

The OECD Guidelines for Multinational Enterprises: an analysis

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This set of guidelines from the Organisation for Economic Co-operation and Development has recently been updated to reflect changes in the business environment

Over the years, the Organisation for Economic Co-operation and Development (“OECD”) has taken the initiative to issue various guidelines in relation to the activities of multinational enterprises. There are the OECD Guidelines for Multinational Enterprises, 1976 (Reproduced in 15 *International Legal Materials* (1976) 969) the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (Reproduced in 37 *International Legal Materials* (1998) 7); the OECD Principles of Corporate Governance; the OECD Guidelines for Consumer Protection in the context of Electronic Commerce (Reproduced in 39 *International Legal Materials* (2000) 504); and the OECD Guidelines on Transfer Pricing for Multinational Enterprises and Tax Administrations. Recently, the OECD published another set of guidelines for multinational enterprises (The text of the Guidelines has been published in 40 *International Legal Materials* (2001) 237). In this article “*multinational enterprises*” and “*transnational corporations*” have been used interchangeably. The author believes that the latter term is more appropriate than the former: see also the UN Code of Conduct on Transnational Corporations, 1990.).

The gap between the first major guidelines and the current guidelines issued by the OECD is 25 years, and the business environment has significantly changed over this period. It was therefore timely for the OECD to publish another guidelines representing the changes that have taken place in the business world, and to which multinational enterprises may be subject. Many host countries, particularly in the developing world, have

adopted investment legislation which provides for control of multinational enterprises. On the other hand, there are many other countries which have not yet developed such legislation. The Guidelines states that:

“The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinationals can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.” (International Legal Materials, *op. cit.*, at 238)

But the question remains in what way(s) may multinationals contribute to the economic progress if they are not involved in infrastructure work. Multinational enterprises facilitate the transfer of technology to host countries; they also provide training, and promote the development of human resources. The desired result from multinationals may only be achieved by identifying the needs of host countries, be they developed or developing, and how best the interests of multinationals may be protected. Governments should develop an identifiable policy framework and legislation for controlling activities of multinationals and the incentives they provide to the latter. On the other hand, multinationals may identify, in consultation with host countries’ governments, how best they could contribute to the economic development process of those countries. Furthermore, host governments are required to operate a non-discriminatory policy towards multinationals; they must also assure them of appropriate judicial protection in host countries, if necessary, and honest public administration.

Over the years, the OECD has directed its attention to developing policy framework in order that maximum benefit may be derived from their activities without causing any harm to consumers and host countries. (See also the UN Code of Conduct on Transnational Corporations; *op. cit.*,)

The current Guidelines are the latest in the OECD's attempt to regulate the conduct of multinational enterprises, and it is the purpose of this article to examine the kind of contributions the Guidelines may make for a better utilisation of multinational enterprises.

AN ANALYSIS OF THE GUIDELINES

The Guidelines have been developed under the following sub-headings:

- (a) Concepts and Principles
- (b) General Policies
- (c) Disclosure
- (d) Employment and Industrial Relations
- (e) Environmental
- (f) Combating Bribery
- (g) Consumer Interests
- (h) Science and Technology
- (i) Competition
- (j) Taxation.

The purpose is not to discuss each of these sub-headings in detail, but to examine some of the important sub-headings and evaluate them from a practical standpoint.

CONCEPTS AND PRINCIPLES

Interestingly enough, hardly any concepts have been defined or discussed under this sub-heading, although certain Principles have been identified. Both the 1976 and the current Guidelines maintain that no precise definition of a multinational enterprise is required for the purpose of such Guidelines. However, the Guidelines state that multinational enterprises usually comprise:

"... companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed." (The Guidelines, *op. cit.*, at 239)

According to the Guidelines, there should not be any difference of treatment between multinational and domestic enterprises; thus multinationals and domestic enterprises are subject to the same expectations in respect of their conduct. This is because all enterprises, domestic

or otherwise, are expected to follow certain standards of conduct, namely, in respect of consumer protection, or protection of the environment or disclosure of information etc. The 1976 Guidelines were exclusively addressed to multinational enterprises the activities of which extended to foreign jurisdictions. One of the principles that the Guidelines advocate is that the activities of a multinational enterprise located in various foreign jurisdictions are subject to the local laws, whereas host governments have the right to prescribe the conditions under which these enterprises operate within their jurisdictions, subject to international law.

