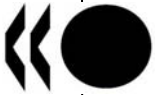


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## OECD INSTRUMENTS AND IUU FISHING

*This paper, written by a consultant, Ms. Ursula Wynhoven, explores the use of certain OECD instruments in the combat of IUU fishing activities.*

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For further information, please contact :  
Carl-Christian SCHMIDT (E-mail: [carl-christian.schmidt@oecd.org](mailto:carl-christian.schmidt@oecd.org))

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## OECD INSTRUMENTS AND IUU FISHING<sup>1</sup>

### 1. Introduction and executive summary

1. The context for this paper is the problem of illegal, unregulated and unreported (IUU) fishing,<sup>2</sup> its impact on world fisheries, and the associated serious economic, environmental and social consequences. The number and complexity of the factors driving IUU demands a multidisciplinary and multifaceted response.<sup>3</sup> One avenue of investigation is to examine the instruments and follow-up mechanisms that already exist to determine their potential contribution to a solution. One category of existing instruments, and the focus of this paper, is the OECD's investment instruments.

2. This paper discusses the OECD's investment instruments with a view to assessing their utility in combating IUU. The instruments are: the OECD Codes on Liberalisation, the OECD Declaration and Decisions on International Investment and Multinational Enterprises (including the OECD Guidelines for

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<sup>1</sup> Prepared by a consultant, Ms. Ursula A. Wynhoven. The author wishes to thank Kathryn Gordon and Eva Thiel, both of the OECD's Directorate for Financial, Fiscal and Enterprise Affairs, for their guidance on the accuracy of facts in this paper, especially the sections on the OECD Guidelines for Multinational Enterprises and the OECD Codes of Liberalisation. The opinions expressed, and any mistakes, are the author's own.

<sup>2</sup> The terms "illegal fishing," "unreported fishing" and "unregulated fishing" are defined in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome 2001. "Illegal fishing" refers to activities: conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization. "Unreported fishing" refers to fishing activities: which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization. "Unregulated fishing" refers to fishing activities: in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

<sup>3</sup> A description and analysis of the economic and social drivers of IUU, including market control, price distortion, effect of the global economy and world fishing opportunities, international regulations, fishing agreements, reflagging, national fisheries management policy (including subsidies, excess capacity and surveillance activities) is contained D.J. Agnew and C.T. Barnes, "The Economic and Social Effects of IUU/FOC Fishing," February 2003.

Multinational Enterprises), and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

3. The paper presents a brief overview of the nature and scope of each instrument and an analysis of how the instrument could be used in a way that could contribute to the fight against IUU and/or how the instrument could present an obstacle. Though none of them explicitly address the problem of IUU, their potential contribution is significant. Some of the more promising possibilities are:

- Using the OECD Guidelines on Multinational Enterprises - a set of recommendations on good corporate behaviour by 38 governments to the multinational enterprises operating in or from their territories - to start a dialogue about corporate responsibility for IUU and/or to raise awareness generally of IUU as a corporate responsibility problem. Specific recommendations in the Guidelines could be used to encourage enterprises to, among other things, respect the environment, disclose more information about their activities and corporate structure, provide protection for whistleblowers, apply pressure to their suppliers and other business partners to act more responsibly, not engage in bribery, refrain from seeking or accepting exemptions not contemplated in relevant statutory or regulatory frameworks, use fair marketing and advertising practices etc.
- Bringing to the attention of the relevant adhering country National Contact Point (NCP) situations of alleged corporate failure to observe the OECD Guidelines on Multinational Enterprises in connection with IUU and/or related activities. This would then invoke a set of procedures – described in Box 2 below - pursuant to which the NCP would deal with the situation.
- Referencing the OECD Declaration and Decisions on International Investment and Multinational Enterprises in encouraging adhering countries to address the impact of investment incentives and disincentives on the drivers of IUU.
- Prosecuting, under national legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, persons who have bribed a foreign public official in connection with IUU or related activities. The Convention makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business deals.
- Using the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and domestic legislation implementing it, as a demonstration of the legal possibility of holding a country's own nationals responsible for their conduct engaged in abroad.
- Using peer review mechanisms – of which there are many examples currently in use across the OECD - as a model for devising a peer review mechanism for country efforts to deal with IUU.

4. There are also some possible obstacles arising out of the non-discrimination and national treatment principles embodied in the OECD's investment instruments:

- National treatment is the commitment by a country to treat enterprises operating on its territory, but controlled by the national of another country, no less favourably than domestic enterprises in similar situations. This may mean that measures aimed at curbing IUU should not single out foreign-controlled enterprises or vessels (either in general or the enterprises or vessels of particular countries) for less favourable treatment than is accorded national enterprises or vessels in gaining access to the country's fisheries. This is despite the fact that the enterprises and vessels

flying flags of particular countries may be statistically more likely to be involved in IUU activities.

- The OECD Codes of Liberalisation require OECD countries to move progressively towards open markets and liberalisation, whereas some measures aimed at discouraging IUU and related activities could, at least theoretically, be construed as moving in the opposite direction. Examples of such measures might be a law prohibiting nationals from registering their ships in another country, and boycotts or blacklists of foreign vessels or the entities owning them that cause Foreign Service providers difficulties in entering the market of the country imposing the sanctions.

5. These possible contributions and obstacles are discussed in more detail below. The paper concludes with some suggested future actions that the OECD Fisheries Committee and others may wish to take.

## 2. The OECD's investment instruments

6. The OECD has a number of legal instruments on international investment and trade in services.<sup>4</sup> They are:

- The OECD Codes of Liberalisation;
- The Declaration and Decisions on International Investment and Multinational Enterprises (which incorporates the OECD Guidelines on Multinational Enterprises);
- The Convention on Combating Bribery of Foreign Officials in International Business Transactions.

7. Together, these instruments establish the “rules of the game” for adhering countries and multinational enterprises based in or operating in their countries for capital movements, international investment and trade in services. These are instruments to which all member countries of the OECD must adhere. In addition, some of the instruments are open for adherence by non-member countries.

8. None of the instruments discussed in this paper expressly deal with IUU. Nevertheless, there is a contribution they can make in the fight against it. This part of the paper explores the nature and scope of each instrument and presents an analysis of how the instrument could be used in this context and/or possible obstacles to be overcome. Each instrument is introduced with a brief overview explaining what it is, to whom it applies and how it is implemented. A copy of each of the instruments is included in the appendices.

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<sup>4</sup> Another OECD legal instrument on international investment was negotiated between 1995 and 1998. However, negotiations were abandoned in December 1998 after a six month hiatus, during which no official meetings of negotiators took place. The instrument, which was called the draft Multilateral Agreement on Investment (MAI), was to be a “free standing international treaty, open to all OECD Members and the European Communities, and to accession by non-OECD Member Countries” and its proposed objective was to “provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures.” A key reason for the cessation of negotiations was that public interest groups were concerned about the impact of globalisation on labour and human rights, the environment and consumer and development issues. See OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD, April 2003, p. 13.

## **2.1 OECD Codes of Liberalisation**

### *2.1.1 What they are*

9. The Codes of Liberalisation is a collective term for two separate instruments: the Code of Liberalisation of Capital Movements; and the Code of Liberalisation of Current Invisible Operations. They prescribe progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions (mainly services).<sup>5</sup> Both were formally adopted in 1961 and have been revised and expanded in scope a number of times. Though not a treaty or an international agreement, they are, nevertheless, legally binding rules of behaviour for the governments of OECD countries.

10. The Codes are very similar, sharing many provisions in common. The main difference is that one Code concerns capital movements and the other invisible transactions and transfers. The structure of each Code is as follows: In Article 1 members commit to eliminating, between one another, restrictions on capital and current account operations. The remainder of each Code sets out the framework for working towards this objective. Each Code has two principle annexes: a list of economic activities covered, and a list of countries' current reservations.

11. In the Code of Liberalisation of Capital Movements, 16 categories of economic activities are covered, including direct investment, liquidation of direct investment, credits directly linked with international transactions or with the rendering of international services, and a large number of other short- and long-term capital movements.<sup>6</sup> Both capital inflows and capital outflows are covered, as are actions initiated by non-residents in the country concerned and actions abroad initiated by non-residents.<sup>7</sup> For example, direct investment - including creating, acquiring or participating in a new or existing business - in the country concerned by non-residents or abroad by residents are both addressed.

12. The coverage of the Code of Liberalisation of Current Invisible Operations is more limited. It is concerned with liberalisation of cross-border trade in services, namely, the supply of services to residents by non-resident service-providers and vice versa. A variety of sectors is covered, including banking and financial services, insurance, professional services, maritime<sup>8</sup> and road transport, and travel and tourism.

13. The kinds of restrictions that members are to progressively eliminate are laws, decrees, regulations, policies and practices taken by authorities that may restrict the conclusion or execution of economic activities covered by the Codes.<sup>9</sup> Non-discrimination is a key principle of the Codes: OECD

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<sup>5</sup> The Codes are actually Decisions of the OECD Council, which are legally binding on OECD member governments. See OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, April 2003, p. 6.

<sup>6</sup> Annex A, OECD Code of Liberalisation of Capital Movements.

<sup>7</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 22.

