CHAPTER XX

THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT[1]

When one thinks of international law whose administrative processes we should care about, the European Union, World Trade Organization and International Monetary Fund come to mind without a moment's hesitation. A bit later, perhaps, one might also come up with the Montreal Protocol secretariat, Codex Alimentarius or the International Organization for Standardization. It will probably take a good while before the Organization for Economic Cooperation and Development (OECD) comes to mind, though. In some respects, this is hardly surprising for the OECD is not a well known international organization (and certainly not as a lawmaking institution). Located in Paris and best known for its research reports, the OECD has a "secret life" that goes well beyond that of policy analysis. Indeed a number of its activities influence domestic agency action far more than is generally realized.

This chapter commences with a description of the OECD. Because the organization does not garner much attention from scholars or the public, this section sets out the basics of the organization's origins, operations, and examples of its range of activities. The chapter then provides four case studies that examine the OECD's multiple roles and how these bear on the development of a global administrative law. The cases range from traditional treaty-making, to consensus development of standards, to quasi-judicial review of the actions of multinational enterprises. Each of these examples relies on different types of administrative mechanisms to address the core concerns of transparency, responsiveness and accountability. The final section proposes a number of insights and conclusions from the cases, suggesting that the OECD's ad hoc efforts to provide administrative safeguards shed important light both on the breadth of what global administrative law means in practice and what it could come to mean.

I should note at the outset that this draft has been written more for discussion at the workshop on February 17th than for inclusion as a chapter in the book. In other words, to be most effective, the final draft of this chapter will be far more useful when it reflects and integrates themes and theories developed in other parts of the book than if it slots in as a stand-alone piece. Ignorant of other work and insights in the Administrative Law and Global Governance Project, I have focused more in this draft on facts than on theory, more on providing case studies and suggesting their lessons for understanding global administrative law than in developing independent theses. My intention is to substantially re-write this draft based on the workshop discussion. To that end, I would be grateful if workshop participants would focus on the following questions:

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[1] James Salzman, Professor and Emalee C. Godsey Scholar, Washington College of Law, American University. I am grateful for the helpful insights provided in interviews with OECD secretariat, particularly the candid comments of Katy Gordon, Ken Ruffing, Cristina Tebar y Less, Dian Turnheim, Rob Visser, Janet West and Jean le Coquic. I should note that I worked in the OECD Environment Directorate from 1990-1992. All errors are mine alone.

- What additional information would you like the case studies to include?

- What comparisons/contrasts would be useful to draw between the OECD practices and the activities or administrative processes of other international organizations?

- Do the case studies suggest testable hypotheses to explore in the next draft?

- Which proposals in Section III strike you as most interesting and useful to develop?

I. The Organization for Economic Cooperation and Development

A. History of the OECD

The predecessor to the OECD, the Organization for European Economic Cooperation (OEEC), was created in April, 1948, amidst the rubble of World War II's devastation. The OEEC's explicit charge was to administer the Marshall Plan for the reconstruction of Europe. Housed in the Chateau de la Muette in Paris with representatives from its founding 18 Member countries, the OEEC's name expressed well the organization's goals – the promotion of cooperation and commerce among Europe's reconstructed economies, development of a European customs union, and, ultimately, a free trade area. The OEEC's initial work focused on the effective allocation of the Marshall Plan's grants and credits. With the unexpected end of Marshall Plan aid in 1952, the OEEC remained active by directing its energies to European economic development and helping lay the groundwork for the creation of the European Economic Community.

With the establishment of the European Economic Community in 1957, the original impetus for creation of the OEEC no longer existed. Europe now had a permanent institution dedicated to forging closer economic ties. Member countries had found value in the common forum provided by the OEEC, however, and the Cold War's ideological battle over centrally-controlled versus market economies had grown considerably colder and more hostile. Thus the OEEC Member countries decided to create a new organization in its place – the Organization for Economic Cooperation and Development (OECD).

In keeping with its predecessor's mandate, the OECD is first and foremost an economic organization dedicated to the principles of free markets.[2] The OECD's original

[2] Its founding treaty mandates the organization to promote policies designed:

> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

membership of 21 countries (the founding Western European members, the United States, Canada, and the key NATO allies Turkey and Iceland) has expanded to 30 today.[3] The only legal requirement for membership, apart from unanimous approval of existing members, is that an applicant have a market-based economy.

B. OECD Activities

In comparison with other international governmental organizations (IGOs), the OECD remains a curious creature. Far from being a Cold War relic, the OECD has developed into an amalgam of a rich man's club, a management consulting firm for governments, and a legislative body.

The OECD is, first and foremost, an exclusive club whose members produce two-thirds of the world's goods and services.[4] The OECD provides a private setting for wealthy industrialized governments to share experiences, identify issues of common concern, and coordinate domestic and international policies. In simple terms, the OECD's range of standing inter-governmental committees serves as useful talking shops for countries to share experiences, learning from one another's successes and challenges. The OECD occupies a unique position in the constellation of IGOs, with membership broader than the EU, Nordic Council, or NAFTA, yet much more restrictive than the UN or WTO, and topic coverage as broad as any IGO. As a result, the OECD provides a restricted forum on virtually unrestricted topics.[5]

> (b) to contribute to sound economic expansion in Member as well as non-Member countries in the process of economic development; and
>
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

See, Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728.

[3] The Member countries and dates of accessions are: Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), The Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Spain (1961), Sweden (1961), Switzerland (1961), Slovak Republic (2000), Turkey (1961), United Kingdom (1961), United States (1961).

[4] < http://www.oecd.org/about/general/index.htm>

[5] Perhaps one reason the OECD's mandate is so broad is, as described on the next page of text, its lack of direct political power authority. As Krause and Nye have observed:

> It is sometimes said that intergovernmental organizations operate according to "the law of inverse salience": the greater the political prominence of an issue, the less the operational autonomy of the organization. This law is sometimes used as a reason for limiting the scope of an organization's domain to a narrow range of issues that are more likely to be susceptible to technical than to broad political treatment."

Krause and Nye, *supra* note __, at 335.

The OECD also acts as a high-powered research institution. Its more than 1,800 employees (many of whom are economists) collect data, monitor trends, forecast economic developments, and develop policy options for consideration by Member countries. The OECD's ability to gather and synthesize data on members' policy initiatives and results provides a wealth of insight concerning which types of policies work best in particular settings. The result is over 500 books published annually (in addition to the many reports that are not published).[6] Books and reports must be approved by all Member countries prior to "derestriction" and publication.

Bringing together the wealthy industrialized nations in a private setting and providing high-powered research has led in a number of instances to negotiation and adoption of international legal instruments. Article 5 of the OECD's convention provides for Member countries, through the Council of Ministers, to take three types of legal action – Recommendations, Decisions, and agreements with other governmental bodies.

Recommendations are non-binding agreements that generally represent policy advice with a strong base of support. As a recent example, in response to the increasing use of information technology to create new avenues for offshore investment for the purposes of tax avoidance and evasion, in 1998 the OECD Council adopted two Recommendations to improve exchange of information between countries – advocating the use of tax identification numbers and a standard magnetic format for automatic exchange of information.[7] Member countries generally use Recommendations either as a means to influence domestic policy development, arguing in their respective capitals that the OECD has endorsed a particular approach, or as a precursor to a Decision. It is rare for a Recommendation to lead to direct changes in agency action or rulemaking. *Decisions* are legally binding on Member countries. Not surprisingly, adoption of Decisions is less frequent than adoption of Recommendations and the negotiations are followed much more closely by Member countries.

Article 6 of the OECD Convention requires consensus for adoption of Recommendations and Decisions, though members may abstain and thereby enter the equivalent of a reservation. If proponents of a Recommendation or Decision face concerted opposition from even a few countries, a vote will not be taken until negotiation has produced a text unobjectionable to all the Member countries. Despite the fact that Decisions are binding, it is exceedingly rare for any OECD Decision to provide sanctions for noncompliance.

The OECD's work on bribery provides a useful example of Recommendations and Decisions at work, as well as the OECD's role as a rich man's club and management consultant. In 1975, the UN General Assembly adopted by consensus a resolution on "Measures against corrupt practices of transnational and other corporations, their

[6] < http://www.oecd.org/about/public/index.htm>

[7] OECD Annual Report, 1998. <http://www.oecd.org/publications/97_rep/sec_gene1.htm>

intermediaries, and others involved." This led four years later to a draft convention on illicit payments.[8] The draft convention was never adopted, however, because developing countries demanded adoption of stronger corporate codes as a precondition for their support. It took almost twenty years later for the OECD to address the issue directly. Following extensive discussions amongst Member countries, the OECD adopted Recommendations in 1994, 1996 and 1997 on various aspects of bribery, calling on Member countries to combat international corruption by making bribery of foreign public officials a crime, preventing tax deductions for bribes, prohibiting corruption in contracts funded by development assistance programs, and creating effective company rules on accounting and auditing to reveal practices of bribery. In December, 1997, the Member countries and five non-members agreed to a Decision that made binding the steps agreed to in previous Recommendations.[9] Soon after, the UN adopted a declaration against bribery referring to the OECD and OAS Conventions and passed a code of conduct for public officials.[10] This ability to reach agreement on issues that IGOs with larger membership have been unable to address meaningfully is a unique strength of the OECD.