An important purpose under the Guidelines is that the governments should adhere to the Guidelines with the understanding that they will treat enterprises equitably and in accordance with international law and their contractual obligations.

According to the Guidelines, in facilitating the resolution of legal problems arising between enterprises and host governments, governments should not appropriate international dispute settlement mechanisms (*e.g.* conciliation, good offices, mediation, enquiry and judicial settlement), including arbitration.

The general policies of the Guidelines are interesting in that they clearly identify what multinational enterprises should do while they operate in host countries. This is very much in line with the Code of Conduct developed by the UN Centre on Transnational Corporations. Furthermore, according to the Guidelines, multinational enterprises should consider the views of other stakeholders. In particular, according to the Guidelines, they should do the following:

1. *Contribute to economic, social and environmental progress with a view to achieving sustainable development.*
2. *Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*
3. *Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.*
4. *Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.*
5. *Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.*
6. *Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*
7. *Develop and apply effective self-regulatory practices and*

management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

8. *Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.*
9. *Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.*
10. *Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct, compatible with the Guidelines.*
11. *Abstain from any improper involvement in local political activities.* (39 International Legal Materials, *op. cit.*, at 240)

These general principles represent the aspirations of host governments, particularly of developing countries. They place emphasis on the participating activities of multinational enterprises in host countries so that they may be accepted as actions of development, particularly in the context of developing countries. The policy of encouraging local capacity through close co-operation with the local community is a long awaited one; this obligation is clear and needs no explanation. The policy of providing support and upholding good corporate governance principles is in conformity with the current practice: in the United Kingdom, one of the recent reports on this issue is the report published by *Committee on the Financial Aspects of Corporate Governance* (December 1992). This is extremely important as governments and business communities are extremely conscious of these principles and practices. The policy of developing and applying "effective self regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and societies in which they operate" is a laudable one, but this is where much is to be expected of transnational corporations. The Guidelines are silent as to the nature of the self-regulatory practices and management systems that should be adopted with a view to fostering a relationship of confidence and trust between transnational corporations and the societies in which they operate. This is an attempt to abolish the "we and they" situation. This principle recognises however that there currently exists a degree of lack of confidence and trust between the two parties. The OECD Guidelines may prompt state governments and their multinational enterprises to develop self-regulatory practices and management systems.

DISCLOSURE

The practice of non-disclosure of information, including accounts, by multinational enterprises has become a matter of concern for some time. Non-

disclosure of information helps avoid payment of taxes to the host authorities. The OECD's Guidelines are in line with the UN Code of Conduct on Transnational Corporations (*op. cit.*, paragraphs 46-48.). It is interesting to note that the OECD Guidelines recommend disclosure for the enterprise as a whole, and where appropriate, along business links or geographic areas.

On the other hand, host countries should have appropriate legislation to ensure that appropriate surveillance may be carried out on multinational enterprises, and if necessary, should be able to check their accounts and reports. This procedure will also prevent these enterprises from being engaged in transfer pricing. Disclosure should also be made of information of a non-financial nature, including information on environmental and social issues. According to the Guidelines, in addition to disclosing the basic information about the enterprises, their names, locations, organisational structures, nature of ownership and shareholding etc, enterprises should disclose material information on:

- (a) financial and operating results of the company;
- (b) company objectives;
- (c) major share ownership and voting rights;
- (d) board members, any executives and their emoluments;
- (e) foreseeable risks;
- (f) substantive issues about employees and other stakeholders; and
- (g) the corporate governance structure and policies (The Guidelines, *op. cit.*, at 241).

The Guidelines encourage multinational enterprises to communicate additional information on matters such as value statements or statements of business conduct intended for disclosure to the public; information on their social, ethical and environmental policies; information on how they manage risks, and on relationships with their employees and other stakeholders.

Transparency of the activities, including information on the activities of multinational enterprises, has long been an issue which provokes controversy particularly among developing countries. In fact, if under no compulsion by legislative means, many multinational enterprises may not volunteer information. In this connection it may be maintained that the tax haven jurisdictions provide multinational enterprises an opportunity for abstaining from disclosure of their financial information.

EMPLOYMENT AND INDUSTRIAL RELATIONS

According to the Guidelines, multinational enterprises should respect the rights of their employees, within the framework of applicable law, regulations and prevailing

labour relations; and should contribute to the abolition of child labour, forced or compulsory labour. They should not discriminate against employees on grounds of race, sex, religion, political opinion or social origin; they should also provide information to representatives of employees for meaningful negotiations on conditions of employment, and be engaged in consultation with the employees and their representatives on matters of mutual concern (*op. cit.*, at 242).