<sup>8</sup> The Code of Liberalisation of Current Invisible Operations covers maritime freights (including chartering, harbour expenses, disbursements for fishing vessels, etc), maritime transport (including bunkering and provisioning, maintenance, repairs, expenses for crews, etc) and other items that have a direct or indirect bearing on international maritime transport. It is intended to give residents of one member country the unrestricted opportunity to avail themselves of, and pay for, all services in connection with international maritime transport that are offered by residents of any other member country. See Notes to Annex A of the Code of Liberalisation of Current Invisible Operations, Note 1.

<sup>9</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 17.

members are expected to grant the benefits of open markets to residents of all other OECD member countries.<sup>10</sup> A measure is a restriction if it discriminates between residents and non-residents. Although “resident” is not synonymous with “national,” nationality requirements are generally considered incompatible with the Codes.<sup>11</sup> Non-discrimination is not to be confused with preferential treatment, which non-residents are not entitled to.<sup>12</sup> Non-residents are also subject to the same general regulations as residents.<sup>13</sup> The treatment of residents and non-residents need not be identical as long as it is equivalent.<sup>14</sup> Reservations are generally not permitted to the non-discrimination principle.<sup>15</sup>

14. A copy of the Codes can be found in Appendices 1 and 2 respectively.

### 2.1.2 *To whom they apply*

15. The Codes create rights and obligations for OECD member countries only.<sup>16</sup> However, members have agreed to use their best offices to extend the benefits of liberalisation to all members of the IMF.<sup>17</sup> Moreover, the adoption of the General Agreement on Trade in Services (GATS) has meant that a number of the economic activities covered by the Codes, especially establishment and cross-border trade in services, are now also subject to the liberalisation obligations in the GATS.<sup>18</sup> The result is that where OECD members have committed themselves to non-discrimination between GATS members, liberalisation benefits under the Codes overlapping with those in the GATS are also to be extended to all GATS signatories.<sup>19</sup>

### 2.1.3 *How they are implemented*

16. The Codes ask OECD member countries to implement their obligations through necessary measures at the national level. Non-conforming measures are required to be listed in country reservations lodged under the Codes, and members are expected to progress at their own pace towards open markets, that is, the full abolition of restrictions.

17. Further implementation or follow-up occurs through policy reviews and country examinations, which rely on peer pressure to encourage unilateral liberalisation. These take place in the context of the

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<sup>10</sup> Article 9 of the Codes.

<sup>11</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD April 2003, p. 18.

<sup>12</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD April 2003, p. 18.

<sup>13</sup> Ibid at 22.

<sup>14</sup> Ibid at 18.

<sup>15</sup> Note, however, that Article 10 provides (paraphrasing) that Members that are part of a special customs or monetary system, such as the European Community, are permitted to liberalise more rapidly or widely among themselves, or, in other words, to maintain more restrictions in relation to other members that are not in their special customs or monetary system

<sup>16</sup> In addition, the entities subject to the liberalisation obligation are government authorities not private entities. Ibid. at 16.

<sup>17</sup> Article 1(d) of the Codes.

<sup>18</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD April 2003.

<sup>19</sup> *Idem.*

OECD Committee on Capital Movements and Invisible Transactions (CMIT), which is the forum where member countries meet to discuss application and implementation of the Codes. There are no direct sanctions involved in the compliance review process. Nevertheless, peer review and peer pressure in a multilateral setting have provided strong incentives for authorities to undertake policy adjustments through “benchmarking” regulations and administrative procedures against those adopted and enforced by peer members.<sup>20</sup>

18. Neither individuals nor enterprises can directly invoke rights to invest abroad, move funds or provide cross-border services under the Codes. Their complaints can only be raised through their own (OECD) governments, which could then raise a case under the Codes with the CMIT.

#### *2.1.4 How they could be used to tackle IUU*

19. The Codes are aimed at liberalisation - in the sense of removing unnecessary barriers to the free circulation of capital and services. As such, it is difficult to see what contribution they could make in the fight against IUU, which seems to need more restrictions rather than less. For this reason, the Codes could actually present an obstacle in searching for new ways to deal with IUU insofar as they have the potential to restrict the ability of a country to take certain measures to deter IUU and related activities. However, most, perhaps all, of these obstacles could be avoided if law makers consult with their international investment colleagues to ensure that the proposed measures will not contravene the country’s liberalisation commitments.

20. Peer reviews that are conducted as part of the Codes implementation process and/or elsewhere at the OECD could also present an interesting model for dealing with IUU. Having used them since its inception, the OECD has developed a comparative advantage in conducting peer reviews - the assessment of the policies and performance of a country by other countries with a view to improving the first country’s policies and help it comply with established standards and principles.<sup>21</sup> A recent analysis of peer review processes at the OECD observed that there was no other international organisation in which the practice of peer review has been so extensively developed.<sup>22</sup> The analysis also articulated a (best practice) model based on the different peer review mechanisms in operation across the OECD. This model and the OECD’s expertise in this area could perhaps be used to help construct a peer review process for country efforts to deal with IUU.

#### *2.1.5 Potential limitations to their use in combating IUU*

21. At least in theory, the Codes have the potential to constrain a member country’s ability to introduce and maintain measures to deal with IUU, especially where those measures distinguish between residents and non-residents or between nationals and foreigners. For example, it may be that efforts aimed at actively discouraging insurance, banking, and shipping industries and other related sectors from providing products and services to vessels and companies from certain flag of convenience countries, closing ports to them or refusing to grant them licenses and approvals, on a blanket basis because of their flag, could be inconsistent with a country’s obligations under the Codes to progressively liberalise. Similarly, measures aimed at restricting their own residents from registering their fishing vessels in other states or being involved in the fishing industry in other states could also implicate the Codes. In practical

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<sup>20</sup> “Successful Capital Movements Liberalisation: A Question of Governance – Recent OECD Experience” in *International Investment Perspectives*, No. 1 2002, p. 118.

<sup>21</sup> *Peer Review: A Tool for Co-operation and Change – An Analysis of an OECD Working Method*, OECD, 2003 (SG/LEG(2002)1).

<sup>22</sup> *Ibid* at 7.



terms, however, the impact of the Codes on measures designed to tackle IUU may be minimal because of the way concepts in the Codes have been interpreted, exceptions in the Codes themselves, and reservations that countries have lodged.

22. *The coverage of the Codes and the way they have been interpreted.* Measures aimed at curbing IUU and related activities will not necessarily fall foul of the Codes. For example, the Codes do not cover domestic transactions. Thus, if there is no international element, in the sense of involving residents of more than one OECD country, the Codes will not apply. As already described, the Codes also only address certain kinds of international transactions. If an anti-IUU measure has no impact on one of these transactions, the Codes will not be relevant. In addition, if the measure does not discriminate it will not be inconsistent with the obligation of non-discrimination.<sup>23</sup> For example, encouraging service providers not to maintain business relations that they may have with vessels identified as engaging in IUU fishing does not discriminate and would be unlikely to contradict liberalisation obligations under the Codes.

23. Notwithstanding the potential for licensing requirements and other domestic regulations to affect operations under both Codes, the CMIT has generally considered that such measures do not constitute restrictions under the Codes as long as they are applied in a non-discriminatory manner.<sup>24</sup> This means that governments can be relatively confident that non-discriminatory – on their face and in effect - licensing requirements and domestic regulations can be used in dealing with IUU and related activities without violating their obligations under the Codes. The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also recognises the importance of non-discrimination, providing that “The IPOA should be developed and applied without discrimination in form or in fact against any State or its fishing vessels.”<sup>25</sup>

24. Liberalisation obligations also do not generally apply to subsidies or the conditions attached to them, or the levying of taxes, duties and other charges. Although, if they have the effect of frustrating liberalisation, suggestions may be made to encourage their removal or modification.<sup>26</sup>

25. *Exceptions in the Codes.* The Codes also have a number of exceptions built in that preserve for countries a degree of latitude in taking actions that might otherwise fall within the scope of the Codes. There are exceptions for action that the member considers necessary for the maintenance of public order or the protection of public health, morals and safety; the protection of its essential security interests; and the fulfilment of its obligations relating to international peace and security.<sup>27</sup> These exceptions allow members to introduce, reintroduce or maintain restrictions that are not covered by reservations to the Code and to

<sup>23</sup> The importance of non-discrimination is also emphasised in the European Commission’s Community action plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002.

<sup>24</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD, April 2003, p. 17. Article 16 of the Codes is concerned with situations where domestic regulations do not discriminate directly (i.e. on the face of the regulation), but nevertheless have an unreasonable discriminatory effect. In such situations, an affected member country can refer the situation to the OECD, which will make a determination as to whether the regulation does indeed have the effect of frustrating its measures of liberalisation and, if so, will make suggestions about removing or modifying it. An example of a regulation that had a discriminatory effect on or prejudiced foreigners would be any regulation that was much more difficult for foreigners to comply with than nationals.

<sup>25</sup> See 9.6 Non-discrimination.

<sup>26</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD, April 2003, p. 46.