As noted in the Introduction, there has been very little scholarship on the OECD as an institution in any context.[11] The one area that has begun to garner attention is its role in developing transgovernmental networks. Professor Anne-Marie Slaughter, in particular, has developed this theme, going so far as to predict that, in stark contrast to the U.N. constellation of institutions, "[t]he next generation of international institutions is…likely to look more like the Basle Committee [, composed of 12 central bank governors], or, more formally, the Organization for Economic Cooperation and Development, dedicated to providing a forum for transnational problem-solving and the harmonization of national law."[12]

C. OECD Structure

Decisions and recommendations are voted on by the *OECD Council*, the governing body of Member country representatives that oversees the work of the organization and meets twice monthly, and more if necessary. These are ambassador-level appointments, with one representative from each country as well as the European

[8] U.N. Doc. E/AC.67/L.1 (1979).

[9] Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1, 4 (1998).

[10] This history is recounted in Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Ongoing Crusade Against Corruption*, VAND. J. OF TRANSNAT'L. L. cite.

[11] Andrew Moravcsik's study of the OECD Export Credit Arrangement provides an excellent analysis of negotiations conducted at the OECD, but his focus is on regime formation and maintenance rather than on the OECD, itself. Andrew Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement*, 43 INT'L ORGANIZATION 173 (1989) [hereinafter Moravcsik].

[12] Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183, 196 (1997) [hereinafter Slaughter].

Union. The OECD's productive work, however, is carried out by specialized *directorates*. Each directorate is governed by a managing *committee*, composed of representatives from Member countries. Committees, through a one-country one-vote process, determine the directorate's work program and priorities. Below the committees are *divisions, groups,* and *ad hoc groups* that oversee the more technical activities and the work program. As an example, the Environment Directorate's main committee, the Environmental Policy Committee, oversees divisions and working groups on waste management policy, transport, chemicals, pesticides and biotechnology, and other policy areas. In all, there are approximately 200 committees, working groups and expert groups, involving the combined participation of thousands of senior officials from Member country governments.

Traditionally, the OECD has expressly avoided the hallmarks of administrative law – transparency, responsiveness and accountability. Meetings are closed to the public. While not voiced openly, in the view of many OECD country delegates the closed-door meetings provide a welcome alternative forum to what is often viewed as the developing country-dominated and politicized United Nations system. Coupled with the consensus requirement for Recommendations and Decisions, the OECD has eliminated much of the acrimony and political grandstanding in other IGOs such as the UN's General Assembly.

Until recently, the OECD's only formal relations with civil society have been in the labor area through its two nongovernmental partners – the Trade Union Advisory Committee (TUAC)[13] and the Business Industry Advisory Committee (BIAC).[14] As we shall see in the MAI case study, failure to formally consult other sectors of civil society fundamentally undermined the OECD's effectiveness in developing global rules for investment and eventually killed the process. Nor is there an accountability mechanism similar to the World Bank's Inspection Panel or the International Finance Corporation's Ombudsman that can review and assess the OECD's actions.

In some respects, this lack of administrative safeguards is not surprising. After all, the OECD was initially created to administer economic aid and promote capitalism, not promulgate standards or engage non-state actors. Over time, however, while the OECD's function has changed its organizational procedures have not kept pace. The result is an organization whose administrative safeguards are in flux, unsure of how much

[13] TUAC is the formal representative of labor organizations to the OECD. Originally created in 1948 to provide advice to the OEEC in its implementation of the Marshall Plan, TUAC has continued to provide feedback from the international labor community through regular consultations with OECD committees, the OECD secretariat, and Member country delegates. Based in Paris, TUAC is a free-standing organization with affiliates from over 55 national trade unions in the 29 OECD Member countries, representing approximately 70 million workers.

[14] The Business and Industry Advisory Committee to the OECD (BIAC) was created at the time of the OECD's birth in 1962. An independent organization, BIAC is regarded by the OECD as its official link with employers – business and industry interests. In terms of interactions with the OECD, BIAC shares many of the same features as TUAC. It holds regular consultations with the OECD secretariat, committees and groups in order to provide an institutional counterbalance to the efforts of TUAC.

and what types of engagement with non-state actors are necessary without undermining the organization's basic mission.

II. Case Studies

The first case study presented, the failed attempt to negotiate a Multilateral Agreement on Investment (the MAI), shows clearly the price the OECD paid for not reaching out to civil society. It is an important case to start with because the OECD's humiliation provided a powerful impetus for the organization to reconsider its administrative procedures. Institutionally, as a result of its bruising interactions with governments and civil society, the OECD's perception of itself and the public's perception of the OECD dramatically changed. The second case study explores the Mutual Acceptance of Data system. Run by the OECD's Chemicals Division, this has been an extremely successful harmonization program that effectively sets laboratory and chemical safety test standards on behalf of national agencies. It provides a model of extensive engagement with stakeholders that is as transparent and responsive as any rule-setting process in the international arena. The third case study explores development of the Common Approaches on Export Credits. Despite occurring after the MAI debacle, on its face the Common Approaches process appears to have followed the same process. In looking closer, however, one finds a clear understanding between the OECD secretariat and Member states over the need for civil society engagement and, importantly, where and when it should take place. The last case looks at an interesting model for accountability – the OECD Guidelines for Multinational Enterprises. Although in existence since 1976, the Guidelines were extensively revised in 2000 and now offer a fascinating international quasi-judicial process that operates in practice at the national level. In sum, these cases provide important windows into both the administrative processes of the OECD and the interaction of national and international interests.

A. The Multilateral Agreement on Investment (MAI)

The past twenty years have witnessed unprecedented increases in foreign direct investment (FDI). Flows of foreign capital to developing countries increased ten-fold from 1982 to 1993 and almost twenty-fold by 1996, with a 40% increase in FDI inflows from 1994 to 1995 alone.[15] Total FDI now exceeds the value of goods in trade by more than five-fold yet, remarkably, no comprehensive agreement exists at the international legal governing FDI.[16] Absent coverage in the GATT or other economic treaties, the international legal framework governing FDI has developed in a piecemeal, incremental approach through a broad network of bilateral investment treaties (BITs). BITs both establish and clarify the rights of foreign investors. Mirroring the growth of FDI, the

[15] Eric Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U.J. INT'L L. & POL'Y 1015, 1019 (1997).

[16] Sal Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. Pa. J. Int'l. Econ. L. 731, 744 (1998); Kenneth Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 29 MICH. J. INT'L L. 373, 382 (1998) [hereinafter Vandevelde I]; Burt, *supra* note __, at 1016

number of BITs has dramatically increased, as well. From 1989 to 1995, more BITs were negotiated than during the previous three decades.[17] By 1995, over 900 BITs had been signed between more than 150 nations.[18]

Most BITs share the same basic protections – national treatment, most favored nation (MFN) treatment, prohibition of exchange controls, prohibition of uncompensated expropriation, and resolution of disputes by binding arbitration.[19] Importantly, BITs have not addressed linkages with other fields.[20] If the only concerns raised by FDI were expropriation of property and repayment of debts, this lack of linkages would make good sense. But FDI, in practice, can have a direct relation to labor, environmental and other social welfare concerns because the goals of MNEs and host countries may conflict.[21]

During the Uruguay Round, a number of countries had sought to harmonize the patchwork of BITs through an MAI. The United States and others proposed a comprehensive investment agreement but faced concerted opposition from developing countries. Against this backdrop of failure, in the early 1990s, the OECD's Committee on International Investment and Multinational Enterprises (CIME) commenced a research project known as the Wider Investment Instrument Project. The OECD Member countries sought to bring order to the proliferation of FDI and BITs, perhaps through an agreement that consolidated and harmonized the many BITs – through a multilateral agreement on investment (MAI). Thus, following the completion of over 70 preparatory studies, in 1995 CIME and the Committee on Capital Movements and Invisible Transactions (CMIT) reported to the OECD Council that "the foundations have now been laid for the successful negotiation of…[an MAI] building on OECD's existing instruments and expertise."[22]

The stated goal was to complete the treaty by May, 1997. A high-level negotiating group was established with the mandate to create an agreement that would:

> provide a broad multinational framework for international investment with high standard for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures; be a free-standing international

[17] Kenneth Vandevelde, *Book Review: Bilateral Investment Treaties*, 90 A.J.I.L. 545 (1996).

[18] Id.

[19] Vandevelde, *supra* note__, at 374

[20] In interviews, TUAC claimed that none of the 1600 BITs address labor issues.