Multinational enterprises must have adequate steps for maintaining at least the statutory level of occupational health and safety measures. Multinationals should employ local personnel, where possible, and provide training with a view to improving their levels of skills. Collective bargaining is to be encouraged by multinationals in matters of employees' wages and conditions of work, in addition to allowing the parties "to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters." (*op. cit.*, at 242).

These recommendations are laudable, but their implementation much depends upon the relevant legislation operational in host countries. These recommendations are not novel; in this connection one should consult the study entitled *Multinational Enterprises and Social Policy* issued by the International Labour Office in 1973.

This is an issue in respect of which host countries' governments should take the initiative and by legislative means require multinational enterprises to observe these prescriptions in the mutual interest.

The issue of protection of the environment or the view of protective measures which should be adopted by multinational enterprises has received the attention of the OECD. Multinational enterprises, according to the Guidelines, should establish and maintain a system of environmental management appropriate to each case, which would include information about their activities, plans for improving environmental performance, and the system adopted or to be adopted by them for monitoring and reviewing their progress in this regard.

Adequate and timely information on the potential environment, health and safety impacts of their activities should be provided to the public and their employees, taking into account, of course, costs, business confidentiality and the protection of intellectual property rights. Multinational enterprises should maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage for their operations. The Guidelines provide that:

"Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not to use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage."

Multinational enterprises should also develop products and services that have no undue environmental impacts, are safe, and promote higher levels of awareness among customers of the environmental implications of using their products and services. They should also provide adequate education and training to employees in environmental health and safety matters.

In order to combat bribery, the Guidelines recommend that multinational enterprises "should not directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage." (*op. cit.*, at 244). The Guidelines recommend certain measures which every multinational enterprise should implement, namely, enhancement of the transparency of the activities in the fight against bribery and extortion; promotion of employee awareness of and compliance with company policies against bribery and corrupt practices; and not to make illegal contributions to candidates for public offices or to political parties or to any political organisation.

The Guidelines, which also provide for consumer interests recommend that multinational enterprises should act "in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide." (The Guidelines, *op. cit.*, at 245). Consumer interest, according to the Guidelines, relates to the legally required standards for consumer health and safety, providing accurate and clear information regarding their content, safe use, maintenance, storage and disposal in order to enable consumers to make informed decisions; to employ transparent and effective procedures for dealing with consumer complaints; and to respect consumer privacy and provide protection for perusal of data, and other related issues pertaining to consumer protection.

It is interesting to see that the OECD in its Guidelines has recommended that multinational enterprises should ensure that "their activities are compatible with the science and technology policies and plans of the countries in which they operate." (*ibid.*)

The Guidelines also recommend that multinationals should diffuse know-how, with due regard to the protection of intellectual property rights (*op. cit.*, at 245). Multinationals are encouraged to carry out development work in science and technology in host countries to cater for their local market needs, and employ host country personnel in such development work and encourage their training in the light of their commercial needs. Multinationals should also develop ties with local universities, public research institutions and participate in co-operative research projects with local industries.

Whilst the OECD's recommendations on this issue are laudable, the question remains whether it would be profitable for multinational enterprises to carry out any co-operative research and disseminate information on know-how in developing countries.

Multinational enterprises should, according to the Guidelines, conduct their activities in a competitive manner, and refrain from entering into anti-competitive agreements among competitors to fix prices; to make collusion bids; to impose output restrictions; and to manipulate markets by allocating customers or suppliers. Of course, the Guidelines rightly recommend that multinational enterprises should comply with the tax laws and regulations in host countries.