<sup>27</sup> Article 3 of the Codes.

exempt them from the principle of progressive liberalisation.<sup>28</sup> More comfort would be provided, though, if there was also an exception for measures protecting the environment.<sup>29</sup> Another exception concerns obligations in existing multilateral international agreements.<sup>30</sup> However, this exception does not apply to obligations in agreements concluded after the adoption of the Codes.<sup>31</sup> Yet another important exception concerns law enforcement, specifically, the powers of members to verify the authenticity of transactions and transfers and to take any measures required to prevent the evasion of their laws or regulations.<sup>32</sup> A note by the Chairman of the Negotiating Group on the Multilateral Agreement on Investment (MAI) concluded that this exception presumably includes laws and regulations concerning the environment.<sup>33</sup> Members that are part of a special customs or monetary system, such as the European Community, are also permitted to liberalise more rapidly or widely among themselves, or, in other words, to maintain more restrictions in relation to other members that are not in their special customs or monetary system.<sup>34</sup>

26. *Reservations to the Codes.* By lodging a reservation, a member retains the right to maintain restrictions, as specific in the reservation, on the economic activity concerned.<sup>35</sup> Many OECD countries have reserved to themselves the right and power to regulate such things as ownership or registration of their flag vessels by non-residents,<sup>36</sup> and the ownership of a business engaged in commercial fishing or investment in fishing and/or primary fish processing by non-residents.<sup>37</sup> This means that the countries concerned would not be violating their obligations under the Codes if they maintain restrictions that are consistent with these reservations. Table 1 sets out some of these reservations.<sup>38</sup> There are, however, almost no reservations concerning outward direct investment, that is, abroad by residents.<sup>39</sup> In other

<sup>28</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 24. Nevertheless, in recent years, members have been encouraged to lodge reservations when introducing restrictions for national security concerns. *Idem*.

<sup>29</sup> Note that even the General Agreement on Tariffs and Trade has an exception for measures "necessary to protect human, animal, or plant life or health" (Article XX(b)). This provision has attracted a lot of controversy because of its narrow scope/it has been interpreted narrowly. For example, a United States embargo on tuna products was ruled impermissible notwithstanding its stated aim was to protect dolphins. See GATT Dispute Settlement Panel Report on United States Restrictions on Impacts of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 (1991) and June 16, 1994, 33 I.L.M. 839 (1994).

<sup>30</sup> Article 4 of the Codes.

<sup>31</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 25.

<sup>32</sup> Article 5 of the Codes.

<sup>33</sup> MAI and the Environment, Note by the Chairman, Negotiating Group on the Multilateral Agreement on Investment (MAI), 9 October 1996 (DAFFE/MAI(96)30).

<sup>34</sup> Article 10 of the Codes.

<sup>35</sup> The CMIT has taken special pains to ensure that the language of each reservation is as specific and narrow as possible so as to promote transparency and discourage backwards sliding.

<sup>36</sup> See, for example, the reservations lodged by Australia, Austria, Belgium, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Netherlands, New Zealand, Norway, Poland, Portugal, Sweden, Switzerland, and the United Kingdom to the OECD Code of Liberalisation of Capital Movements (Annex B).

<sup>37</sup> See, for example, the reservation lodged by Canada, Denmark, Iceland, Japan, Korea, Mexico, New Zealand, Norway and Sweden to the OECD Code of Liberalisation of Capital Movements (Annex B).

<sup>38</sup> Table 1 shows only those reservations that relate to fishing, shipping and related activities.

<sup>39</sup> A notable exception appears to be Japan, which maintains an exception concerning direct investment abroad by residents applying only to investment in an enterprise engaged in fishing regulated by

words, restrictions on outward direct investment by residents will generally be inconsistent with the Codes and not allowed. In certain limited circumstances, it is possible to introduce new reservations.<sup>40</sup> However, even where it is possible to do so, lodging a reservation entails providing the reasons for doing so and submitting to an initial examination as well as subsequent periodic examinations.<sup>41</sup> Part of these examinations will involve the application of strong peer pressure to encourage the country concerned to justify its reservations, to narrow them, to look for other non-restrictive ways of achieving the same (legitimate) objectives, and to move progressively towards eliminating them. Adding, limiting or withdrawing a reservation requires a decision of the OECD Council.<sup>42</sup>

## **2.2 Declaration and Decisions on International Investment and Multinational Enterprises**

### *2.2.1 What they are*

27. The Declaration on International Investment and Multinational Enterprises (the “Declaration”) is a policy commitment to improve the investment climate, encourage the positive contribution multinational enterprises can make to economic and social progress and minimize, and resolve difficulties that may arise from their operations. The Declaration is comprised of four elements, each of which is supported by a Decision of the OECD Council on follow-up procedures:

- The Guidelines for Multinational Enterprises, which are a set of recommendations by governments to multinational enterprises on responsible corporate conduct;
- National Treatment requiring that member countries accord to foreign-controlled enterprises on their territories no less favourable treatment than that accorded in like situations to domestic enterprises;
- Conflicting requirements obliging members to co-operate so as to avoid or minimize the imposition of conflicting requirements on multinational enterprises;
- International investment incentives and disincentives in relation to which members recognise the need to give due weight to the interest of members affected by laws and practices in this field and endeavour to make measures as transparent as possible.

28. The second, third and fourth elements are dealt with in this section. The first - the OECD Guidelines for Multinational Enterprises - is considered separately later in this paper because of its special focus on corporate responsibility – which is of key importance in the discussion of ways to tackle IUU

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international treaties to which Japan is a party or fishing operations coming under the Japanese Fisheries Law.

<sup>40</sup> The circumstances under which a new reservation can be lodged are set out in Article 2 of the Codes.

<sup>41</sup> OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users’ Guide, OECD April 2003, p. 23.

<sup>42</sup> Idem.

**Table 1. Examples of reservations lodged under the OECD Code of Liberalisation of Capital Movements<sup>43</sup>**

Country	Reservation
Australia	Ownership of Australian flag vessels, except through an enterprise incorporated in Australia
Austria	Acquisition of 25% or more in ships registered in Austria
Belgium	Acquisition of Belgian flag vessels by shipping companies not having their principal office in Belgium
Canada	Fish harvesting
Denmark	Ownership of Danish flag vessels by non-EC residents except through an enterprise incorporated in Denmark.  Ownership by non-EC residents of one-third or more of a business engaged in commercial fishing.
Finland	Ownership of Finnish flag vessels, including fishing vessels, except through an enterprise incorporated in Finland
France	Ownership after acquisition of more than 50% of a French flag vessel, unless the vessel concerned is entirely owned by enterprises having their principal office in France.
Germany	Acquisition of a German flag vessel, except through an enterprise incorporated in Germany
Greece	Ownership of more than 49% of the capital of a Greek flag vessel for fishing purposes
Iceland	Investment in fishing and primary fish processing (excluding retail packaging and later stages of preparation of fish products for distribution and consumption).  Ownership of Icelandic flag vessels, except through an enterprise incorporated in Iceland.
Ireland	Acquisition by non-EC nationals of sea fishing vessels registered in Ireland.  Foreign acquisition of shipping vessels registered in Ireland is subject to a reciprocity requirement.
Italy	Purchase by foreigners other than EC residents of a majority interest in Italian flag vessels or of a controlling interest in ship owning companies having their headquarters in Italy.  Purchase of Italian flag vessels used to fish in Italian territorial waters.
Japan	Investment in primary industry related to fisheries.  (Abroad by residents) Investments in an enterprise engaged in fishing regulated by international treaties to which Japan is a party or fishing operations coming under the Japanese Fisheries Law.
Korea	Fishing in internal waters, the territorial sea and the EEZ if foreign investors hold 50% or more of the share capital

<sup>43</sup> Note, unless specified to the contrary, the reservations relate to direct investment in the country concerned by non-residents.

**Table 1. (cont.) Examples of reservations lodged under the OECD Code of Liberalisation of Capital Movements**

Country	Reservation
Mexico	Investment exceeding a total of 49% in fishing, other than aquaculture, in coastal and fresh waters or in the EEZ
Netherlands	Ownership of Netherlands flag vessels, unless the investment is made by shipping companies incorporated under Netherlands law, established in the Kingdom and having their actual place of management in the Netherlands.
New Zealand	Acquisition, regardless of dollar value, of 25% or more of any class of shares or voting power in a New Zealand company engaged in commercial fishing.  Acquisition, regardless of dollar value, of assets used, or proposed to be used, in a business engaged in commercial fishing.
Norway	Ownership of Norwegian flag vessels, except a) through a partnership or joint stock company where Norwegian citizens own at least 60% of the capital, b) by registering the vessel in the Norwegian International Ship Register under the applicable conditions.  Investment in a registered fishing vessel bringing foreign ownership of the vessel above 40%.
Poland	Investment in a registered vessel, except through an enterprise incorporated in Poland
Portugal	Ownership of Portuguese flag vessels other than through an enterprise incorporated in Portugal
Sweden	Acquisition of 50% or more of Swedish flag vessels, except through an enterprise incorporated in Sweden.  Establishment of, or acquisition of 50% or more of shares in, firms engaged in commercial fishing activities in Swedish waters, unless an authorisation is granted.
Switzerland	The registration of a ship in Switzerland serving two points on the Rhine
United Kingdom	Acquisition of United Kingdom flag vessels, except through an enterprise incorporated in the United Kingdom
United States	Fishing in the "Exclusive Economic Zone", and deepwater ports, except through an enterprise incorporated in the United States

### 2.2.2 To whom they apply

29. The Declaration binds all countries that have adhered to it. At present, there are 38 adherents (OECD countries and 8 others).<sup>44</sup> Other countries that are willing and able to meet the Declaration's requirements are also welcome to apply to adhere. Although the Declaration itself is binding, national treatment of foreign controlled enterprises on their territories is only a voluntary commitment. Nevertheless, in 1988, there was a unanimous pledge not to introduce new exceptions to national treatment.