[21] Trying to increase employment, for example, countries have employed a range of operational restrictions (also known as performance requirements) such as mandating the hiring of local workers and limiting the ability of the company to employ foreign employees. For this reason as well as concerns over sovereignty, developing countries have preferred negotiating BITs and, with few exceptions, uniformly opposed strong multilateral rules liberalizing FDI under the auspices of the GATT or WTO

[22] Pelham, *cite*, at 13

treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries.[23]

From the outset, the MAI negotiations were regarded internally by the secretariat as a technical harmonization exercise. Given that there was a great deal in common among the many investment treaties, it was expected that the OECD secretariat would review the range of BIT texts, identify common features, and create a unifying draft that would form the basis of a general agreement. The MAI, it was hoped, would be the first comprehensive international investment treaty creating uniform rules for FDI protection, liberalization, and dispute settlement. By creating a more level playing field than the bumpy terrain of BITs, the MAI would greatly reduce distortions to investment flows and therefore speed the growth of FDI, significantly promoting the liberalization of investment measures and performance requirements beyond the results of the Uruguay Round agreements.

The draft MAI, as originally proposed, was based upon the principles of national treatment, most-favored nation treatment, and transparency. It would have restrained governments from treating foreign and local investments differently, moving closer to a baseline of non-discrimination. The agreement sought to harmonize upward by creating mechanisms addressing standstill and rollback of investment measures.[24] Indeed the MAI was less an attempt to regulate FDI than an effort to *deregulate* FDI flows. It is beyond the scope of this study to examine the MAI's text in detail, but it is important to recognize that, despite the reassurances of its proponents, the MAI did more than simply harmonize BITs.[25]

The MAI negotiations were announced in OECD press releases, articles were published in the organization's magazine, the *OECD Observer*, and many of the conference papers were posted on the OECD internet website created for the MAI in June, 1996. Indeed the OECD held an early press conference to discuss issues concerning negotiation of the MAI and no one showed up. This confirmed CIME's view that negotiation of the MAI was purely a technical harmonization exercise and that there was no public interest in the matter.[26] With the exception of NAFTA, which is more a trade than an investment treaty, none of the previous BITs had ever been met with outrage or even interest by NGOs. Given this intense indifference to the MAI from the outset, why just two years later had an effective global coalition of labor, environmental, and other groups formed explicitly against the MAI?

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[23] Pelham , *supra* note__, at 14.

[24] Standstill measures prohibit the introduction of additional non-conforming measures. Rollback measures allow only future liberalization of measures.

[25] For a discussion of the specific reasons behind NGO opposition, *see* MJIL.

[26] In a revealing anecdote on how low-profile the MAI exercise was *within* the OECD, a member of the OECD secretariat related that she was at a UN Commission for Sustainable Development meeting in 1996 when an NGO participant started denouncing the MAI negotiations. The OECD delegate had to call back to Paris to ask what the MAI negotiations were.

From the end of 1995, a small number of NGOs started to follow the negotiations and oppose both the goals and content of the MAI process. At the start, these were primarily environmental and social rather than labor groups. The OECD held an informal meeting with interested NGOs in December of 1996. While the OECD was open in terms of announcing the process of the negotiations and their general status, in keeping with OECD procedures the meetings and internal documents were restricted. In February, 1997, however, the group Public Citizen, founded by Ralph Nader, got hold of the current Chairman's draft (i.e. the consolidated negotiating text up to that point) and posted it on the Internet.[27] This posting provided the catalyst for widespread and hard line opposition of NGOs against the MAI.

Speaking to those involved in the campaign, many described the NGO opposition as a wildfire. Indeed, the rapidity and effectiveness of NGO opposition to the MAI was unprecedented. Just two months after the initial posting, a more formal meeting for NGOs was hosted by members of the Negotiating Group and secreteriat officials. While the OECD's first consultative meeting with interested groups about the MAI had been in an empty room, the October briefing attracted over 70 representatives from 30 groups around the world.[28] In a mere matter of months, through the internet and e-mail a global campaign against the MAI had come into being. Drafts and bulletins on the MAI were now regularly posted on a host of NGO websites.[29] By 1998, anti-MAI campaigns were active in more than half of the OECD countries as well as many developing countries.[30]

The impact of a global NGO campaign against the MAI was quickly felt. By the time the Chairman's draft was issued in early 1998, many of TUAC's initial demands had been met. Despite earlier protestations by some Member countries, text was inserted to prohibit the lowering of social and environmental standards to attract FDI, to ensure that treaty obligations would not prevent governments from maintaining (or heightening) protective social and environmental standards, and to ban claims by foreign investors for compensation for losses caused by non-discriminatory regulatory actions.

These concessions, however, came too late, for the NGO campaign had taken on a life of its own in domestic politics. In early 1998, seeking to resurrect the chances of renewed Fast Track authority from Congress, the Clinton Administration sought NGO support by denouncing the MAI as "fatally flawed" and demanding that it be reconsidered. Domestic opposition also flared up in Paris, where demonstrations in February took aim at the impact of the MAI on France's ability to protect its cultural heritage. In response, the MAI negotiations were formally suspended for six months for

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[27] Stephen Kobrin, *The MAI and the Clash of Globalizations*, FOREIGN POLICY at 97 (September 22, 1998) [hereinafter Kobrin].

[28] Pelham, *supra* note__, at 40.

[29] e.g., <http://www.citizen.org/gtw/mainewte.htm>.

[30] Pelham, *supra* note__, at 38.

a period of assessment by the negotiating parties. On October 14th, France, one of the MAI's strongest early proponents, announced it would pull out of the negotiations. Its abandonment of negotiations meant the EU had to follow, effectively dooming the OECD's negotiation of an MAI. Reflecting this course of events, the OECD issued a press release on December 3rd stating that "Negotiations on the MAI are no longer taking place."[31]

B. Mutual Acceptance of Data

One of the most influential OECD programs on agency action has also been among the least known. Since the 1980s, the Chemicals Division of the Environment Directorate has administered a mutual recognition system for the non-clinical safety of chemicals. Known as the Mutual Acceptance of Data (MAD) system, member countries and non-member countries agree to accept non-clinical safety data from one another. These data are relied on by governments to evaluate the safety of a staggering range of products – from chemicals, pesticides, pharmaceuticals, and cosmetics to food, feed additives, biocides, etc.

In simple terms, the MAD system ensures that chemical test results produced in one country will be used when an agency assesses the same chemical in another country. Thus, in practice, governments that receive requests to approve the sale of industrial chemicals, pharmaceuticals or pesticides can base their decisions on testing results that have been produced in other countries. This saves the chemicals industry the expense of repeatedly testing products for sale in different markets, and promotes civil society concerns over data quality and transparency of test methodologies and lab standards.[32] In an era of falling tariffs, non-tariff barriers to trade have become increasingly important. The MAD system reduces the threat of non-tariff barriers by harmonizing safety tests and lab standards across the range of commercial chemicals.

It is important to note that the MAD system addresses the safety testing of the chemicals, *not* the decision whether the chemicals are safe enough be sold on the market of any particular country. The system is founded on three legally-binding Council Decisions.[33] Thus, except for a narrow exception described below, member governments *must* accept test results from other participating countries.[34]

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[31] *Id.* at 43.

[32] Study found yearly net savings from MAD to be $54 million ($63.5 million savings from avoided testing less $9.5 million in program administration.

[33] The three decisions are:

- the 1981 Decision on the Mutual Acceptance of Data (MAD) in the Assessment of Chemicals [C(81)30(Final)],with its associated Test Guidelines and Principles of Good Laboratory Practice (GLP);
- the 1989 Decision-Recommendation on Compliance with Good Laboratory Practice [C(89)87(Final)];

All 30 OECD Members participate in the MAD system – twenty-five have implemented the 1981 and 1989 Council Acts through national legislation and regulation, two are establishing monitoring programs, and the remaining three have not implemented the Council Decisions but must accept data from other participating countries. The system clearly is effective, for there has been growing interest from non-Member countries. South Africa became a full participant in 2003; Slovenia, Israel and India are joining soon, and negotiations are underway with Brazil, China and the Russian Federation.

For such a system to work, of course, the participating governments must be confident that the tests on the chemicals were both relevant and properly carried out. This is ensured through the OECD Test Guidelines and Principles of Good Laboratory Practice (GLP Principles). Thus all test data submitted to agencies must include a declaration by the test facility that the appropriate Test Guideline was followed and that the testing was carried out in accordance with GLP Principles.

Approximately 100 Test Guidelines have been developed.[35] As their name suggests, they are basically recipes for how particular types of tests should be done. If one is testing the toxicity of a chemical on aquatic organisms, for example, the relevant Test Guidelines will state the type of organism to use (e.g., daphnia), how the doses should be administered, how toxicity should be measured, etc.

The Principles of Good Laboratory Practices (GLP) focus not on the tests themselves but, rather, on the conditions under which the tests are carried out. Established in 1978, three years before adoption of the MAD system, the GLP Principles seek to ensure the quality and validity of test data. Thus the Principles focus on the organizational processes and conditions under which laboratory studies are planned, performed, monitored, recorded and reported. As an example, the GLP Principles for storage require, among other procedures, that:[36]

> To prevent contamination or mix-ups, there should be separate rooms or areas for receipt and storage of the test and reference items, and mixing of the test items with a vehicle.