A COMPARISON BETWEEN THE OECD GUIDELINES AND THE UN CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

The current OECD Guidelines for Multinational Enterprises (2000) is certainly an improvement upon the previously issued Guidelines, but it is important to point out that the current Guidelines have included items which have been incorporated in the UN Code of Conduct on Transnational Corporations. The current Code of Conduct was preceded by a draft Code of Conduct on Transnational Corporations (1982); the acceptance of the Draft Code by States previously led the United Nations Centre for Transnational Corporations to develop the final version of the Code, which contains a number of obligatory provisions for transnational corporations. The current OECD Guidelines are entirely recommendatory in respect of national sovereignty of host states and observance of their domestic laws, regulations and administrative practices, including those relating to balance of payments and financing, taxation, transfer of technology, consumer protection and environmental protection; disclosure of information which may be required by host countries in relation to their *modus operandi*; respect for human rights and fundamental freedoms in the countries in which they operate; non-interference in internal affairs of host states; abstention from corrupt practices, observance of the relevant provisions of the set of multilaterally agreed Equitable Principles and Rules for the Centre of Restrictive Business Practices adopted by the General Assembly in its resolution 35/63 of 5 December 1980, in the field of restrictive business practices; and supply of information to trade unions or other representatives of employees in relation to labour relations, and employer-employee relations with due regard to the relevant provisions of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, in order to enable them to obtain a true and fair view of the performance of the local entity and where appropriate, the corporation, as a whole, and plans for future development having major economic and social effects on the employees concerned.

Unlike the 1980 OECD Guidelines, the UN Code of Conduct provides for certain general provisions relating to the transnational corporations by host states: (1) "In all matters relating to the Code, States shall fulfil, in good faith, their

international obligations, including generally recognised and accepted international legal rules and principles." (*op. cit.*, paragraph 49); (b) host States have the right to regulate the entry of transnational corporations based on sectorisation of their economies, and to determine the role such corporations may play in their social and economic development; (c) host countries should accord transnational corporations fair and equitable treatment, and national treatment, but the right of a host state to grant such special incentives to transnational corporations as may be considered necessary in its national interest must be preserved; (d) laws and regulations affecting transnational corporations should be made publicly and readily available by host countries, and relevant information on decisions of administrative bodies should be disseminated; (e) confidentiality as to the information published by transnational corporations to host authorities should be accorded reasonable safeguards by them; (f) transfer of employees of host countries for managerial and technical training between entities of a transnational corporation should be made in accordance with the laws and regulations of the host state concerned; and (g) subject to the relevant legislation of host states (*e.g.* foreign exchange laws and restrictions emanating from exceptional balance of payments difficulties), transnational corporations are entitled to transfer all payments legally due to them.

The Code points out that a host state under international law has an obligation to pay appropriate compensation in the event of its taking assets of a transnational corporation. But the Code and the Guidelines clearly state that an entity of a transnational corporation is subject to the jurisdiction of the host state in which it operates (*The UN Code, op. cit.*, paragraph 58; *The OECD Guidelines, op. cit.*, at 239). However, whereas in regard to ownership and control, the UN Code of Conduct provides, *inter alia*, that:

"Transnational Corporations should make every effort so as to allocate their decision-making powers among their entities as to enable them to contribute to the economic and social development of the countries in which they operate." (*op. cit.*, paragraph 22)

The Code of Conduct further provides that:

"Transnational Corporations should co-operate with Governments and nationals of the countries in which they operate in the implementation of national objectives for local equity participation and for the effective exercise of control by local partners as determined by equity, contractual terms in non-equity arrangements or the laws of such countries."

The OECD Guidelines, on the other hand, state that:

"While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the expertise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed." (*The OECD Guidelines, op. cit.*, at 239)

The OECD Guidelines do not directly encourage “local equity participation and for the effective exercise of control by local partners as determined by equity.” (The UN Code of Conduct, *op. cit.*, at paragraph 24) The General Policies of the OECD Guidelines, are briefly, to contribute to economic, social and environmental progress in the host state; to encourage local capacity building, and human capital formation; to support and uphold good corporate governance principles and practices; to refrain from discriminatory or disciplinary action against employees who may make bona fide reports to management; and to abstain from any improper involvement in local political activities.

Whereas the OECD Guidelines are more of an advisory document as to what multinational enterprises should do, the UN Code of Conduct emphasises the role of the principal actors involved in an investment programme (the host country, the transnational corporation) in addition to certain general principles relating to the treatment of transnational corporations by host states.

Although both the OECD Guidelines and the UN Code of Conduct include the issue of disclosure of information by transnational corporations, the disclosure requirements under the UN Code of Conduct are more comprehensive than those under the OECD Guidelines in respect of information of a financial nature.