<sup>44</sup> The eight non-member countries that have adhered are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, and Slovenia. The application of Singapore is currently being considered. Though not able to be an adherent itself, the European Commission is also an active participant in the administration of the Guidelines.

### 2.2.3 *How they are implemented*

30. Each of the four elements of the Declaration has its own distinct follow-up procedure. Implementation of the Guidelines and their unique follow-up procedures are discussed in the section devoted to the Guidelines. Implementation and follow up of the national treatment, conflicting requirements and investment incentives and disincentives parts of the Declaration are described here.

#### *National treatment*

31. The national treatment instrument consists of a declaration of principle in the Declaration and a procedural OECD Council Decision (December 1991), which requires adhering countries to notify their exceptions to national treatment and establishes follow-up procedures. The exceptions are subject to periodic examination by the Committee on International Investment and Multinational Enterprises (CIME), which, in turn, result in a decision of the OECD Council and proposals for action for the country concerned. Exceptions are usually confined to certain key sectors such as fisheries, transport and communications, and are generally limited in scope.<sup>45</sup> Exceptions are limited or removed either by unilateral action by the country itself, or as a result of the examinations.

#### *Conflicting requirements*

32. The instrument on conflicting requirements also consists of a declaration of principle in the Declaration and an OECD Council Decision on procedures (June 1991). Under the Declaration, governments of adhering countries have committed themselves to co-operate with a view to avoiding or minimizing the imposition of conflicting requirements on multinational enterprises and to take into account the General Considerations and Practical Approaches.<sup>46</sup> The aim of avoiding or minimising the imposition of conflicting requirements by governments is implemented through promoting co-operation among member countries, bilaterally and/or in the context of the CIME.<sup>47</sup>

#### *Investment incentives and disincentives*

33. The instrument on international incentives and disincentives is comprised of a declaration of principle in the Declaration and an OECD Council Decision (May 1984). Recognising that adhering countries may be adversely affected by investment incentives and disincentives provided by other adhering countries, the provisions ask that such measures be made as transparent as possible and encourage effective co-operation between adhering countries. The instrument prescribes consultations and review procedures, and asks that adhering countries provide information about their policies and participate in studies on investment incentives and disincentives. The consultations take place in the CIME at the request of an adhering country that considers that its interests may be adversely affected with the objective of examining the possibility of reducing the adverse effects to a minimum.

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<sup>45</sup> The exceptions are found in Annex A to the Third Revised Decision of the Council on National Treatment, December 1991. Countries that have notified exceptions in connection with the fishing sector include: Australia, Austria, Brazil, Canada, Chile, Greece, Iceland, Ireland, Italy, Japan, Korea, Lithuania, Mexico, New Zealand, Norway, Sweden and United States. These exceptions limit such things as access to fisheries by foreign flag vessels or foreign-controlled enterprises, and/or prescribe limits on ownership of registered fishing vessels by foreign-controlled enterprises.

<sup>46</sup> General Considerations and Practical Approaches is a document setting out a process for co-operation between countries on the subject of conflicting requirements.

<sup>47</sup> Decision of the OECD Council, June 1991.

#### 2.2.4 *How they could be used to tackle IUU*

##### *Conflicting requirements*

34. The conflicting requirements provisions offer a non-adversarial, co-operative mechanism for dealing with inconsistent requirements on multinational enterprises. The contribution that such provisions can make to the fight against IUU is not immediately apparent. However, if, for example, measures aimed at curbing IUU resulted in different adhering governments imposing conflicting obligations on multinational enterprises, then the non-adversarial, co-operative approach might be helpful in responding to the conflict.

##### *International Investment Incentives and Disincentives*

35. The OECD and others, including the WWF, have pointed to the role of various types of subsidies in keeping illegal fishing vessels in operation and/or encouraging the export of excess capacity to other areas of the world.<sup>48</sup> The WWF has also called for the urgent control of subsidies that assist in driving IUU fishing.<sup>49</sup> The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also calls on States to avoid conferring economic support, including subsidies, to companies, vessels or persons that are involved in IUU fishing.<sup>50</sup>

36. Part IV of the Declaration - concerned with international investment incentives and disincentives - contributes to the fight against IUU by recognizing that adhering countries need to strengthen their co-operation in the field of international direct investment, as well as pay attention to the interests of adhering governments affected by specific laws, regulations and administrative practices providing official incentives and disincentives to international direct investment. Under the Declaration, adhering governments also commit to try to make such incentives and disincentives as transparent as possible so that their importance and purpose can be ascertained and information on them can be readily available. Promoting transparency of such measures and encouraging dialogue and co-operation between adhering countries about them, could provide another entry point for discussions about the incentives and disincentives (including subsidies) that may fuel IUU.

#### 2.2.5 *Potential limitations to their use in combating IUU*

##### *National treatment*

37. Concerns about IUU and scarce enforcement resources might prompt some countries to consider restricting access to their fisheries by foreign-controlled enterprises or vessels, either generally or by nationals from certain countries and/or vessels flying flags from countries that are well-known for their open registries, low standards and/or lax enforcement.<sup>51</sup> Alternatively, or in addition, some countries might

<sup>48</sup> See, for example, S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000; The Environmental, Economic and Social Issues and Effects of IUU/FOC Fishing Activities in the High Seas, OECD, 14 February 2003 (AGR/FI(2003)5); D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing," February 2003.

<sup>49</sup> S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

<sup>50</sup> Paragraph 23 (Economic Incentives).

<sup>51</sup> Some flag states are of particular concern for the management of fisheries. See, for example, M. Gianni (for WWF), "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing," February 2003, pp. 2-3.

seek to concentrate their scarce IUU detection and enforcement resources on, or otherwise to treat less favourably, foreign-controlled vessels or enterprises from certain countries. Along similar lines, the International Coalition of Fisheries Associations has adopted a resolution calling on governments and the private sector to prevent flag of convenience vessels from gaining access to international markets; freighter companies to refrain from transporting any fish caught by flag of convenience fishing vessels; and trading and distribution companies to refrain from dealing in fish caught by flag of convenience vessels.<sup>52</sup> Others have also called for discouraging or preventing certain countries that cannot or will not exercise control over fishing vessels operating outside of their EEZs from registering large-scale fishing vessels, and for the closing of ports to flag of convenience fishing vessels.<sup>53</sup>

38. The requirement of according national treatment to foreign-owned or -controlled enterprises might present an obstacle to measures aimed at singling out foreign enterprises and vessels for worse treatment because they are foreign or because of the flag they are flying, particularly in the absence of proof that the vessels concerned had actually been engaged in IUU or intended to do so.<sup>54</sup> Such a concern may, however, be mitigated, to some extent, by the fact that the obligation to accord national treatment is subject to adhering countries' needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security. Importantly, a number of countries have notified fishing related exceptions to the national treatment principle. These exceptions limit such things as access to fisheries by foreign flag vessels or foreign-controlled enterprises, and/or prescribe limits on ownership of registered fishing vessels by foreign-controlled enterprises. Table 2 lists the fishing-related exceptions to national treatment. Moreover, the obligation to accord national treatment is less strong with respect to non-adhering countries, which are more likely to be flags of convenience countries: adhering countries only "consider applying" national treatment to countries other than adhering countries. Lastly, the Declaration expressly states that it "does not deal with the right of adhering governments to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises." Thus, if the measures being considered fell into this category, they would fall outside the national treatment instrument.

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<sup>52</sup> "ICFA Calls for Elimination of Flag-of-Convenience (FOC) Fishing Vessels," press release, International Coalition of Fisheries Associations, 5 January 2000, available at <http://www.icfa.net/?a=Press%20Releases&item=158>.

<sup>53</sup> See, for example, M. Gianni (for WWF), "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing," February 2003, p. 6.

<sup>54</sup> Beyond the desire to engage in IUU fishing, there are a host of other reasons, some legitimate, some not, why a vessel may have a particular flag.



**Table 2 – Fishing-related exceptions to the national treatment principle<sup>55</sup>**

Adhering country	Exception
Australia	(Western Australia only) Foreign ownership in rock lobster processing is limited to 20%; restrictions are placed on non-residents becoming directors or office bearers in corporations undertaking rock lobster processing.
Austria	Requirements to obtain the national flag: citizenship, residence in Austria, and more than 75% local ownership. The flag is required for registration of vessels.
Brazil	Exploitation of internal waters, areas within the territorial sea and some other activities are reserved to native-born Brazilians or persons who have naturalised citizenship or must be undertaken by firms registered in Brazil. Foreign vessels need authorisation from the Ministry of Agriculture to develop fishing activities.
Canada	There is no limit on foreign ownership of fish processing companies that do not hold fishing licences. Canadian fish processing companies which have more than 49% foreign ownership are not permitted to hold Canadian commercial fishing licences. Fish harvesting firms with foreign participation are subject to the same rules and policies as wholly Canadian-owned firms (e.g. Canadian registry and Canadian crews for licensed fishing vessels). (British Columbia only) Nationality requirement to obtain a fish buyer's license.
Chile	Ownership of Chilean fishing vessels is limited to Chilean individuals or Chilean majority-owned corporations with principal domicile and real effective seat in Chile. However, an owner of a fishing vessel registered in Chile prior to 30 June 1990 is not subject to the nationality requirements. Fishing vessels specifically authorised by the maritime authorities, pursuant to powers conferred by law in cases of reciprocity granted to Chilean vessels by other States, may be exempted from the above-mentioned requirements on equivalent terms provided to Chilean vessels by that State.
Greece	Non-EC ownership of Greek flag vessels including fishing vessels is limited to 49%.
Iceland	Foreign investment in primary fish processing (i.e. excluding retail packaging and later stages of preparation of fish products for distribution and consumption) is prohibited. No foreign ownership limitations apply to further fish processing.