- and the 1997 Decision on the Adherence of Non-Member Countries to the Council Acts related to the Mutual Acceptance of Data in the Assessment of Chemicals [C(97)114/Final].

[34] The relevant Decision text states that "data generated in the testing of chemicals in an OECD Member country in accordance with OECD Test Guidelines and OECD Principles of Good Laboratory Practice shall be accepted in other Member countries for purposes of assessment and other uses relating to the protection of man and the environment." cite

[35] These are in the areas of physical-chemical properties, human toxicity, ecotoxicity, and degradation and accumulation.

[36] cite

> Storage rooms or areas for the test items should be separate from rooms or areas containing the test systems. They should be adequate to preserve identity, concentration, purity, and stability, and ensure safe storage for hazardous substances.

OECD working groups meet regularly to manage the MAD system. These groups oversee publication of Consensus Documents on interpretation of the Principles, Guidance Documents, and Advisory Documents, all of which promote development of new and revision of existing standards. In a practice that stands in stark contrast to how the rest of the OECD operates, the working groups actively engage industry and civil society to reach consensus on Testing Guidelines and GLP Principles. This occurs both through participation of non-state experts at meetings and, more important, through a network of 7,000 experts for peer review and validation of proposed new Test Guidelines and updates. This network has a broad membership, with participants from industry, trade unions, academia and environmental NGOs and animal welfare NGOs.

The participation of civil society NGOs not only adds scientific expertise but also helps ensure that the process remains transparent. BIAC and TUAC have full participation rights in the meetings while other non-state actors participate as observers. To increase their voice, environmental groups are generally represented by a single member of the European Environment Bureau who speaks with authority on their behalf. Seeking to achieve the same unified voice, in a clever strategy, animal welfare groups have formed a group known as the International Council for Animal Protection in OECD Programmes (ICAPO).[37] ICAPO was created explicitly to participate in the GLP and Test Guideline working groups with an equal voice to the EEB. It's worth noting, of course, that the interests of the NGOs these groups represent are not identical. Environmental and consumer NGOs, for example, often want to increase the number of animals required per test while animal welfare NGOs want to reduce the numbers.

How does this process work in practice? Hazard data of chemicals is routinely needed on skin irritation, acute toxicity, and other basic effects. A proposal for a test method can come from anyone, but usually comes from an agency or industry that wants to update a test method or have a new one adopted. A group of government and non-state experts considers the request and, if deemed worth pursuing, the proposed test is sent out for comments (as well as posted on the website). If, after revisions based on the peer review comments, the test method is close to adoption, the proposal is sent to national coordinators at relevant domestic agencies. They make the decision whether to approve or continue development. If approved, the test method is sent to the Environment Directorate's governing committee (EPOC) for approval, and then on to the OECD

[37] *See* <http://www.hsus.org/ace/16124>. ICAPO defines its mission as seeking "to promote new test guidelines the fully incorporate alternative methods that can replace, reduce, and refine animal use (the 'Three Rs'). Similarly, ICAPO will seek to limit animal use and promote alternative methods in OECD testing programs, such as the OECD's emerging programs to assess 'high production volume' chemicals and "endocrine disrupting" chemicals."

Council. Once adopted by Member states, the test method has legally binding force as a Council decision.

The controversy over genetically-modified organisms (GMOs) shows just how well this system works. While the U.S. and Europe have recently moved their battle over GMOs to the WTO dispute settlement process, several years ago, with tempers still flaring across the Atlantic, the OECD reached consensus on how GMOs should be tested for safety. The MAD system has been able to navigate the controversial animal welfare debate, as well, developing testing methodologies using cultivated cells or tissues (the so-called in vitro or in silico tests).

While the MAD system harmonizes data requirements for use in all the member countries' regulatory processes, decisions whether or not to register a chemical lie in the hands of regulatory agencies. As part of the 1981 OECD Decision, member governments are required to:[38]

i) establish national procedures for monitoring compliance with GLP Principles, based on laboratory inspections and study audits;

ii) designate an authority or authorities to discharge the functions required by the procedures for monitoring compliance; and

iii) require that the management of test facilities issue a declaration, where applicable, that a study was carried out in accordance with GLP Principles and pursuant to any other provisions established by national legislation or administrative procedures dealing with good laboratory practice.

While each government is required to set up its own GLP compliance monitoring procedure, there is no uniform model. All governments, however, must ensure their domestic regulatory practices are consistent with the OECD decision. For European Union countries, this is done directly through community legislation. All OECD Test Guidelines and the GLP principles are transcribed directly into European Directives without amendment. In all, 25 OECD countries have implemented the 1981 and 1989 Council Acts through national legislation and regulation.[39]

The United States has not adopted the GLP Principles and Testing Guidelines directly. While the OECD standards inform the U.S. FDA's actions, the FDA promulgates its own GLP and Testing Guidelines as informal rules, often going beyond what's required by the GLP.[40] EPA have their own FIFRA and TSCA GLP Principles, for example, which are comparable to the OECD's.[41]

[38] Annex 2 of the Council Decision C(81)30(final)

[39] Two OECD countries are currently establishing monitoring programs and three have not yet implemented the Council Decisions, though they are required to accept data from the other participating countries.

Member states are required to appoint authorities and establish procedures to monitor compliance with GLP Principles, including laboratory inspections and study audits. Member states are also expected to exchange information with one another and provide information about compliance of their national GLP test facilities to other member states. Despite these requirements, there have been a small number of cases where countries have refused to accept safety data for product evaluation, contending that they had concerns over the effectiveness of GLP compliance monitoring procedures in the country where the data had been generated. This has been a particularly controversial issue for the U.S. While the FDA generally accepts test data, in the mid-1990s it challenged EU testing on a number of occasions, demanding assurances that the declarations of compliance with the Test and GLP Guidelines were accurate.

Concerns over how adequately countries were monitoring compliance with GLP Principles and Test Guidelines came to a head in the late 1990s, when the Working Group on GLP established an informal system of evaluation. Known as "mutual joint visits," over a three-year period all 34 GLP compliance monitoring authorities were visited by three-person teams drawn from three other national authorities. The visiting teams evaluated the program documentation and accompanied staff on inspections and study audits. The visit reports were reviewed in the Working Group, which then made recommendations on necessary improvements. While the reviews were informal, the peer pressure was significant and apparently has been sufficient to bring about specific changes in program management. When evaluated by the OECD Chemicals Committee in 2002, it was agreed that the same procedures should be continued and extended to non-OECD countries in the system. Two additional requirements are worth noting in this regard, as well. Not only must authorities now circulate among themselves annual overviews of all inspections and study audits they carry out but, where good reason exists, information concerning GLP compliance of a test facility (including information focusing on a particular study) can be requested by another Member country.[42]

The MAD system truly is unique. In substantive terms, there are no ISO standards (or any other standards, for that matter) comparable to the GLP Principles and Test Guidelines in terms of regulatory acceptability.[43] As the OECD Chemicals Division has described, "data generated solely under ISO/IEC Guide 25 or equivalent standards is

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[40] Japan, too, sometimes requires additional testing (e.g., a 28 day test with an added control beyond what is called for in the Test Method). This is appropriate since the Council Decision establishes a floor, not a ceiling. One can ask for additional tests, in other words, but not different tests.

[41] Get more details on this…

[42] It is worth noting that the group overseeing the mutual joint visits is the only Chemicals group restricted to government officials. This helps ensure frank and open discussion of compliance monitoring and enforcement weaknesses.

[43] Data generated solely under the ISO/IEC Guide 25 is not likely to be accepted by regulatory authorities for the purposes of the assessment of chemicals related to the protection of health and the environment.

unlikely to be accepted by regulatory authorities for purposes of assessment of chemicals related to protection of health and the environment."[44]

In procedural terms, the system is unlike any other administrative processes at the OECD.

- International, mandatory standards are set, placing the OECD in the effective role of a regulator.
- All meetings open to non-state actors (except when GLP inspections are discussed).
- All documents are unrestricted and free.
- Decisions rely on the contributions of a large network of non-state experts.
- The process is support both by industry and civil society groups.
- Compliance with standards is assured by regular site visits and the effective use of peer pressure.
- And the system is open to non-OECD countries (indeed, non-Member participation is encouraged).