On the other hand, the provisions as to the protection and preservation of the environment are more extensive under the OECD Guidelines than those under the UN Code of Conduct, but under the latter, transnational corporations have certain obligations under the general provisions of environment protection. In connection with the issue of the protection and preservation of the environment, the UN Code of Conduct primarily places emphasis on the protection, and where damaged, rehabilitation of the environment, and the requirement for the supply of information as to the characteristics of the products they may be manufacturing and the prohibitions, restrictions and warnings that they should issue. The OECD Guidelines include such issues such as environmental management, including issues relating to foreseeable environmental health and safety-related imports; understanding of the risks where there exist threats of serious damage to the environment; and maintenance of contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations. The Guidelines continually seek to improve corporate environmental performance, by examining, for example, development of products or services that have no undue environmental impact, and are efficient in their consumption of energy and natural resources; promotion of a higher level of awareness among customers, and research of means and ways of improving the environmental performance of the enterprise (The OECD Guidelines, *op. cit.*, at 244). The

Guidelines recommend that adequate education and training to employees in environmental, health and safety matters, including the handling of hazardous materials, should be given by transnational corporations, in regard to which the UN Code of Conduct is silent.

As regards abstention from corrupt practices, including bribery, the OECD Guidelines are more elaborate than the corresponding provisions of the UN Code of Conduct. According to the Guidelines, multinational enterprises should “foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.” (The OECD Guidelines, *op. cit.*, at 244). The Guidelines aim at promoting employees’ awareness of and compliance with company policies against bribery and extortion; in other words, the Guidelines are based on the assumption that every multinational enterprise must have a policy on combating bribery and corruption. The Guidelines also recommend that multinational enterprises should not make illegal contributions to candidates for public office or to political parties or to any political organisation. According to the Guidelines, multinational enterprises should “fully comply with public disclosure requirements.” (*op. cit.*, at 245)

Whereas the UN Code of Conduct deals with “consumer protection”, “consumer interest” has received the attention of the OECD Guidelines. From a theoretical standpoint it may be stated that “consumer interest” is much broader than “consumer protection”. Both the UN Code of Conduct and the OECD Guidelines pay attention to the issues of consumer health and safety by providing goods of the relevant international standards; disclosure of information on products or services to public authorities in the country concerned, when required; packaging, labelling and clear instructions on the use, health warning and storage and maintenance of products.

The UN Code of Conduct requires transnational corporations to “carry out their operations, in particular, production and marketing, in accordance with national laws, regulations, administrative practices and policies concerning consumer protection of the countries in which they operate.” (The UN Code of Conduct, *op. cit.*, paragraph 39).. The OECD Code, on the other hand, recommends that “... enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide.” (The OECD Guidelines, *op. cit.*, at 245). The OECD Guidelines also provide for the following procedure for consumer complaints: fair and timely resolution of consumer disputes without undue cost and burden; respect of consumer privacy; and provision for the prosecution of personal data. The UN Code of Conduct, on the other hand, recommends that:

“Transnational corporations should be responsive to requests from Governments of the countries in which they operate and

be prepared to co-operate with international organisations in their efforts to develop and promote national and international standards for the protection of the health and safety of consumers and to meet the basic needs of consumers." (The UN Code of Conduct, *op. cit.*, paragraph 42)

In other words, the UN Code also expects governments to take the initiative to adopt policies and legislation pertaining to consumer protection, and recommends transnational corporations to co-operate with their efforts to develop and promote national and international standards for the protection of the health and safety of consumers. The Code also aims at developing policies and legislation which will meet the basic needs of consumers.

CONCLUSIONS

The Guidelines "provide voluntary principles and standards for responsible business conduct consistent with applicable laws." (The Guidelines, *op. cit.*, at 237 (preface)) Objectives are:

"... to ensure that the operatives of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises." (ibid.)

It is to be borne in mind that the OECD Guidelines have been addressed to Governments and multinational enterprises which operate in both developed and developing countries. What is noticeable however is that unlike the UN Code of Conduct, the OECD Guidelines do not allocate special obligations to multinational enterprises operating in developing countries, nor provide any incentive to them for increasing investment flows into developing countries. The Guidelines are addressed generally to multinational enterprises on the assumption that they may be applied to both developed and developing countries, which is not the case. Special provisions addressing the needs of developing countries and to help them develop their infrastructures would have been more appropriate. The dilemma is that multinational enterprises are profit maximisers, and it may not pay them to invest in developing countries, unless investments are allowed to be made in the open sector, which usually includes mining or extraction of natural resources.