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These exceptions are found in Annex A to the Third Revised Decision of the Council on National Treatment, December 1991.

**Table 2. (cont.) Fishing-related exceptions to the national treatment principle**

Adhering country	Exception
Ireland	Registration of fishing vessels requires ownership by citizens or companies from an EC Member State and a license to fish within Irish fishing limits. The acquisition by non-EC nationals of sea fishing vessels registered in Ireland may be restricted.
Italy	Fishing in territorial waters is reserved to nationals.
Japan	Foreign-controlled enterprises may be restricted from engaging in fisheries.
Korea	Enterprises with foreign participation require authorisation to be engaged in commercial fishing in internal waters, the territorial sea and the EEZ.
Lithuania	Access to Lithuania's waters is only possible for vessels with a Lithuanian flag and registered in Lithuania or for foreign country vessels on the basis of bilateral and multilateral agreements.
Mexico	Foreign investment is permitted up to 49% in fishing in coastal and fresh waters of in the EEZ and up to 100% in aquaculture.
New Zealand	Purchase of fishing quota is restricted to enterprises where 75% of more of the voting rights are held by New Zealand residents.
Norway	As a general rule, processing, packing or re-loading fish, crustaceans and mollusk or parts and products of these, is not allowed on a foreign-controlled vessel inside the fishing limits or the Norwegian EEZ. To obtain ownership (including part) of a registered fishing vessel, a 60% Norwegian ownership is required. Foreign-controlled enterprises may not fish with trawls from Norwegian vessels.
Sweden	A legal entity, owned up to 50% or more by foreign citizens, is subject to permission for having the right to pursue commercial fishing activities in Swedish waters without holding a private fishing right.
United States	Foreign-controlled enterprises may not engage in certain fishing operations involving coastwise trade. In addition, foreigners may not hold more than a minority of shares comprising ownership in companies owning vessels which operate in US fisheries. Also, corporate organisation requirements pertain to the registration of flag vessels for fishing in the US EEZ. Foreign-flag vessels may not fish or process fish in the 200 nautical mile US EEZ except under the terms of a Governing International Fisheries Agreement (GIFA), or other agreement consistent with US law.

## 2.3 *OECD Guidelines for Multinational Enterprises*

### 2.3.1 *What they are*

39. Though it forms part - Annex 1 - of the previously mentioned instrument (the Declaration), the OECD Guidelines for Multinational Enterprises (the Guidelines), are discussed separately here. The Guidelines are regarded as one of the world's foremost corporate responsibility instruments and are becoming an important international benchmark for corporate responsibility. They aim to promote the

positive contributions multinational enterprises can make to economic, environmental and social progress. They contain ten short chapters of voluntary<sup>56</sup> principles and standards for responsible business conduct addressing such areas as human rights, disclosure of information, anti-corruption, taxation, labour relations, environment, and consumer protection. The principles and standards are in the form of recommendations by the 38 countries that have adhered to them to the multinational enterprises operating in or from their territories. They express the shared values of the governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises. Box 1 presents a brief overview of the main Guidelines recommendations.

**Box 1. Main recommendations of the OECD Guidelines for Multinational Enterprises<sup>57</sup>**

**The Preface** situates the Guidelines in a globalising world. The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress, and to minimise the difficulties to which their various operations may give rise.

**I. Concepts and Principles:** sets out the principles that underlie the Guidelines, such as their voluntary character, their application world-wide and the fact that they reflect good practice for all enterprises.

**II. General Policies:** contains the first specific recommendations, including provisions on human rights, sustainable development, supply chain responsibility, and local capacity building, and more generally calls on enterprises to take full account of established policies in the countries in which they operate.

**III. Disclosure:** recommends disclosure on all material matters regarding the enterprise, such as its performance and ownership, and encourages communication in areas where reporting standards are still emerging, such as social, environmental and risk reporting.

**IV. Employment and Industrial Relations:** addresses major aspects of corporate behaviour in this area, including child and forced labour, non-discrimination and the right to bona fide employee representation and constructive negotiations.

**V. Environment:** encourages enterprises to raise their performance in protecting the environment, including performance with respect to health and safety impacts. Features of this chapter include recommendations concerning environmental management systems and the desirability of precaution where there are threats of serious damage to the environment.

**VI. Combating Bribery:** covers both public and private bribery, and addresses passive and active corruption.

**VII. Consumer Interests:** recommends that enterprises, when dealing with consumers, act in accordance with fair business, marketing and advertising practices, respect consumer privacy, and take all reasonable steps to ensure the safety and quality of goods or services provided.

**VIII. Science and Technology:** aims to promote the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, thereby contributing to the innovative capacities of host countries.

**IX. Competition:** emphasises the importance of an open and competitive business climate.

**X. Taxation:** calls on enterprises to respect both the letter and spirit of tax laws, and to co-operate with tax authorities.

<sup>56</sup> Observance of the Guidelines is voluntary in the sense of not being legally enforceable (see I.1 of the Guidelines). However, as was pointed out in *Corporate Responsibility: Private Initiatives and Public Goals*, OECD 2001, p. 12, there are often powerful pressures acting on firms engaged with voluntary corporate responsibility initiatives.

<sup>57</sup> This box is reproduced from *The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument*, OECD Policy Brief, June 2003.

### 2.3.2 *To whom they apply*

40. The Guidelines' principles apply to multinational enterprises operating in or from the territories of the 38 countries that have adhered to them.<sup>58</sup> These are the OECD countries and 8 others.<sup>59</sup> Other countries that are willing and able to meet the Declaration's requirements are also encouraged to apply to adhere. Each additional country that adheres expands the reach of the Guidelines' recommendations to companies that operate in or from the new adhering country.

41. A precise definition of multinational enterprise is not provided. 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."<sup>60</sup> The ownership of the enterprises – whether it is private, state or mixed – is irrelevant.<sup>61</sup> In addition, when the Guidelines apply to a particular multinational enterprise, they generally apply to all the entities it contains – parent companies and/or local entities.<sup>62</sup> Moreover, the Guidelines do not only apply to large enterprises: the adhering governments also encourage small- and medium-sized enterprises to observe the Guidelines' recommendations to fullest possible extent.<sup>63</sup>

42. The Guidelines are also not aimed at introducing differences of treatment between multinational and domestic enterprises: they are intended to reflect good practice for all. Multinational enterprises and domestic enterprises are therefore subject to the same expectations in respect of their conduct wherever the Guidelines are relevant for both.<sup>64</sup>

### 2.3.3 *How they are implemented*

43. While the Guidelines are voluntary for companies, they are binding on the governments that have adhered to them. These governments are required to establish a National Contact Point (NCP) – typically a government office<sup>65</sup> – to encourage observance of the Guidelines and ensure that they are known and understood by the national business community and other interested persons.<sup>66</sup> An NCP's responsibilities include: promoting the Guidelines, handling enquiries about them, gathering information on national experiences with the Guidelines, and reporting annually to the OECD Committee on International Investment and Multinational Enterprises (CIME).

44. The Guidelines' Procedural Guidance provides for a facility that allows interested parties to call a company's alleged non-observance of the Guidelines' recommendations (called a "specific instance") to the attention of an NCP. NCPs are required to offer a forum for discussion and assist the business

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<sup>58</sup> I.2 of the Guidelines.

<sup>59</sup> See note 44 above for the identity of the 8 non-OECD countries.

<sup>60</sup> I.3 of the Guidelines.

<sup>61</sup> *idem*

<sup>62</sup> *idem*

<sup>63</sup> I.5 of the Guidelines.

<sup>64</sup> I.4 of the Guidelines.

<sup>65</sup> There are four types of NCP structure presently in use: single government office, multi-departmental government office, tri-partite body, and quadripartite body.

<sup>66</sup> Decision of the OECD Council, June 2000.

community, employee organizations, civil society organisations and other parties concerned to deal with the issues raised.<sup>67</sup> The procedures to be used in providing this assistance are set out in Box 2.

**Box 2. Procedures to be followed by NCPs in handling specific instances raised under the OECD Guidelines for Multinational Enterprises**

The NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
  - a) Seek advice from relevant authorities, and/or representatives of the business community, employee organizations, other non-governmental organizations, and relevant experts.
  - b) Consult the National Contact Points in the other country or countries concerned.
  - c) Seek the guidance of the CIME if it has doubt about the interpretation of the Guidelines in particular circumstances.
  - d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.
4.
  - a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.
  - b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.
5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

45. In addition to the official OECD Guidelines Procedural Guidance, NGOs and labour organizations have produced manuals to assist those wishing to raise a specific instance to know how to do so and what to expect.<sup>68</sup> Some NCPs have also developed their own more detailed procedures.<sup>69</sup>

<sup>67</sup> Involving a range of persons and organisations in trying to resolve a problem is consistent the emphasis, in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 9.1 Participation and coordination.