C. Common Approaches on Environment and Officially Supported Export Credits

Export credit agencies (ECAs) are national agencies that offer loans, insurance and guarantees to support domestic companies' overseas activities. ECAs represent one of the largest sources of public finance, supporting almost 10% of world trade through $500 billion of financing in 2001.[45] They are major development players, as well, accounting by the late 1990s for over "24 percent of all developing countries' debt, and 56 percent of the debt owed to official governmental agencies."[46]

While financing overseas investment has helped spur development in poor countries, it has also led to significant controversy, particularly when the monies support large infrastructure projects with major environmental impacts. A high-profile project in Batu Hijau, Indonesia, for example, illustrates a typical conflict. A consortium of companies, involving the United States, Japan, and Indonesia, operate an open pit copper and gold mine.[47] Upon completion, the mine will have excavated 3 billion tons of rock, creating a pit 2,625 meters wide and 460 meters deep. NGOs charge that the mine is located in a "previously undisturbed tropical forest," destroying local vegetation and the endangered yellow-crested cockatoo's habitat, impacting local water levels and quality,

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[44] cite

[45] cite

[46] Jakarta Declaration For Reform of Official Export Credit and Investment Insurance Agencies (May 1-7 2000), *at* http://www.eca-watch.org/goals/jakaratadec.html (last visited Jan. 24, 2004).

[47] U.S. General Accounting Office, Export Credit Agencies, Movement Towards Common Environmental Guidelines, but National Differences Remain, Report No. GAO-03-1093 (Sept. 2003), *at* www.gao.gov/new.items/d031093.pdf (last visited Jan. 30, 2004) [hereinafter Export Credit Agencies, Movement Towards Common Environmental Guidelines, but National Differences Remain].

creating excess waste rock, and polluting the air.[48] Another ECA-financed project, the Chad-Cameroon Petroleum Pipeline, has proven equally controversial. The pipeline transports oil from Doba, in southern Chad, to an off-shore oil-loading facility on Cameroon's coast.[49] Financed by the World Bank Group and the International Finance Corporation, as well as Exxon-Mobil, Petronas, and Chevron-Texaco, the project has allegedly caused serious harm to Cameroon's Atlantic littoral rainforest and the indigenous Bakola pygmies who live in the region.[50] One could list many other ECA-supported projects in the mining, pulp extraction, oil and power development sectors that face similar criticism. Traditionally, however, ECAs have not considered the environmental impacts of projects, leaving it to host governments to establish appropriate regulations and ensure enforcement.

Seeking to change this practice, a concerted NGO campaign in the 1980s focused on World Bank activities. This contributed to adoption of a series of internal policies and procedures to guide the Bank's assessment and implementation of projects with environmental impacts. In 1984, for example, Operational Manual Statement 2.36 on Environmental Aspects of Bank Work was adopted, setting forth eight principles to guide Bank activities. The principles include commitments, for example, not to finance projects that "cause severe of irreversible environmental deterioration, including species extinction without mitigatory measures acceptable to the Bank" or to "finance projects that contravene any international environmental agreement to which the member country concerned is a party."[51] These were followed by specific Operational Directives, Bank Procedures, and Good Practices that set out environmental steps and policies Bank staff must follow in all Bank operations and projects.[52]

A year after the World Bank's adoption of an environmental policy, in 1995, the United States Export-Import (Ex-Im) Bank became the first national ECA to develop minimum environmental standards and evaluation procedures.[53] The Ex-Im Bank developed two types of guidelines: "quantitative or numerical guidelines" to assess air emissions, water quality, and noise impacts; and "qualitative guidelines" to assess the project's ecological, economic, and cultural impacts.[54] In practice, all applicants to the Export-Import Bank for projects with a principal liability of more than $10,000,000 or a

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[48] *See id.* (stating that the Export-Import Bank, in 1997, began requiring a series of environmental reviews, and project developers are attempting to mitigate the environmental affects with a deep-sea tailings disposal system, the operation of a revegetation program, and a study of water seepage patterns).

[49] *Id.*

[50] *Id.*

[51] cite

[52] *See generally,* DAVID HUNTER, JAMES SALZMAN AND DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1481-1482 (2ND ED. 2002).

[53] These guidelines are termed, "Environmental Procedures and Guidelines," effective April 2, 1996.

[54] *See* Export-Import Bank of the United States, Environmental Guidelines, Annex A, Table 5 (May 1998, *revised* July 2, 2003) *at* http://www.exim.gov/products/policies/environment/envguide.html.

repayment term of more than seven years are required to prepare an "Environmental Screening Document."[55] If the project poses potentially adverse environmental impacts, an environmental assessment may be required.[56] Most transactions, though, do not require a review either because they are short-term transactions or are not environmentally sensitive.[57]

Landing contracts for large foreign projects is a highly competitive business, and the support provided by ECAs can make or break a deal. With mandatory environmental guidelines in place, the Ex-Im Bank found itself at a competitive disadvantage to national ECAs that did not have to meet similarly stringent standards. Thus, the United States started lobbying for OECD members to adopt similar standards (The United States followed a similar route in pushing for a Bribery Convention at the OECD that mirrored the requirements of the Foreign Corrupt Practices Act). In 1997, for example, at the Denver G-7 Summit, the Final Communique for the Summit stated that, "[g]overnments should help promote sustainable practices by taking environmental factors into account when providing financing and support for investment in infrastructure and equipment."[58]

These efforts were supported by a global NGO campaign, spearheaded by ECA Watch and the International NGO Campaign on Export Credit Agencies. These groups called for "public access to information and consultation by ECAs …[and b]inding common environmental and social guidelines and standards that are not lower and less rigorous than existing international procedures."[59]

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[55] Export-Import Bank of the United States, Ex-Im Bank Environmental Requirements (revised Sept. 1, 1999), *at* http://www.exim.gov/products/policies/environment/envpol.html (last visited Feb. 2, 2004).

[56] *See id.* (stating what the environmental assessment should include). *See also,* Export-Import Bank of the United States, Environmental Procedures, Introduction (revised July 2, 2003) (listing the categories as Category N: Nuclear, Category A: Categorical Exclusions [no environmental information required], Category B: Sensitive Location, Project Finance, Hydroelectric [environmental assessment required], Category C: Other [information on environmental effects required]; Category C contains all long-term transactions that do not fit into Categories A or B and are reviewed on a case by case basis), *at* http://www.exim.gov/products/policies/environment/envproc.html.

[57] Export Credit Agencies, Movement Towards Common Environmental Guidelines, but National Differences Remain, *supra* note __.

[58] Nicholas Hildyard, *Snouts in the Trough: Export Credit Agencies, Corporate Welfare and Policy Incoherence, Words But Little Action*, ECA Watch, *at* http://www.eca-watch.org/eca/snouts4.html (last visited Jan. 24, 2004).

[59] *Campaign Goals*, ECA Watch, *at* http://www.eca-watch.org/goals/index.html (last visited Jan. 24, 2004). The clearest statement of the NGOs' position was the *Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies* issued in May, 2000. Based on the experiences of Indonesia and other developing country hosts of ECA-backed projects, the Jakarta Declaration called for the development of "binding common environmental and social guidelines and standards no lower and/or less rigorous than existing international procedures and standards…coherent with…the United Nations Convention on Biological Diversity."

In 1998, the OECD responded and the Trade Committee's Working Party on Export Credits and Credit Guarantees (ECG) issued a "Statement of Intent on Export credits and the Environment" discussing the consideration of environmental impacts during the risk assessment stage of various projects. A year later, the G-7 and OECD Ministers expressly called for development of common, international standards and commenced negotiations at the OECD, and soon after adopted an "Action Statement," outlining a framework of "Common Approaches" for ECA activities.[60] Following intensive negotiations, the ECG produced a draft "Recommendation on Common Approaches on Environment and Officially Supported Export Credits."

Known as "The Sixth Revision of the draft Common Approaches," it called on ECAs to screen and classify projects in sensitive areas for potential environmental impacts, conduct an environmental review (and, where needed, a more comprehensive Environmental Impact Assessment), evaluate and disclose the information from the review, and finally, report and monitor their experiences at a national level. [61] When it came time for adoption, both Turkey and the United States objected to the draft. Turkey based its objection on concerns over language that might address their treatment of the Kurds and the United States held out for a stronger text. Lacking consensus approval, the Common Approaches were not adopted as a Recommendation.

Despite this failure, OECD Secretary-General Donald J. Johnston lauded the Common Approaches as "an important first step," stating that, "the implementation of

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> (1) Members agree to continue to develop, within their national systems of official export credit support, procedures and methodologies for identifying and assessing the environmental impact of projects…(2) Members agrees to continue to monitor and evaluate, over time, their own experiences with these procedures and methodologies, as well as their own experiences related to mitigating the environmental impact of individual projects, and share these experiences with the other Members…(3) Members agrees based on ECAs' experiences (e.g. with Environmental Information Exchanges), to explore ways to synthesise common elements and best practices related to environmental review and impact assessment in order to strengthen a framework of common approaches amongst export credit agencies…(4) Members agree to exchange views on an informal basis with appropriate stakeholders.

Export Credits and the Environment: Work-Plan, OECD (Apr. 2000), *at* http://www.oecd.org/document/7/0,2340,en_2649_34181_1888199_1_1_1_1,00.html.

[61] In summarizing its goals, the Sixth Revision stated that it would:

> Promote coherence between policies regarding officially supported export credits and policies for the protection of the environment, including relevant international agreements and conventions, thereby contributing towards sustainable development. Develop common procedures and processes relating to the environmental review of projects benefiting from officially supported export credits, with a view to achieving equivalence among the measures taken by the Members and to reducing the potential for trade distortion. Promote good environmental practice and consistent processes for projects benefiting from officially supported export credits, with a view to achieving a high level of environmental protection.