The OECD Guidelines are mere "guidelines"; they may not be compared with the Code of Conduct, the objective of which is to set standards. This is what the UN Code of Conduct aims at achieving, particularly through its obligatory provisions. Application and observance of any guidelines may not necessarily be assumed. In so far as investment and trade by transnational corporations in developed countries are concerned, the OECD Guidelines may not serve much purpose, as important relevant legislation with the object of controlling the activities of

transnational corporations is already in place in most of the developed countries.

The Guidelines however places a duty upon the home governments of multinational enterprises. They provide that governments may "prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law." (The Guidelines, *op. cit.*, at 239). They further provide that:

"Governments adhering to the Guidelines should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest." (ibid.)

It is not obligatory for the home governments of multinational enterprises to adhere to the Guidelines, nor is it obligatory for any government to adhere to all the provisions of these Guidelines. The Guidelines also provide that:

"The entities of multinational enterprise located in various countries are subject to the laws applicable in these countries." (ibid.)

It is elementary that subsidiaries or branches of multinational enterprises would be governed by the laws of host countries; what the Guidelines fail to consider is that in respect of important policy issues, subsidiaries and branches are significantly guided and controlled by parent companies. The OECD Code of Conduct therefore addresses these issues (See, in particular, General Policies, at 240), in an attempt to change the attitudes and policies of transnational corporations in this regard.

In the Section entitled "General Policies", the Guidelines provide, inter alia, that the enterprises should:

"... contribute to economic, social and environmental progress with a view to achieving sustainable development."

The provision is addressed particularly to developing countries; however, the Guidelines do not provide any indication of how this may be achieved. This is an important issue for developing countries; in an ideal situation, in order to achieve sustainable development, multinational enterprises would be required to be engaged in infrastructural work, examples of which are few, other than in the field of communications. In fact, in general, the General Policies of the Guidelines are the policies which multinationals try to avoid as they run counter to the policy of profit maximisation. In this respect, the Guidelines seem to have adopted a merely theoretical approach.

The Section on Science and Technology is based on the assumption that all host countries have the industrial infrastructure to be able to use foreign technology and absorb rapid diffusion of technology and know-how, which is not the case. Secondly, the question remains whether transnational corporations should transfer high technology to developing countries. The Guidelines provides that enterprises should:

“Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.” (The Guidelines, op. cit., at 245)


This is where the issue of the choice of technology and investment programmes in consultation with host countries, paying attention to the particular environmental problems in a host country, rich or poor, proves to be essential (See paragraphs 43-45 of the UN Code of Conduct, *op. cit.*).

If transnational corporations are required to do what the Guidelines suggest then they may not find their business of technology transfer profitable enough, although in principle, what the Guidelines suggest, is correct. Instead, perhaps transnational corporations should be required to develop technology in host countries, particularly in developing host countries, by the latter’s indigenous means; the advantages of this system cannot be over-emphasised. In this connection, one may like to refer to the UN recommendations on acquisition of technology (*Transnational Corporations in World Development, Third Survey, UN Centre on Transnational Corporations (1985) paras 198 – 206.*)

It is interesting to note that whereas the Section on Environment recommends multinational enterprises to take care of a number of issues, this may or may not be successfully performed, because of environmental problems of varying degrees. Furthermore, the Guidelines do not refer to the “polluter pays” principle, which has been accepted by a number of countries, viz Germany, Greece, Portugal and Spain. This is an important issue in that most of the developing countries suffer from environmental damage. The Rio Declaration of 1992 provides, *inter alia*, that:

“States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.” (Principle 13)

Whereas the UN Code of Conduct provides for a number of obligatory provisions by using the term “shall” (The following provisions use the terms “shall” in the UN Code of Conduct:), the entire OECD Guidelines is recommendatory. Of course, the obligatory provisions of the UN Code of Conduct become binding for those of the States which may accept it. Furthermore, the UN Code of Conduct specifically addresses issues to both host countries and transnational corporations, in addition to making certain general provisions, which are applicable to both.

Finally, Codes of Conduct or Guidelines have their limits, in that irrespective of whether they are binding or not, unless transnational corporations appreciate what is expected of them, particularly by developing countries and unless host countries, particularly host countries of developing countries, develop collaborative programs with transnational corporations which may be prepared to develop their infrastructure, Guidelines and/or Codes of Conduct will not produce the desired results. 

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