<sup>68</sup> See, for example, Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises: A Critical Starter Kit for NGOs*, Amsterdam, Friends of the Earth Netherlands, 2002, available at [www.foenl.org/publications/TK\\_ENG\\_DEF.PDF](http://www.foenl.org/publications/TK_ENG_DEF.PDF); Trade Union Advisory Committee (TUAC) to the OECD, *A User's Guide to the OECD Guidelines for Multinational Enterprises*, available at [www.tuac.org/publicat/guidelines-EN.pdf](http://www.tuac.org/publicat/guidelines-EN.pdf).

46. The CIME also plays an important role in implementation. It is the OECD body responsible for overseeing the functioning of the Guidelines. It also supervises OECD research projects on the role and use of the Guidelines in particular contexts, and can issue clarifications on the application of the Guidelines. It also regularly consults with a range of stakeholders - including business, labour and NGOs – on matters relating to the Guidelines and their implementation, as well as on other issues concerning international investment and multinational enterprises.

#### 2.3.4 *How they could be used to tackle IUU*

47. Corporate irresponsibility is clearly an important component of IUU. Corporate entities are implicated in a wide range of IUU-related or IUU-facilitating activities. For example,

- Conducting IUU activities and registration of flags of convenience vessels engaged in IUU fishing<sup>70</sup>
- Supporting IUU by purchasing illegally caught fish.<sup>71</sup>
- Enabling or facilitating IUU by providing products and services to vessels and persons involved in IUU.

48. The part of the Guidelines that is most obviously relevant to the problem of IUU is the environmental chapter, which broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21; the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters; and the standards in instruments such as the ISO Standard on Environmental Management Systems. However, the Guidelines contain a number of general corporate responsibility principles of potential relevance to the fight against IUU. In some cases, IUU activities may directly contradict a recommendation. For example, the Guidelines recommend that enterprises:

- Comply with local laws and policies: Enterprises are asked to take fully into account established policies in the countries in which they operate, and to consider the views of other stakeholders.<sup>72</sup> IUU activity, especially where it contravenes the law or policies on commercial fishing, may amount to a failure to observe this recommendation.
- Contribute to economic, social and environmental progress with a view to achieving sustainable development.<sup>73</sup> The environmental harm caused by IUU activities is the contrary of environmental progress.
- Respect the human rights of those affected by their activities.<sup>74</sup> IUU activities may impact the enjoyment of a range of human rights, especially the economic rights of those whose livelihoods are detrimentally affected by the IUU activities.

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<sup>69</sup> For example, the Australian NCP has developed and posted on their website at [www.ausncp.gov.au](http://www.ausncp.gov.au) procedures for raising a specific instance. These incorporate, but also build on, the OECD Guidelines Procedural Guidance.

<sup>70</sup> See S.J. Cripps, A. Oliver and J. Cator, “International aspects of the control and eradication of IUU fishing – an NGO’s perspective,” Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

<sup>71</sup> See S.J. Cripps, A. Oliver and J. Cator, “International aspects of the control and eradication of IUU fishing – an NGO’s perspective,” Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

<sup>72</sup> II of the Guidelines.

<sup>73</sup> II.1 of the Guidelines.

- 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.<sup>75</sup> Some IUU activity may involve bribery and other such conduct that may be inconsistent with this recommendation.
- Within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>76</sup> IUU activity will not normally be consistent with taking due account of the need to protect the environment, or be consistent with sustainable development.
- Continually seek to improve corporate environmental performance.<sup>77</sup> IUU is clearly a step in the opposite direction.
- Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.<sup>78</sup> This recommendation, concerning supply chain, is of particular relevance in the IUU area given calls for enterprises to stop doing business with IUU fishing vessels and companies.<sup>79</sup>
- Not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.<sup>80</sup> IUU may require bribery.<sup>81</sup>
- The chapter on disclosure provides, among other things, that enterprises should ensure timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance.”<sup>82</sup> It also asks enterprises to disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.<sup>83</sup> The availability of more information about

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<sup>74</sup> II.2 of the Guidelines.

<sup>75</sup> II.5 of the Guidelines.

<sup>76</sup> V of the Guidelines.

<sup>77</sup> V.6 of the Guidelines.

<sup>78</sup> II.10 of the Guidelines.

<sup>79</sup> See, for example, M. Gianni “Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing, p. 7. See also Communication from the Commission, Community action plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002, p.5, action 3 concerning the control of activities associated with IUU fishing. Paragraph 73 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also ask States to take measures to ensure that importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, and other services suppliers and the public are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing.

<sup>80</sup> VI of the Guidelines.

<sup>81</sup> D.J. Agnew and C.T. Barnes “The Economic and Social Effects of IUU/FOC Fishing,” February 2003, para. 4.6.4. observe that corruption is a significant factor in gaining IUU access to EEZ waters in various parts of the world.

<sup>82</sup> III.1 of the Guidelines.

<sup>83</sup> III.3 of the Guidelines.

ownership and control of vessels and companies engaged in IUU could help better deal with the problem.<sup>84</sup>

- When dealing with consumers, 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 and services they provide. In particular, they should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.<sup>85</sup> IUU related activities may entail using deceptive packaging and other practices to deceive consumers and the authorities as to the origin and nature of the fish concerned.<sup>86</sup>
- Contribute to the public finances of host countries by making timely payment of their tax liabilities, complying with the tax laws and regulations of all countries in which they operate, exerting every effort to act in accordance with both the letter and spirit of those laws and regulations, and providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed.<sup>87</sup> Enterprises engaged in IUU are unlikely to be paying their full share of taxes or to be providing to the relevant authorities full information about their activities.

49. Many IUU-related or –facilitating activities may thus amount to a failure to observe the Guidelines, and could be raised as a specific instance with an NCP. Any interested person could raise the specific instance – for example, it could be an NGO concerned about IUU, a competitor company, an employee, a concerned coastal community etc. Box 2, above, sets out the procedures that an NCP will follow in dealing with a specific instance brought to its attention.<sup>88</sup>

50. In addition, there are a number of Guidelines’ recommendations that are perhaps less clearly relevant in dealing with IUU, but, if they are followed, would nevertheless help minimize the likelihood that enterprises will or even can engage in IUU. These recommendations, also drawn from the ten Guidelines chapters, include techniques such as disclosure, communication, training, management systems, and whistleblower facilities. For example, the Guidelines recommend that enterprises:

- Support and uphold good corporate governance principles and develop and apply good corporate governance practices.<sup>89</sup>
- 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.<sup>90</sup>

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<sup>84</sup> The desirability of such information is made clear by the FAO’s Technical Guideline for Responsible Fishing, no. 9 (Implementation of the International Plan of Action to Deter, Prevent, and Eliminate Illegal, Unreported and Unregulated Fishing), which observes that “The beneficial owners of the vessels, who typically have nationalities that differ from those of their vessels, often succeed in preventing fisheries managers and law enforcement officials from ascertaining their identities.”

<sup>85</sup> VII.4 of the Guidelines.

<sup>86</sup> See D.J. Agnew and C.T. Barnes “The Economic and Social Effects of IUU/FOC Fishing” February 2003, observing that enterprises engaged in IUU activities may be motivated to repackage and relabel fish to disguise its origin .

<sup>87</sup> X of the Guidelines.

<sup>88</sup> See note 68, above, for examples of manuals that civil society groups and labour organisations have prepared to help guide persons wishing to raise a specific instance. Some NCPs have developed their own guidance for persons raising specific instances. See, for example, the guidance referenced in note 69.

<sup>89</sup> II.6 of the Guidelines.



- Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.<sup>91</sup>
- 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.<sup>92</sup> If whistleblowers feel confident that there will not be adverse consequences for reporting IUU activities, they are likely to be more willing to disclose what they know.
- Apply high quality standards for disclosure, accounting and audit, and for non-financial information including environmental and social reporting where they exist.<sup>93</sup>
- Communicate additional information that could include: information on systems for managing risks and complying with laws, and on statements or codes of business conduct.<sup>94</sup>
- Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of their activities, and engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprises and by their implementation.<sup>95</sup>
- Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, and mechanisms for immediate reporting to the competent authorities.<sup>96</sup>
- Provide adequate education and training to employees in environmental health and safety matters, as well as more general environmental management areas.<sup>97</sup>
- Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.<sup>98</sup>
- Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.<sup>99</sup>
- Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.<sup>100</sup>

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90 II.7 of the Guidelines.

91 II.8 of the Guidelines.

92 II.9 of the Guidelines.

93 III.2 of the Guidelines.

94 III.5 b) of the Guidelines.

95 V.2 of the Guidelines.

96 V.5 of the Guidelines.

97 V.7 of the Guidelines.

98 V.8 of the Guidelines.

99 VI.4 of the Guidelines.

100 V.5 of the Guidelines.

51. The standards articulated in the Guidelines are being promoted and reinforced in a variety of ways by adhering governments. For example, in addition to conferences and mailings to business, at least ten countries refer to the Guidelines as a benchmark for companies applying to their investment guarantee, export credit and investment promotion programmes.<sup>101</sup> Other voluntary standards, including those more directly responsive to the problem of IUU, could perhaps be similarly used. In addition, governments could consider referring to the Guidelines in other related contexts, such as in granting licences and permits.