Draft Recommendation on Common Approaches on Environment and Officially Supported Export Credits: Revision 6, OECD Working Party on Export Credits and Credit Guarantees, TD/ECG(2000)11/REV6 (2000).

this proposal by most members from January 2002 will mean that all major exporting countries of the OECD will now be applying environmental review mechanisms. This results in the first common 'greening' of export credits and should be seen as a major accomplishment."[62] Surprisingly, even without official adoption by the OECD Council, the standards were voluntarily and unilaterally incorporated throughout the OECD. Most members adopted the OECD standards as internal agency procedures or rules. From interviews with OECD staff, this appears to be the first time that a practice has been adopted throughout the OECD *prior* to Council adoption. This seems to have occurred due to the combination of strong external NGO pressure, considerable resources having been expended to develop the Sixth Revision, and the fact that near consensus had been achieved.

Responding to continued NGO and U.S. pressure, the ECG kept negotiating and finally adopted a revised Recommendation that was fully adopted in December, 2003, including Turkey and the United States. Similar to the Export-Import Bank's policy, the Recommendation separates projects into categories requiring different levels of environmental review.[63] This policy sets minimum international environmental standards that vary depending on the extent of impact.[64] With the most sensitive projects, the OECD advises that an Environmental Impact Statement be prepared and remain available for 30 calendar days before final commitment. The OECD Common Approaches also require transparency during the review process and public notice for consultation with affected groups. Despite a proposal from Japan for an accountability mechanism (and models in the World Bank Inspection Panel and the MNE Guidelines' National Contact Points), the ECG chose not to include a review mechanism or sanction process. In their place, annual reports to the Working Group on progress are required. ECAs must provide notification details of reviews of sensitive projects and it is hoped that peer pressure will be enough to ensure compliance.

The Common Approaches seems to have been adopted domestically as an internal agency policy or procedure rather than through statute. The United States signed the 2003 Recommendation and may need to make some small modifications to the Export-Import Bank's guidelines (which need to be renewed on a regular schedule, anyway). Since the Common Approach creates a floor rather than a ceiling and leaves flexibility for national adoption, there has been a wide range of implementation, with Austria and

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[62] Statement by the OECD Secretary-General Donald J. Johnson on Export Credits and the Environment (Apr. 12, 2001), *at* http://www.oecd.org/document/33/0, 2340,en_2649_34181_2675489_1_1_1_1,00.html.

[63] *See Recommendation on Common Approaches on Environment and Officially Supported Export Credits*, OECD (2003) (including in Category A any project that has the potential to create significantly adverse environmental impacts and including all projects in "sensitive areas" [as listed by Annex I], in Category B any project where the potential environmental impacts are less adverse than those of Category A and where mitigation is available and the effects are reversible, and in Category C any project that has minimal to no likely environmental impact), *at* http://www.oecd.org/dataoecd/26/33/21684464.pdf.

[64] For instance, a Category A project requires an EIA that includes an "executive summary; policy, legal and administrative framework; project description; baseline data (involving the existing environmental conditions); environmental impacts; analysis of alternatives; environmental management plan; and record of consultation." This is based on the World Bank's Operational Manual. *Id.* at Annex II.

Germany essentially adopting the Common Approach (i.e., no complaint or accountability mechanism) and the UK, U.S., Canada and Japan going beyond.

The transparency and responsiveness of the process offers a fascinating insight into how things have changed at the OECD since the MAI experience. Negotiations over the Common Approaches followed directly on the heels of the MAI debacle but, at first glance, seemed to take little heed of the experience. If anything, the process seemed *more closed* than the MAI negotiations. Only representatives of ECAs set at the table and all documents were restricted. The only formal engagement with non-state actors was through periodic information meetings. Indeed, the only way the OECD environment secretariat was able to influence the proceedings was by sending draft restricted papers to Environmental Policy Committee delegates, who then sent them on to their national environmental agencies to influence development of negotiating positions. In the negotiations following the Sixth Revision in 2001, a number of Member states opposed sharing any documents with NGOs and, interestingly, no country delegation included NGO representatives. Thus far, the process seems identical to the MAI (and the way prior negotiations had occurred). The Common Approaches process was strongly influenced by NGOs, though, so how did this happen?

From interviews with the OECD secretariat, it appears that early on they made it clear to Member states that it was not the OECD's job to perform civil society consultations. Effectively, it seems, the OECD told NGOs that to influence the process they needed to work at their national capitals and told Member states that engagement with civil society would not be occurring at the OECD. Importantly, *Member states and NGOs responded.* Many countries held formal stakeholder consultations several months prior to OECD negotiations in the Fall of 2003. Japan had three weeks of open meetings with NGOs and business community. France had a full day consultation, and the EU, Germany and Switzerland held meetings over the summer, as well. In addition, during negotiations countries would be saying, "This is unsellable at home to the government and NGOs." Such statements, OECD secretariat staff suggested, never would have been made prior to the MAI experience. And when an information meeting was held just prior to formal negotiations in November, NGO and business groups made very specific comments that clearly were based off of the (supposedly restricted) Chairman's draft. One can only conclude they were provided the current Chairman's draft by the Member states.

Nor is the story over. The OECD continues to receive strong criticism. ECA Watch argues that the Recommendation "perpetuates the ECAs' race to the bottom" by not requiring "ECAs to apply any specific minimum set of [international standards] to projects, [and] deferring rather to a broad list of varying standards which they can elect to apply, or not, at will."[65] Perceiving the Recommendation as both an "opportunity and a threat" in that "for a number of European ECAs, it will mean becoming much more

[65] "Groups blast weak OECD agreement on environment, Loopholes allow export credit support for harmful projects to continue" (Dec. 11, 2003), *at* http://www.eca-watch.org/press/PressReleaseOECDDecember 11.htm (last visited Jan. 26, 2004).

transparent and finally joining the modern world of international norms, while others may use it as an excuse to move back into the stone age;" thus, the ECA Watch asserts it will vigilantly monitor the negotiations leading to revision of the Common Approaches in 2005.[66]

D. OECD Guidelines for Multinational Enterprises

Following revelations in the early 1970s of wide-scale unethical and illegal activities by multinational enterprises (MNEs), the UN, ILO, OECD and national governments focused on means to influence their behavior.[67] The UN's General Assembly adopted a consensus resolution on measures against corrupt transnational practices, but failed to follow up with a stronger legal instrument. One year later, in 1976 the OECD Council of Ministers adopted a recommendation entitled the *Declaration on International Investment and Multinational Enterprises*.[68]

As its name suggests, the overriding purpose of the Declaration was to promote transnational investment. In its introduction and seven chapters, the Declaration and its accompanying Guidelines covered a wide breadth of issues governing investments. The separate chapters ranged from topics such as information disclosure, competition and financing to taxation, science and technology; but the requirements were voluntary, vague and hortatory. The Guidelines were necessary to promote investment, it was argued, in order "to prevent misunderstandings and build an atmosphere of confidence and predictability between business, labour and governments."[69] The Guidelines, it was hoped, would ensure the operation of MNEs was compatible with the expectations of the host country by establishing a baseline of rights.

The chapter on competition, for example, encourages MNEs "to conform to countries' rules and policies on competition by, for example, refraining from forming cartels or restrictive agreements and from abusing dominant market positions through anti-competitive acquisitions, predatory behaviour and other practices." The chapter on employment and industrial relations was equally regarded with great hope when it was included in the final Declaration. Supported by both TUAC and BIAC – both sides of the bargaining table – it set forth labor rights of union representation, collective bargaining, meaningful engagement with management, and non-discrimination.[70]

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[66] *Id.*

[67] The best known examples during this period were the involvement of ITT and other U.S. companies in the 1973 Chilean coup that overthrew president Allende and the series of bribes paid by Lockheed to Japanese politicians for military contracts.

[68] Cite

[69] <http://www.oecd.org/daf/cmis/CIME/mnemore.htm>

[70] The Guidelines called on MNEs to:

Until revisions in 2000, implementation of the Guidelines commenced at the National Contact Points within national governments. National Contact Points (NCPs) serve as the initial stage of consideration for issues and conflicts arising under the Guidelines. Any party, including BIAC, TUAC, and Member countries, who believed the Guidelines had been violated could request consultations with the Contact Points. If the discussions at this level did not resolve the issue between the parties, it could be passed to the OECD's Committee on International Investment and Multinational Enterprises (CIME, pronounced as "seemay"). CIME (located within the Directorate for Financial, Fiscal and Enterprise Affairs) was ultimately responsible for adjudication and development of the Guidelines. In response to disputes passed up by the National Contact Points, CIME responded by clarifying or interpreting specific language. This process of interpretation involved discussion within CIME as well as consultations with BIAC and TUAC. All CIME decisions required consensus among the Member countries.

