

BIAC contribution to the OECD Global Forum on Responsible Business Conduct and the Informal Ministerial Meeting

26-27 June 2014

Responsible business conduct matters

The private sector, as represented by BIAC, has long recognized the importance of responsible business conduct in a globalized world. Today many companies have integrated responsible business conduct into their overall business strategy to manage their activities in a responsible way. Apart from obvious ethical reasons, there are a number of reasons for responsible business conduct as a critical component of a long-term business strategy. Among others, responsible business conduct can help companies increase productivity, attract new investors, mitigate risk, and enhance appropriate measures along supply chains. At the same time, it is important to have a clear understanding of the role companies can play and what the responsibility of governments should be.

BIAC considers responsible business conduct as promoted by the OECD Guidelines for Multinational Enterprises (MNEs) as an essential part of an open investment climate and in the best interest of business. To that end, we are committed to work in partnership with the OECD and national governments to promote them in adhering countries and beyond.

The importance of the OECD Guidelines for Multinational Enterprises

There are a number of international reference texts and tools that provide a framework for responsible action. The OECD Guidelines for Multinational Enterprises are a key pillar of the global CSR architecture, covering all major areas of business ethics. They are the only multilaterally agreed corporate responsibility instrument that adhering countries have committed to promoting in a global context. They have been formulated in such a way that they can be accepted by all countries participating in and benefiting from world trade. We therefore welcome additional emphasis on outreach activities.

BIAC was actively involved in the 2011 update of the Guidelines and accepted the outcome. BIAC supports an effective implementation of the updated MNE Guidelines, is involved in numerous outreach and awareness-raising activities and is committed to constructively assist affiliated companies to follow the recommendations. To ensure widespread support within the business

community and beyond, BIAC would like to draw the OECD's attention to the following key business considerations as the Guidelines are being implemented:

- ***Ensure a shared view of all stakeholders of the NCP process***

The Guidelines are the only international corporate responsibility instrument with a built-in grievance mechanism in the form of National Contact Points (NCPs). In line with the spirit of the Guidelines, which are intended to stimulate and promote fair behaviour, the NCPs cannot be an instrument for legal procedures. They are fundamentally a platform for mediation and conciliation. The purpose of the NCP process is to work constructively on the basis of facts and trust towards a common future-oriented solution to the advantage of all parties. The good faith test and respect of confidentiality are essential elements to build trust in the NCP procedure.

While in some cases the NCP process has led to a meaningful stakeholder dialogue, added value for companies, and to the solution of disagreement, the fundamental nature of the NCP procedure and certain provisions of the procedural guidance have been severely disregarded in others, thus complicating the mediation effort. As long as the procedure is represented by some as a mediation platform, but by others as a semi-legal public prosecution, it will be difficult to develop broad-based trust in the process. The OECD and NCPs should ensure that the NCP procedure is presented to the public at large as a mediation procedure and that the initiation of a procedure does by no means automatically imply that a company has failed to observe the Guidelines. BIAC would be pleased to assist in this process.

- ***Foster global engagement***

BIAC actively supports OECD outreach activities and close cooperation with key emerging economies which are not yet adherents to the OECD Declaration on International Investment and the MNE Guidelines. The Guidelines are the best reference instrument for a level playing field in global markets. With the shift of weight in the world economy, it is more important than ever to expand the geographical coverage of the Guidelines. We therefore actively support efforts to establish the standards of the Guidelines in non-adhering countries. These countries should give serious consideration to endorsing the Guidelines which will also contribute to creating a favourable investment environment. As a consequence, the Guidelines, being voluntary in nature, need to be applicable in a variety of legal and social backgrounds in different jurisdictions and societies.

- ***Avoid an excessively broad interpretation***

The 2011 Guidelines include provisions on how to promote observance of principles in the supply chain. Recently, it has been claimed by some that a simple business relationship with a supplier would establish responsibility of an MNE for any adverse impact brought about by that supplier in the supply chain of the MNE, regardless of the specifics of the link of the MNE to this impact. We strongly advise against such a broad interpretation as this would clearly go against the consensus that was reached during the 2011 update.