52. One of the OECD's core strengths is its creation of consensus-based, behavioural norms for governments and private actors.<sup>102</sup> The Guidelines are helping to shape and reinforce norms of good corporate behaviour in many spheres. In addition to the promotional activities engaged in by adhering countries and the OECD, their profile has been raised through the recognition they have been given in high-level political declarations, such as the 2002 OECD ministerial meeting, the G8's 2002 Africa Action Plan, and the G8 finance ministers' statement in May 2003. They were also referenced in a report by a high level panel of the United Nations Security Council. However, much more can be done by adhering countries to promote observance of the Guidelines by multinational enterprises. Referring to the Guidelines in the context of responses to IUU could simultaneously help further raise the profile and understanding of the Guidelines as an important benchmark for enterprise behaviour and focus more attention on IUU as a corporate responsibility problem.

#### 2.3.5 *Potential limitations to their use in combating IUU*

53. The Guidelines could contribute to the fight against IUU in a number of ways. There are, however, also some limitations.

54. The Guidelines articulate standards for responsible behaviour, while enterprises engaged in IUU are likely to be the antithesis of responsible. Not only is IUU activity itself irresponsible, but the entities concerned often fail to observe a range of other standards as well. Some examples are taxation, health and safety, and labour conditions. Enterprises such as these, which deliberately act in an irresponsible way, are unlikely to be moved by the mere existence of the Guidelines. Nevertheless, through the supply chain recommendation, and measures by adhering countries to link the Guidelines to a variety of authorisations etc there is scope for impacting even these enterprises. In addition, many other companies, perhaps less directly involved in IUU activities, either as an uninformed customer or as a supplier of products or services that unwittingly facilitates IUU activities may be more susceptible to the pressures that adhering countries could bring to bear on them through the Guidelines process.

55. For a range of reasons, the determination of which IUU activities amount to a non observance of the Guidelines is a matter of interpretation. On some topics - for example Employment and Industrial Relations – the Guidelines are quite specific. However, on many other topics, the Guidelines are very general. IUU is not explicitly mentioned (nor is any other environmental issue) and thus to credibly claim that any particular IUU activity amounts to a failure to observe the Guidelines – and thus invoke the specific instance procedures – is likely to require a detailed analysis of the activity and the Guidelines.

56. The Guidelines apply to enterprises operating in or from an adhering country. Thus, while they apply to adhering country enterprises wherever they operate, they only apply to non-adhering country enterprises when they are operating within the territory of an adhering country. This means that a non-adhering country enterprise engaged in IUU on the high seas or in the waters of another non-adhering

<sup>101</sup> The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

<sup>102</sup> "Multinational Enterprises and the Quality of Public Governance: A Case Study of Extractive Industries," in *International Investment Perspectives*, No. 1 2002, p. 110.

country is beyond the reach of the Guidelines procedures. Since a significant amount of IUU occurs in the waters of developing countries (most of which have not yet adhered to the Guidelines) and is carried out by vessels flying the flags of other countries, which are also not usually adhering countries, this may mean that a lot of IUU activity is beyond the reach of the Guidelines procedures. However, the Guidelines and their procedures could still be relevant if an adhering country enterprise is involved in some way, for example, through the supply chain<sup>103</sup> or through its beneficial interest in the IUU activity. The Guidelines might also apply to distribution, that is, to customers, especially in so far as they can be construed as business partners.<sup>104</sup> The principles and standards that the Guidelines contain could thus be used in engaging in dialogue with enterprises and industry associations to encourage them to act responsibly in providing their products and services – such as equipment, banking, insurance - to those likely to be engaging in IUU activities.<sup>105</sup>

57. Around 64 specific instances have been raised since the Guidelines were reviewed in 2000. It can take several months or even longer for an NCP to handle a specific instance to its resolution. However, NCPs are now focusing on improving the transparency and effectiveness of the Guidelines procedures.<sup>106</sup> Without attracting additional resources, they are unlikely to have the capacity to handle a sudden surge in the number of specific instances. The Guidelines and their procedures can help resolve the particular specific instances under consideration, but as a mechanism for bringing about broader change, they suffer from many of the same limitations that other attempts to tackle IUU suffer from: lack of resources and lack of political will.

## **2.4 Convention on Combating Bribery of Foreign Officials in International Business Transactions**

### *2.4.1 What it is*

58. The Convention on Combating Bribery of Foreign Officials in international Business Transactions (the Convention) requires states parties to criminalise the bribery of foreign public officials. The offences concerned include intentionally offering, promising or giving a bribe, or complicity in or authorization of such a bribe.<sup>107</sup> The Convention also requires parties to take measures to prohibit the

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<sup>103</sup> Some examples might be where an adhering country enterprise has a business partner, including a supplier or sub-contractor, who is involved in IUU and yet does not encourage them to stop/adopt principles of corporate conduct compatible with the Guidelines.

<sup>104</sup> Note, however, that a Roundtable on Corporate Responsibility: Supply Chains and the OECD Guidelines on Multinational Enterprises, held at the OECD in June 2002 did not discuss in any detail concerns about how customers might be using an enterprise's products or services and what the responsibilities of a supplier might be in this context. See OECD Guidelines for Multinational Enterprises: Focus on Responsible Supply Chain Management, Annual Report 2002.

<sup>105</sup> Another potential starting point for a dialogue about customers is contained in the environmental chapter of the Guidelines. It is perhaps most likely to be relevant where the product or service itself may have direct environmental impacts rather than where it only enables an activity like IUU. V.6.c recommends that enterprises should continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise.

<sup>106</sup> The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

<sup>107</sup> Article 1(1) and (2) of the Convention provide as follows:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party,

establishment of off-the-books accounts and other such accounting techniques for the purpose of bribing foreign public officials or of hiding such bribery.<sup>108</sup> A further reinforcing measure is found in a related text, the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (the 1996 Recommendation), which urges Member countries that do not disallow the deductibility of bribes to deny this deductibility.<sup>109</sup>

59. The Convention also contains a number of provisions designed to assist with its implementation. For example, it calls for parties to provide legal assistance to each other to enable investigations and proceedings, and deems bribery of a foreign public official to be an extraditable offence.<sup>110</sup> The Convention, together with the 1996 Recommendation and the 1997 revised Recommendation on Combating Bribery in International Business Transactions, aim to eliminate the supply of bribes to foreign public officials. The Convention entered into force on 15 February 1999.

#### 2.4.2 *To whom it applies*

60. The Convention applies to those countries that have ratified it. As of the date of this paper, 35 countries had deposited their instrument of ratification with the Secretary-General of the OECD.<sup>111</sup> Under the Convention, each signatory state is responsible for the activities of its nationals and bribery that occurs on its own territory.<sup>112</sup>

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in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

<sup>108</sup> Article 8(1) of the Convention provides that: In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

<sup>109</sup> Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, adopted by the OECD Council on 11 April 1996.

<sup>110</sup> Articles 9 and 10 of the Convention.

<sup>111</sup> These countries are OECD countries plus five others: Argentina, Brazil, Bulgaria, Chile, and Slovenia.

<sup>112</sup> Article 4 of the Convention addresses states parties' jurisdiction to prosecute. It provides that:

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

### 2.4.3 *How it is implemented*

61. Compliance with the Convention and implementation of the 1997 revised Recommendation is monitored through country reviews conducted under the supervision of the OECD Working Group on Bribery in International Business Transactions, and is divided into two phases: Phase 1 and Phase 2. Phase 1 evaluated whether the legal texts through which participants implemented the Convention met the standard set by the Convention. Phase 2, which is currently under way, is studying the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Monitoring is also seen as an opportunity to consult on difficulties in implementation and to learn from the solutions found by other countries.

### 2.4.4 *How it could be used to tackle IUU*

62. Though it does not contain any provisions concerning IUU or fisheries in general, the Convention is nevertheless relevant because of the connection between IUU and corruption. In particular, in order to engage in IUU or related activities, it may be necessary to bribe a foreign official.<sup>113</sup> Where a person involved, directly or indirectly, in the bribing is a national from, or the bribing occurs on the territory of, a country that has ratified the Convention, that person may be exposing themselves to the risk of prosecution for bribery, as well as to the possibility of civil or administrative sanctions.<sup>114</sup>

63. Beyond the direct application of the Convention and Recommendations to IUU, there are also a number of aspects about the OECD's approach to dealing with the problem of corruption that could be applied in the fight against IUU. For example, just as the Convention encourages countries to prosecute their nationals for bribery even for conduct occurring outside their own territories, a similar approach could perhaps be adopted with respect to IUU activities. Called the nationality principle, under international law, states can generally regulate the conduct of their nationals, even when those nationals are abroad.<sup>115</sup> Given that many of the actual owners of IUU fishing vessels are nationals or residents of OECD countries,<sup>116</sup> the same principle could also be used by states as the basis for creating criminal offences connected with IUU activities engaged in by their nationals, whether at home or overseas. Some examples of possible offenses that have been suggested include: owning, operating or knowingly working on a IUU fishing vessel as an officer or fishmaster.<sup>117</sup>

64. The 1997 revised Recommendation is also an interesting potential model for dealing with IUU. It adopts a multidisciplinary approach to the problem, recommending that member countries take a number

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps..

