstrate their impartiality in order to convince all sides that they can act as 'honest brokers'.

Companies' Responses

Companies, including the large multinationals, still appear unfamiliar with the *Guidelines* despite BIAC's dissemination efforts. Although BIAC participated fully in the revision, there is a prevailing sense that not all sectors of business have fully embraced the new text and procedures.

BIAC's Assessment of the Guidelines and Implementation Procedures

The official and clear aim of the *Guidelines* is to improve the climate for foreign direct investment and promote the positive contribution that multinational enterprises can bring. For their part, OECD governments undertook not to discriminate against multinationals, to avoid imposing conflicting requirements on them, and to co-operate on official incentives and disincentives to international investors. ...

Implementation must be carried out in good faith by all parties. Otherwise, there is a serious risk that the main aim – namely, to improve the climate for foreign direct investment – may fail....

BIAC is extremely concerned regarding the Dutch Government's proposal to link official "acceptance" of the *MNE Guidelines* by individual companies to the availability of government subsidies and export credit coverage.

BIAC Statement, OECD Annual Report 2001

BIAC appears to understand the term 'voluntary', which is used in relation to the *OECD Guidelines*, as meaning 'merely optional', whereas for governments, the trade unions and NGOs 'voluntary' is taken to mean 'a firm expectation of company behaviour' but not legally binding. Some parts of business are clearly more adaptable than others to the new corporate social agenda. Of relevance to the mining sector is the fact that intermediaries like investment banks clearly seem to feel that the *Guidelines* are not addressed to them. BIAC and the NCPs in particular should do more work to engage them. Companies need to absorb the potential of the *Guidelines* as endowing 'a seal of

approval' which increasingly will be seen as an essential element of international financial competitiveness. On the whole, mining companies who have had the *Guidelines* drawn to their attention seem to take them very seriously indeed, possibly because they are backed up by the obligatory implementation procedures. Some view the prospect of recourse to the NCPs with dread and have engaged in a series of manoeuvres to prevent a case going forward. This can create a schizophrenic relationship whereby some companies appear to be entering into negotiations only as a means of staving off the services of the NCP. In some extreme cases there have been concerns that companies have even resorted to threats and intimidation of local NGOs. More subtle pressures have also been reported.

Companies' exaggerated fears of reputational damage from engagement with the NCPs overrides the potential benefits that the procedures might offer, particularly regarding facilitation and good offices inherent in the procedural guidance. Paradoxically, this refusal to engage is most likely to provoke a media campaign by NGOs. Ironically, it is the companies who are tending to treat the procedure as a quasi-judicial process, thereby undermining its potential as a simple, fast track dispute-resolution mechanism. If business continues on this path it may well have the effect of eroding the value of the Guidelines and make regulation more likely.

Initial Outcomes

It is too early to have a very clear impression of the full potential of the implementation procedures. But there is room for cautious optimism. The intervention of the NCP in one case clearly has brought about a measure of success. The threat of forcible eviction of squatters on mine land by the army was withdrawn and negotiations, which had broken down between the company and local community leaders, re-started. The company has begun to upgrade its staff dealing with social issues.

A preliminary – possibly premature – impression from the relatively few recent experiences suggests, unsurprisingly, that the cases which may be most amenable to NCP intervention concern familiar problem areas – evictions, environmental hazards, labour and occupational safety. This is not to say that there have been uniformly successful outcomes in all these areas - and not all pending cases have yet been resolved. But it is still early days. There is some doubt about the ability of the NCPs to tackle more controversial issues: for example, an attempt to raise a specific instance about bribery did not proceed. Undoubtedly the potential of some of the unique provisions in the *Guidelines* (such as the provision exhorting companies to conduct their activities in a competitive manner *Chapter IX*) which offer NCPs the scope to undertake a wider scrutiny of the way companies strike deals, impose their own terms on governments and obtain concessions far more generous than what is on offer to smaller, domestic businesses - have yet to be tested.

Advantages of the Implementation Procedure

Mining is a complex activity. The NCP holds out the prospect of a genuine facilitation and reconciliation service that is not seen as serving the interests of only one of the parties. By bringing in independent experts, the NCPs could help resolve misunderstandings between the

parties about some of the more technical aspects (environmental and financial) of mining. The NCPs could instigate phased confidence building measures, which could lay down the foundations for a more constructive and lasting relationship between the local communities, the workforce, host governments and NGOs. A relationship built on mutual trust and respect will be essential if a climate conducive to investment is to be achieved.