Dispute resolution under the Guidelines were not modeled on a traditional judicial model, for CIME's decisions had no retrospective applicability. Indeed since the Guidelines were adopted as recommendations, they could not be treated as binding standards. Perhaps surprisingly, given the formality of the process, CIME did not even make a judgment on the behavior of the companies in question. Instead it uses the case to clarify the *meaning* of how a provision in the Guidelines should be applied in *future* cases. In a legislative context, the closest analogy to this practice would be if Congress continued creating legislative history *after* its passage of a statute. The logic behind this system is similar to that of the common law's clarification of doctrine in specific applications. Unlike the common law analogue, however, CIME's interpretation were never binding once established.

Following the Guidelines' adoption in 1976, TUAC actively sought interpretation of the Employment and Industrial Relations Guidelines and brought a slew of cases resulting in over forty decisions by the end of the 1980s. Their clear goal was to influence both MNE behavior and national laws. While the results of these cases and others led to CIME decisions clearly promoting labor rights,[71] these decisions largely fell

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- respect the right of their employees to be represented by trade unions and other bona fide organisations and engage in constructive negotiations with them on employment conditions;
- provide assistance and information to employee representatives;
- provide information for a true and fair view of the performance of the enterprise;
- observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country;
- utilize, train and prepare for upgrading their labor force;
- provide reasonable prior notice of changes in operations, in particular on intended closures and collective layoffs;
- refrain from discriminatory practices in their employment policies;
- not exercise unfair influence over bona fide negotiations with employee's representatives;
- enable authorized representatives of their employees to conduct negotiations on collective bargaining or labor-management relations with management representatives authorised to take decisions on the matters at hand.

on deaf ears at the national level. Given that the Guidelines provided no binding retrospective or prospective application, and carried no sanctions in the case of violations, the lack of domestic response is unsurprising. Realizing the decisions were having little influence on government or MNE behavior, TUAC become less involved and the 1990s saw only four labor cases brought.

The Guidelines have been amended four times (in 1979, 1984, 1991, and 2000). In 1991 a new chapter was added on the environment. The most recent revisions, approved on June 27, 2000, were the result of lengthy consultations with a wide range of non-state actors and led to dramatic changes. No longer simply a clearinghouse for CIME, the NCPs were overhauled in the revisions to become active investigating and settlement authorities. Anyone may forward a complaint (known as a "specific instance") to the NCP, and the specific instance need not have occurred in the Member state (i.e., the Guidelines now apply to the global operations of MNEs based in adhering countries). Thus, for example, a Venezuelan-based subsidiary of an American MNE would be covered by the Guidelines.[72] The NCP then investigates the details, decides whether the Guidelines have been violated and issues a report that names the company.

This new role has been described by the OECD secretariat as a "soft whistle-blowing facility." In the United States, the NCP is located in the State Department. In Australia the NCP is in the Ministry of the Treasury while in Norway and several other countries the NCP is tripartite, including the Ministry of Foreign Affairs and Industry. Compared to the pre-2000 Guidelines, the Revisions have been extremely successful. As of December, 2003, the Guidelines had been adopted by 37 countries and 64 specific instances had been filed in 21 countries.[73]

A recent specific instance in Sweden illustrates how the revised Guidelines work in practice. The NCP in Sweden is administered by three ministries – Industry, Justice and Environment. In 2002, Friends of the Earth and ATTACK filed a specific instance against two Swedish companies' operations at the Ashanti Goldfields in Ghana. The letter launching the specific instance was accompanied by documentation alleging violations of the Guidelines. The NCP requested the Swedish embassy in Ghana to investigate the allegations, held meetings with the NGOs and companies, and visited the

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[71] For case summaries, s*ee* Christopher R. Coxson, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 DICK. J. INT'L L. 469 (1999). *See also*, ROGER BLANPAIN, ED., INTERNATIONAL ENCYCLOPEDIA ON LABOUR LAW AND INDUSTRIAL RELATIONS, CASE LAW, VOLUME 6 (1985).

[72] While Venezuela would not have a National Contact Point in its government, the Procedural Guidance annex to the Council Decision on the Guidelines provides advice and guidance for the U.S. National Contact Point to follow in case of challenges in non adhering countries. The actual coverage of the Guidelines could be larger yet, since the General Policies chapter mentions sub-contractors and suppliers of MNEs. *See* Guidelines, Chapter II(10).

[73] 2003 Annual Report at 9. Approximately two-thirds of the specific instances concerned company operations in non-adhering countries.

site. In its report, the NCP concluded that the companies were too far removed from the mine operations to be held responsible under the Guidelines. The report's publication was accompanied by a press release.[74] In another example, the the Korean NCP investigated a specific instance in Sri Lanka of a Sri Lankan/Korean joint venture (half owned by the Korean company),[75]

> which fired four workers for their union organization activities. Although the joint venture contract states that the Sri Lankan partner is in charge of labor-management, the Korean NCP recommended that the Korean company share "the responsibility as co-manager" and that the company "conform to the OECD Guidelines and resolve its labor disputes."

In contrast to the process prior to the 2000 revisions, NCP action ended the matter and CIME was not involved. Indeed, it is now expected that CIME will become involved *only* in the case of failure, when the national NCP is unable to resolve the issue. Indeed, of the over 60 cases since the revisions, only one has gone beyond the NCP to CIME. Instead, CIME now serves in largely an oversight capacity, following up with NCPs that have not reported their activities (another example of using peer pressure to promote compliance) and clarifying aspects of the Guidelines. In this role, CIME is assisted by BIAC and TUAC, who can request clarifications or interpretations of the text and procedural guidance. NGOs have a voice in this process through OECD-Watch, an umbrella group created for this purpose.[76]

The "Procedural Guidance" establishing the NCPs states that "NCPs will operate in accordance with core criteria of visibility, transparency, accessibility, transparency and accountability to further the objective of functional equivalence."[77] In practice, approaches to transparency have varied significantly as NCPs seek to find the appropriate balance between confidentiality and openness.[78] NCPs are also struggling with their role in relation to more formal judicial processes. Ten of the twelve most active NCPs, for example, reported that "at least one of their specific instances involved business conduct covered by host country laws, regulations or administrative procedures… [and that] it is

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[74] *Id.* at 10-11.

[75] *Id.* at 10.

[76] Check this

[77] 2003 Annual Review at 12-13.

[78] The 2003 Annual Review notes, for example, that practices differ widely in relation to:

> informing parties of the progress in handling specific instances, provision of information to non parties, publication of the fact that a specific instance has been raised, making statements while the specific instance is being considered, publication of the reasons for not agreeing to consider a specific instance, and the naming of parties to a specific instance.

Id. at 14.

quite common to use the specific instance procedure in parallel with legal regulatory or administrative procedures."[79]

The revised content of the Guidelines in 2000 was not the only change of importance. From an institutional perspective, perhaps far more important was the revision process. Reflecting lessons from the MAI experience, the revision process was much more inclusive than ever before. Breaking from tradition, for the first time CIME created a truly public consultation process, actively seeking input from both *outside* the OECD and *inside* (from the Environment Directorate, for example, and the OECD Working Party on Bribery and Corruption). The Chair of the OECD Working Party on the Review (Marinus Sikkel of the Netherlands) convened an informal consultation group of TUAC, BIAC and selected NGOs. Known as the Hague Process, Sikkel invited these groups to a brainstorming meeting in the Hague with the understanding that the participants spoke in a personal capacity. Before each subsequent meeting the group was given a draft of a paper prepared by Sikkel and OECD staff (but which had not yet been sent to governments). The last meeting in Amsterdam was expanded to include three members from TUAC, three from BIAC, three NGOs, Sikkel and DAFFE staff, and government representatives from the United States, United Kingdom and Mexico. The Hague Process operated in many respects like a focus group. The members had no mandate to bind their organizations, but their reactions and creative drafting provided insights (and perhaps buy-in) that would not otherwise have been apparent.

This draft then fed into a process that resembled notice-and-comment rulemaking. The OECD posted the draft text of the Guidelines on the web and invited public comments. Comments were sent by businesses, labor unions, environmental groups, academic institutions, individuals, and non-Member countries and these, too, were posted on the web for all to see. A second draft text, influenced by these comments, was posted and subject to a similar round of public comment.[80]

While perhaps not surprising to those familiar with national administrative rulemaking procedures, this was unprecedented at the OECD. While secretariat staff who work with the Guidelines regard it as a great success, it is interesting to note that this process was not followed during development of the Common Approaches to Export Credits described in the preceding case study.

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[79] *Id.* at 14-15. The 2003 Annual Review notes that:

> NCPs differed in their response as to whether the fact that a specific instance concerned business conduct covered by legal, regulatory or administrative procedures would influence their approach to a specific instance. Nine experienced NCPs felt that if could or has already influenced decisions. For example, one experienced NCP was confronted with a specific instance that concerned business conduct that was also the subject of legal proceedings. In this situation, the NCP felt it could not proceed in dealing with the specific instance. Another experienced NCP felt that national legal, regulatory or administrative procedures would not affect their decision.