Seeking to prevent or mitigate an adverse impact to which an enterprise is only linked by a business relationship is a recommendation that does not intend to shift the responsibility from the entity causing the adverse impact to the enterprise with which it has a business relationship. We therefore call upon the OECD to ensure that there is a clear understanding of the extent and limitations of responsibility depending on the level of involvement of the MNE. BIAC is concerned that an excessively broad interpretation, which fails to recognize the precise nature of the recommendation to address adverse impacts that MNEs do not cause or contribute to, would be counter-productive as it could jeopardize the broad-based support for the Guidelines in the business community. The Guidelines need to remain a practical and manageable tool for MNEs. This is also crucial to facilitate the acceptance of the Guidelines in non-OECD-member countries.

- ***Key considerations for the pro-active agenda***

One of the progressive elements of the 2011 update was the inclusion of a proactive agenda to help address potential future challenges concerning the implementation of the Guidelines through a forward-looking multi-stakeholder approach. BIAC has in principle been supportive of the proactive agenda and contributes with the understanding that it does not lead to recommendations going beyond the Guidelines. The proactive agenda has been added as a prospective dimension to contribute to problem-solving in a broader context than the specific instances. BIAC engages in discussions on specific pro-active agenda projects, including on the financial sector, stakeholder engagement in the extractive industry, and responsible business conduct along agricultural supply chains. BIAC has also been involved in discussions regarding the textiles sector. The OECD work on due diligence for mineral supply chains in conflict affected countries is a good example of how a multi-stakeholder process can work and produce tangible results.

However, it should be understood that the proactive agenda must not create new responsibilities or recommendations beyond the Guidelines and that it should not create prescriptive sector guidance that would exceed the 2011 agreement. The proactive agenda is essentially an approach to develop, on the basis of the 2011 Guidelines, practical tools for addressing specific challenges, with a view to addressing potential future risks. As such, it should be based on a clear demand from the sector concerned, provide clear added value to existing tools, and be developed with the active involvement of business. In line with the general criteria that have been developed, the objective of the proactive agenda should thus be to remain prospective in nature, foster multi-stakeholder dialogue in close cooperation with member and non-member countries, take stock of existing information, and develop practical tools that would be of concrete value to companies as they conduct due diligence.

- ***Highlight the importance of an open investment environment***

It should be borne in mind that the Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises, which represents a broad and balanced package of instruments, rights and commitments aimed at promoting open markets for international investment. The Declaration emphasizes both the importance of an open and stable investment

environment, and of responsible business conduct. By bringing governments, business and civil society together, the OECD is a unique platform to help maintain this balance.

An open and conducive investment environment should be a priority for governments, business, the workforce and our societies. However, we witness a proliferation of restrictions on foreign direct investment, often hidden and difficult to counter. Therefore, we call on the OECD to continue playing a leading role in the international debate on the freedom of cross-border investment. OECD advice and leadership are particularly important at a time when important instruments, such as bilateral investment treaties (BITs) and investor-state dispute settlement (ISDS), which are crucial to mitigate risk in international investment decisions, have come under attack.

The OECD Policy Framework for Investment (PFI) is another important instrument to improve the conditions for private sector investment in emerging and developing markets. BIAC seeks to contribute actively to the process of updating the PFI in view of the 2015 Ministerial Council Meeting.

A key role for the OECD

BIAC supports OECD work on fostering an open investment environment and responsible business conduct, which go hand-in-hand. It is in this spirit that BIAC is actively involved in multiple outreach and awareness-raising activities regarding the OECD MNE Guidelines and strongly supports OECD outreach efforts to ensure a global level playing field. We call upon the OECD to help foster a shared view of the NCP process and avoid an excessively broad interpretation of the Guidelines to ensure continued broad-based support among the business community.

We also strongly believe that the voice of the OECD in defending an open international investment environment and addressing issues associated with weak governance of host countries is more important than ever. We rely on the OECD to provide governments and their societies with state of the art analysis and to foster dialogue among member and non-member countries. Building on our constructive cooperation with the OECD, we will look for opportunities to continue and further strengthen our dialogue in this area.