Recommendations

- Regular and systemic involvement of NGOs at the CIME level, including access to documentation
- Benchmarking of NCP performance in future annual meetings at the CIME level
- Move towards a review of the Guidelines in 2003
- Engage in confidence building initiatives with companies to reduce their fears about the procedures

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Oxford
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Appendix 1

Table 1: Mineral Dependent States and HDI Rankings, 1995

State	Minerals Dependence	HDI Rank
1. Botswana	35.1	122
2. Sierra Leone*	28.9	174
3. Zambia*	26.1	153
4. United Arab Emirates	18.2	45
5. Mauritania*	18.4	147
6. Bahrain	16.4	41
7. Papua New Guinea	14.1	133
8. Liberia*	12.5	127
9. Niger*	12.2	173
10. Chile	11.9	38
11. Guinea*	11.8	162
12. DRC*	7	152
13. Jordan	6.3	92
14. Bolivia*	5.8	114
15. Togo*	5.1	145
16. CAR*	4.8	166
17. Peru	4.7	80
18. Ghana*	4.6	129
19. Bulgaria	4	60
20. Angola*	3.6	160
21. Zimbabwe*	3.4	130
22. Iceland	3.1	5
23. Kazakhstan	2.6	73
24. Norway	2.5	2
25. Australia	2.4	4

* *Highly Indebted Poor Country*

Mineral Dependence is the ration of non-fuel mineral exports to GDP. HDI is a state's rating in the UNDP's Human Development Index, which ranks states according to a combined measure of income, health and education; rankings range from 1 (highest level of human development) to 174 (lowest).

source: Oxfam America

Appendix 2

Relevance of OECD Guidelines to the Mining Sector
Table 2: Typology of Issues Raised

Status	Company	Country	Issue	Applicable Provision of OECD Guidelines
not filed			Eviction of artisanal miners carried out despite court order restraining action. Alleged complicity in destruction of evidence of deaths of miners.	II, 2 Respect for Human Rights
not filed			Pollution of water resources in violation of WHO standards	V, 2b Consult with directly affected communities V 5 Maintain contingency mitigation plans
pending			Excessive Tax Concessions – later Incorporated into law Exemptions from liabilities For environmental pollution Refusal to deal	II, 5 Refrain from seeking exemptions not contemplated in statutory framework I X Behave in competitive manner X Taxation – contribute to public finances
filed			Threat of violent forced evictions and refusal to negotiate with communities.	II 2 Respect for human rights V 2b Consult with directly affected communities
filed			Occupational Health and Safety and	IV 4b Ensure occupational health and safety in operations
not filed			Neglect of wider social provision in design of mine privatisation	II 1 Contribute to economic, social and environmental progress

Appendix 3

The UDHR calls on 'every individual and every organ of society' to play their part in securing the observance of the rights contained within it. In this context, companies have a moral and social obligation to respect the universal rights enshrined in the UDHR. When looking at the specific responsibilities of companies, the following are specific areas where companies have responsibilities:

- **Discrimination:** Individuals are entitled to equal treatment and companies must not distinguish between individuals on the basis of race, caste, national origin, disability, colour, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. Companies must ensure that their activities do not infringe these rights.
- **Life and liberty:** Every individual has the right to life, liberty and security of the person and companies must ensure that their activities do not infringe any of these rights in relation to any individual or group of individuals.
- **Slavery:** No individual should be held in slavery or servitude of any kind and companies must ensure that their activities do not infringe this right.
- **Torture:** No individual should be subjected to torture, physical mistreatment or to cruel, inhuman or degrading treatment or punishment. Companies must ensure that their activities do not infringe this fundamental right.
- **Security of person:** No individual should be subjected to arbitrary arrest, detention or exile. Companies must ensure that their activities do not infringe this fundamental right.
- **Privacy:** All individuals are entitled to protection against arbitrary and unjustified interference with their privacy and the privacy of their families. Companies must ensure that their activities do not infringe this fundamental right.
- **Property:** All individuals have the right to own property and access common resources, either alone or in association with others and companies must ensure that their activities do not infringe this fundamental right. Any deprivation of property and access to common resources for the purposes of the company's business must only be carried out by a government authority, be on just terms (including the payment of prompt, adequate and effective compensation) and be for the benefit of the public. In the specific context of local communities, this requires that companies not only respect the fundamental rights of these communities but also respect the principles of self-determination, including economic self-determination.
- **Religion:** All individuals have the right to freedom of religion (including the right of assembly and the right to maintain practices of worship and observance), where that religion does not impinge on the fundamental human rights of other individuals. Companies must ensure that their activities do not infringe this fundamental right or condone or promote infringement by any other person.
- **Freedom of opinion:** All individuals have the right to freely hold ideas and opinions, where those ideas and opinions do not impinge on the fundamental human rights of other individuals, and to hold those ideas or opinions without interference from the state or other individuals. Companies must not limit the ability of individuals to hold ideas or opinions, or, where compatible with the normal where those ideas and opinions do not impinge on the fundamental human rights of other individuals, and to hold those ideas or opinions without interference from

the state or other individuals. Companies must not limit the ability of individuals to hold ideas or opinions, or, where compatible with the normal operation of their business, to freely express such ideas or opinions.

- Freedom of association: All individuals have the right of association with other individuals and to bargain collectively. Companies must ensure that their activities do not infringe this fundamental right.
- Labour standards: All employees are entitled to a workplace that is safe, healthy and clean and to a fair and just wage in the context of the social environment within which they are working. Companies must not require any employee to work under conditions that do not meet the standards set out in the Conventions of the International Labour Organisation (ILO) and, furthermore, companies must comply with the requirements of the ILO's Convention on Child Labour and the UN Convention on the Rights of the Child.
- Bribery: Companies must comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In addition to these civil and political rights, the human rights responsibilities of companies are increasingly being recognised as including:

- Respect for national sovereignty: Companies should recognise and respect the national laws, regulations, values, development objectives and the social, economic and cultural policies of the countries in which they operate in so far as these do not conflict with international human rights standards.
- Fair and adequate compensation: Companies should provide workers with remuneration that ensures a lifestyle worthy of human existence for workers and for their families.

Respect for local communities: Companies should respect the rights to health, adequate food and adequate housing and shall refrain from actions that obstruct the realisation of these fundamental rights. Companies should also respect other economic, social and cultural rights such as the right to primary education, rest and leisure and participation in the cultural life of the community and companies should refrain from actions that obstruct the realisation of these rights.

Submission from Amnesty International (UK) Business Group on The Commission of the European Communities' Green Paper: *Promoting a European Framework for Corporate Social Responsibility*

Appendix 4

Summary of Key Initiatives of relevance to the Mining Sector

- Global Compact and the Global Reporting Initiative

The United Nations is promoting the Global Compact by encouraging companies to advance universal values in business operations around the world. The Compact calls on business leaders to adopt and apply nine principles derived from the Universal Declaration of Human Rights, the ILO's Fundamental Principles of Rights at Work, and the Rio Principles on Environment and Development. And the Global Reporting Initiative (GRI), which is an attempt to create a common disclosure framework for economic, environmental and social reporting, that will elevate sustainability reporting practices worldwide to a level equivalent to financial reporting. The GRI claims that its *Sustainability Reporting Guidelines* provide 'a critical ingredient to the Global Compact – accountability'.

- Kimberley Process

The process has been led by South Africa and involves other African governments that mine in conjunction with De Beers. In response to the highly successful NGO campaign on 'conflict diamonds', the Kimberley group has proposed a global diamond regime whereby all diamonds would receive certificates of origin from the time they are mined, so that dealers will know conflict diamonds by the absence of official documentation. Agreement has been reached on the details of export and re-export certificates on minimum standards for controls in mining and trading countries, on statistics and on a process for including all countries as participants in the process. NGOs are concerned however that the final document has watered down the crucial issue of verification and monitoring by making review missions 'voluntary'. The agreement will be submitted to the UN General Assembly for consideration in March 2002. But NGOs are pressing for 'the full force of law to be brought to bear on those individuals and countries that are perpetuating conflict through senseless acts of terrorism funded by diamonds'.^{xxviii}

- Voluntary Principles on Security and Human Rights for Mining and Energy Companies.