<sup>113</sup> D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing," February 2003, para. 4.6.4. observe that corruption is a significant factor in gaining IUU access to EEZ waters in various parts of the world.

<sup>114</sup> Article 3(4) of the Convention. The Commentary to the Convention indicates that the range of possible civil or administrative sanctions, other than non-criminal fines, includes: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

<sup>115</sup> See, for example, G. Watson "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction" *17 Yale Journal of International Law* 41 (1992).

<sup>116</sup> M. Gianni "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing, February 2003.

<sup>117</sup> *idem*

of diverse measures. In particular, it recommends that each member country examine seven different areas (with a view to tackling the problem on all fronts) and take concrete and meaningful steps to deter, prevent and combat bribery of foreign public officials. Many of these areas may also be relevant in dealing with the problem of IUU. The seven areas of examination are (paraphrasing):

- Criminal laws and their application so as to criminalise bribery;
- Tax legislation, regulations and practice to eliminate any indirect support of bribery through tax deductions;
- Company and business accounting, external audit and internal control requirements and practices so that they are fully used to prevent and detect bribery of foreign public officials in international business;
- Banking, financial and other relevant provisions, to ensure that adequate records are kept and made available for inspection and investigation;
- Public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases;
- Civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;
- International co-operation in investigations and other legal proceedings.<sup>118</sup>

65. Since strengthening international co-operation in detection of IUU is often recommended as an important measure in tackling the problem, lessons learned about how to co-operate in the bribery context may be able to be applied in the IUU context.

66. The 1997 revised Recommendation provides detailed recommendations and guidance to member countries on the subject of accounting requirements, external audit and internal company controls. It articulates a set of principles and recommends that member countries take the steps necessary to bring their laws, rules and practices into line. Among the principles are (paraphrasing):

- Requiring companies to maintain adequate records of receipts and expenses, including identifying to what they relate, and prohibiting off-the-books transactions and accounts;
- Requiring countries to disclose the full range of material contingent liabilities in their financial statements;
- Adequate sanctioning of accounting omissions, falsifications and fraud;
- Considering whether requirements to submit to external audit are adequate;
- Maintain adequate standards to ensure the independence of external auditors;
- Requiring auditors who discover indications of bribery to report this discovery to management and, as appropriate, corporate monitoring bodies;
- Requiring auditors to report indications of bribery to competent authorities;
- Encouraging the development and adoption of adequate internal company controls, including standards of conduct.<sup>119</sup>

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<sup>118</sup> Revised Recommendation of the Council on Combating Bribery in International Business Transactions, Adopted by the Council on 23 May 1997.

<sup>119</sup> Ibid, V.

67. A variant of at least some of these principles, which are aimed at enhanced transparency, could be useful in tackling IUU, for example, requiring certain persons to report to appropriate authorities indications of possible involvement in IUU or related activities. Enhanced information about ownership and control of vessels and companies engaged in IUU could help better deal with the problem.<sup>120</sup> A recent OECD report has made a number of recommendations about measures that governments should consider taking to help combat misuse of the corporate form by acting to ensure the availability of information about ownership and control.<sup>121</sup> Among the suggestions made are: that governments should consider taking action to:

- Require up-front disclosure of beneficial ownership and control information to the authorities upon the formation of the corporate vehicle;
- Oblige intermediaries involved in the formation and management of corporate vehicles to maintain such information;
- Develop the appropriate law enforcement infrastructure to enable them to launch investigations into beneficial ownership and control when illicit activity is suspected.

68. Another way in which the Convention and Recommendations could be of interest in the IUU context is that the country review mechanism for the Convention and 1997 revised Recommendation, or indeed another model of peer review in use at the OECD, might be useful if applied in an IUU context to ascertain and encourage implementation of measures at the national level to combat the problem. The OECD's concept of peer review was introduced and discussed briefly above, under the section on the Codes of Liberalisation.

### 3. Conclusion

69. The introduction and executive summary highlighted some of the main potential contributions or obstacles of the OECD's investment instruments to the fight against IUU. What, however, are some of the practical steps that the OECD Fisheries Committee might wish to consider taking based on the information and analysis contained in this paper? The Fisheries Committee :

- May find it fruitful to cooperate with the CMIT to better understand the work each group is doing and thus harmonise their activities to ensure that any potential for mutual support be realised.
- May wish to explore, in more detail, efforts being taken by other OECD bodies and individual member countries to refer to the OECD Guidelines for Multinational Enterprises as a benchmark for companies applying to investment guarantee, export credit and investment promotion programmes. There are potentially many other IUU-related areas where similar linkages could be made.
- Could use the principles and standards contained in the Guidelines in engaging in dialogue about corporate responsibility for IUU activities.
- May wish to promote the existence of the specific instance procedures under the Guidelines to civil society organisations and other interested persons and groups.
- Could offer to assist any NCP to deal with an IUU-related specific instance raised under the OECD Guidelines for Multinational Enterprises (in the event that one is raised in the future).

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<sup>120</sup> See note 84 above.

<sup>121</sup> Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, OECD, 2001.

- May wish to indicate their support for outreach efforts to expand the reach of the Guidelines by encouraging more non-member countries to recommend respect for the principles and standards contained in the Guidelines to the companies operating in and from their territories.
- Could reference the OECD Declaration and Decisions on International Investment and Multinational Enterprises in encouraging adhering countries to address the impact of investment incentives and disincentives on the drivers of IUU.
- May, using the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as a model, wish to consider encouraging countries to hold their own nationals responsible for their IUU-related conduct whether engaged in at home or abroad.<sup>122</sup>
- Could encourage prosecution of instances of IUU-related corruption in accordance with the Convention.
- May wish to consider the possibility of developing a peer review mechanism – using already existing OECD peer review mechanisms as a model – to help countries with their efforts to fight IUU.

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<sup>122</sup> This would be consistent with provisions in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 18, 19 (State Control over Nationals) and 21 (Sanctions).



## REFERENCES

- D.J. Agnew and C.T. Barnes “The Economic and Social Effects of IUU/FOC Fishing,” February 2003.
- Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, OECD, 2001.
- C.J. Carr and H.N. Scheiber “Dealing with a Resource Crisis: Regulatory Regimes for Managing the World’s Marine Fisheries” UCIAS Edited Volume 1, Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies, 2000(3).
- S.J. Cripps, A. Oliver and J. Cator, “International aspects of the control and eradication of IUU fishing – an NGO’s perspective,” Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.
- Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related Documents, OECD 1999 (DAFFE/IME/BR(97)20).
- Corporate Responsibility: Private Initiatives and Public Goals, OECD 2001.
- Food and Agriculture Organization, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Rome 2001.
- Food and Agriculture Organization, *Implementation of the International Plan of Action to Deter, Prevent, and Eliminate Illegal, Unreported and Unregulated Fishing*, Technical Guideline for Responsible Fishing, no. 9 (2002).
- Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises: A Critical Starter Kit for NGOs*, Amsterdam, Friends of the Earth Netherlands, 2002, available at [www.foenl.org/publications/TK\\_ENG\\_DEF.PDF](http://www.foenl.org/publications/TK_ENG_DEF.PDF).
- M. Gianni, “Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing,” Endangered Seas Programme, February 2003.
- MAI and the Environment, Note by the Chairman, Negotiating Group on the Multilateral Agreement on Investment (MAI), 9 October 1996 (DAFFE/MAI(96)30).
- “Multinational Enterprises and the Quality of Public Governance: A Case Study of Extractive Industries,” in *International Investment Perspectives*, No. 1 2002.
- No Longer Business as Usual: Fighting Bribery and Corruption, OECD 2000.
- OECD Code of Liberalisation of Capital Movements, OECD 2003.

AGR/FI/IUU(2004)1

OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility, Annual Report 2001.

OECD Guidelines for Multinational Enterprises: Focus on Responsible Supply Chain Management, Annual Report 2002.

The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003.

Peer Review: A Tool for Co-operation and Change – An Analysis of an OECD Working Method, OECD, 2003 (SG/LEG(2002)1).

Steps Taken and Planned Future Actions by Participating Countries to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, June 2003.

“Successful Capital Movements Liberalisation: A Question of Governance – Recent OECD Experience” in International Investment Perspectives, No. 1 2002.

The Environmental, Economic and Social Issues and Effects of IUU/FOC Fishing Activities in the High Seas, OECD, 14 February 2003 (AGR/FI(2003)5).

The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, OECD 2000 (DAFFE/IME(2000)20).

Trade Union Advisory Committee (TUAC) to the OECD, *A User's Guide to the OECD Guidelines for Multinational Enterprises*, available at [www.tuac.org/publicat/guidelines-EN.pdf](http://www.tuac.org/publicat/guidelines-EN.pdf).

K. von Moltke “The Environment and Non-Discrimination in Investment Regimes: International and Domestic Institutions” International Sustainable and Ethical Investment Rules Project, November 2002.

G. Watson “Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction” 17 *Yale Journal of International Law* 41 (1992).