These were formulated as a result of discussions between the US Department of State, the UK Foreign and Commonwealth Office, transnational oil and mining companies, human rights organisations, unions and business organisations. Companies involved included BP, Royal Dutch/Shell, Chevron, Texaco, Enron, Rio Tinto Zinc, Freeport McMoRan.

- Key findings from the OECD's Review of Voluntary Codes of Conduct

The OECD in a recent review of business approaches to corporate responsibility notes that voluntary initiatives have 'a crucial, but necessarily only partial role', to play in the effective control of business conduct. Voluntary codes cover a broad range of issues and address each of the

economic, social and environmental pillars of the sustainable development agenda. The codes address issues such as environmental management, human rights, labour standards, anti-corruption, consumer protection and information disclosure, competition and science and technology. The OECD found in its inventory of 246 codes that the two most common issues addressed were labour standards and environmental stewardship. The greatest divergence was in the companies treatment of bribery. Few codes discussed remuneration of agents. Some dealt only with bribery of public officials, others only with private-to-private bribery; almost none dealt with both.

NGO Initiatives

- **International Right to Know Campaign:** uses the model of the US Right-to-know laws and would require US companies to report on the key environmental, labour and human rights practices of their companies overseas.
- **World Heritage Sites Protection – IUCN:** this encourages governments to prohibit mining in most IUCN designated protected areas such as those designated for wilderness protection, conservation of specific natural features, habitat and species management.
- **Global Mining Campaign:** is attempting to coordinate civil society activists, NGOs and affected communities. Its aim is to enhance mining company accountability to communities and their performance in the areas of environmental protection, human rights, economic and social developments and cultural rights and integrity.
- **Socially Responsible Investment Initiatives:** in the UK pension fund trustees must now state the extent to which environmental, ethical and social matters are considered in their investment decisions.

ⁱ The OECD Guidelines for Multinational Enterprises, Revision 2000

ⁱⁱ The Honourable Peter Costello M.P., Treasurer of the Commonwealth of Australia, Statement by the Chair of the OECD Ministerial, June 2000

ⁱⁱⁱ Mark Payne, The Global Mining Industry, Financial Times Management Reports 1996

^{iv} Anglo American, Zambia Copepr Investments Limited concludes a strategic review of its investment in Konkola Copper Mine (KCM) operations in Zambia, News Release 24 January 2002

^v Payne, The Global Mining Industry'

^{vi} Letter from Stewart Cruickshank 18 October 2000

^{vii} Global Corruption Report 2001, Transparency International

^{viii} Report of the Committee on Economic Affairs and Labour on the Review of the Privatisation of Zambia Consolidated Copper Mines Limited, Zambian National Assembly, Lusaka November 2000

^{ix} Michael Ross, Extractive Sectors and the Poor, Oxfam America, October 2001

^x Keith Slack, Briefing Paper on Mining in Peru, Oxfam America, May 2000

^{xi} Michael Ross, Extractive Sectors and the Poor, Oxfam America, October 2001

^{xii} Collier and Hoeffler [2000]

^{xiii} Transparency International, [2000]

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- xiv <http://www.un.org/Docs/sc/letters/20011072e.pdf>
- xv Michael Ross, Extractive Sectors and the Poor, Oxfam America, October 2001
- xvi Chris Hinde, 'The global mining industry', UNEP Industry and Environment – Special Issue 2000
- xvii *idem*
- xviii Business Day, 25 January 2002 Crisis for Zambia as Anglo pulls out
- xix *idem*
- xx
- xxi OECD 'Corporate Responsibility: Private Initiatives and Public Goals', 2001
- xxii The Greenbusiness Letter March 2001
- xxiii Global Mining Campaign, 'A Survey of the Mining Landscape: Situational Analysis' September 2001
- xxiv NGO Statement during 17 June 2001 consultation on the OECD Guidelines for Multinational Enterprises
- xxv OECD 'Corporate Responsibility: Private Initiatives and Public Goals', 2001
- xxvi RAID, Applicability of the Guidelines, Submission to the UK National Contact Point, September 2001
- xxvii The section on supranational applicability is taken from RAID, Applicability of the Guidelines, 2001
- xxviii Other Facets Number 4, December 2001