Id. at 33.

[80] *See* <http://www.oecd.org/news_and_events/release/nw00-27a.htm>. CIME also formally invited the ILO to all Working Party meetings.

III. Administrative Law at the OECD

I anticipate that we will spend most of the workshop analyzing what administrative law at the OECD means – in terms of how the organization conducts its activities, how Member states treat OECD determinations at the domestic level, and what this means for the study of global administrative law. As a guide to our discussion of what studying the OECD offers to the study of global administrative law, I pose two basic questions below and offer initial observations.

A. What makes the OECD different?— Transnational Problem Solving

In the little that has been written on the OECD, it is often held up as a prime example of an organization that operates on the basis of cooperation and informal networks, relying on "soft law" – recommendations and standards – rather than rules. Anne-Marie Slaughter, for example, has described the OECD as a model for future international organizations, focusing on its ability to bring together many constituent interests for "transnational problem solving."[81] The basis for her prediction lies in the growth of what she calls "transgovernmentalism" – cooperative problem-solving by global networks of *subparts* of the nation state. "These parts," Slaughter argues, "are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order… [T]ransgovernmentalism is rapidly becoming the most widespread and effective mode of international governance."[82] By providing a forum for government officials and nongovernmental experts to meet and share research and experiences on cutting edge policy issues, the OECD can frame the issues for future collective consideration, lay the groundwork for agreement and identify whose the influential voices in the policy debate shall be.[83]

Dick Stewart has described such activities of coordination and standard setting as "horizontal arrangements" of administrative law that "involve informal cooperation among national regulatory officials to coordinate policies and enforcement practices in areas such as antitrust, telecommunications, chemicals regulation, and transportation safety. Such coordination helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities."[84] Consider that the OECD's committees, working

[81] Slaughter, *supra* note __, at 196.

[82] Slaughter, *supra* note __, at 184-185.

[83] "International organizations provide the physical contact and aura of legitimacy that translate some of these potential transgovernmental coalitions into active ones... These coalitions form not only through contacts in the countries but sometimes through an active role by secretariat officials." Krause and Nye, *supra* note__, at 337-8. While an epistemic community need not be linked with a specific IGO or necessarily include government officials, this is often the case.

[84] NYU cite. This is reinforced by the observation of Krause and Nye that "With the growth of economic interdependence, more bureaucracies that were once considered domestic become involved in international

groups, expert groups and conferences bring together approximately *40,000* government officials and experts annually.[85] Aprt from setting standards (such as the Test Guidelines) and negotiating Recommendations and Decisions, some of these gatherings inevitably coalesce into a core of identifiable groups of experts that exercise influence over the delineation of policy challenges and strategic analysis of their resolution.[86] These actions operate below the radar screen of what we normally consider to be "lawmaking" activities but may significantly influence agency activities. As Stewart notes, a horizontal network of agency officials[87]

> may agree informally to a common regulatory policy that is subsequently implemented domestically by participating U.S. regulators through rulemaking or enforcement actions. While these domestic implementing decisions are subject to U.S. administrative law procedures and judicial review, the underlying policy was adopted through extranational processes that are not. Moreover, in some cases there may be no formal domestic decision at all, but merely administrative exercise of discretion - for example, a decision not to enforce U.S. requirements against imported products because of a prior informal agreement on functional equivalence or mutual recognition of regulatory standards.

One could make a few word changes in the quote above and it would describe exactly the Sixth Revision of the Common Approaches to Export Credits – an OECD agreement that was never formally approved by Council yet was adopted throughout the OECD. And realize that this can happen quite often because of the OECD's inherent flexibility. Since its work program is decided by the Member countries, it can transform its organizational dividing lines, procedures, and priorities in line with changing governmental concerns over complex, multilateral issues that require information creation and dissemination (such as labor standards and trade flows).[88] What should administrative safeguards are appropriate for such activities that are not yet lawmaking?

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affairs. Many bureaucracies and agencies of governments have similar interests. *In some cases, the similarity of interests is greater across national lines than it is with competing domestic agencies and interests*." Krause and Nye, *supra* note __, at 337 (emphasis added).

[85] < http://www.oecd.org/about/general/index.htm>

[86] The influence can be indirect, as well.

> As such practices [i.e., patterns of regularized policy coordination] become widespread, transgovernmental elite networks are created, linking officials in various governments to one another by ties of common interest, professional orientation, and personal friendship. Even where attitudes are not fundamentally affected and no major deviations from central policy positions occur, the existence of a sense of collegiality may permit the development of flexible bargaining behavior in which concessions need not be requited issue by issue or during each period.

Keohane and Nye, *supra* note __, at 46. This observation is equally true for nongovernmental officials.

[87] NYU cite.

[88] Keohane and Nye, *supra* note __, at 54. Of course, this also means that certain issues are not addressed, or possibly avoided. It is interesting to note, for example, that the ELSA Committee has not considered

B. What structures of accountability make this work?

In understanding the role of administrative procedures and safeguards at the OECD, one must keep in mind that traditionally these have not been issues that anyone cared about. When I worked at the OECD's Environment Directorate a decade ago, for example, we sometimes would discuss engagement with NGOs on specific issues but the general topic never came up. That's why the MAI experience was such a shock. Not only was the OECD being held up to public scrutiny really for the first time, but its procedures were being criticized by NGOs *and* by governments. Speaking to those in the secretariat at the time, they felt blindsided and bloodied. What makes the case studies so interesting is that they demonstrate three discrete reactions to the MAI experience.

At first glance, the development of the Common Approaches seems to have learned nothing. The MAI and Common Approaches negotiations looked nearly identical. Negotiations took place behind closed doors. Documents were restricted. Meetings with civil society were infrequent and more in the manner of information dissemination than discussion. Perhaps this should have been expected, for the Common Approaches negotiations involved national civil servants in many cases from the same ministries as the MAI.

In looking deeper, though, a fundamental shift had taken place by the time the Common Approaches negotiation got serious. In early discussions, OECD staff made it clear to Member states not only that consultations with civil society needed to take place (which was unusual in itself) but, more fundamentally, that responsibility for engagement lay first and foremost with the Member states, *not* with the OECD. While the consultation burdens were formally shared by the OECD and Member states, both in Paris and in the national capitals, the net result effectively delegated most of the consultation and transparency responsibilities down to the Member states. This transformed what would otherwise have been a solely international negotiation among like-minded agencies into a broader discussion with non-state input.

This could not have been a greater contrast to the revision of the MNE Guidelines, taking place at the same time. For all effective purposes, this was about as close to notice-and-comment rulemaking as one can get in the international arena. A representative focus group tackled the issues informally, hammering out a draft that was then widely disseminated with a request for comments. The revised version was then posted again. And make no mistake, the Guidelines involved a lot more sectors of civil society than the Common Approaches. The Member states negotiating the Common Approaches knew of the Guidelines revision process but chose not to follow it.

Perhaps most interesting, in terms of institutional learning, is that the most successful and effective process for engagement, the MAD system, has not been copied

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issues of female and child labor as seriously as at the World Bank, or labor market flexibility as seriously as at the ILO.

anywhere else in the OECD. The formal engagement of non-state experts, routinely open meetings, and derestricted documents stands in stark contrast to the MAI and Common Approaches processes and clearly has not been followed. Perhaps the technical complexity of standard setting makes this a difficult model to adopt elsewhere, but surely the guiding principles of transparency and peer review are transferable.

The best explanation for the different processes may lie in the dynamic of credibility and effectiveness. In other words, for the Common Approaches to "work," the OECD Recommendation needs to be adopted by the national ECAs. In terms of lobbying and politics, it would be nice if non-state actors supported the final result but this is by no means necessary. Both the Guidelines and the MAD system are different, though. For the Guidelines to work, civil society must be willing to file specific instances. They have to accept both the legitimacy and the effectiveness of the process. Otherwise the NCPs will become dormant, as occurred in the 1990s when labor groups realized the CIME decisions were impotent. Similarly, while the MAD system ultimately depends only on the acceptance of test results by national agencies, the credibility of the system rests firmly on its acceptance by industry and NGOs. There are few places in the world where animal welfare activists and chemical company toxicologists sit together at the table and seriously work together.

Taken together, these observations suggest another facet of administrative law at the OECD, as well. Put simply, the OECD does not have "an administrative law" for the organization. The decision seems to have been made at the highest levels of the OECD *not* to establish an organization-wide policy concerning the transparency, accountability, and engagement of OECD activities. As the case studies demonstrate, these vary enormously throughout the organization. This all could have changed after the MAI saga, but the OECD Council chose to retain the organization's decentralized manner of operations, effectively rejecting the top-down Operational Directive approach of the World Bank. In practice, this has meant leaving it up to each Directorate (indeed to each division) how best to ensure administrative process safeguards.

In fact, in contrasting the cases of the MAD system, the Common Approaches and the MNE Guidelines, it would be hard to come up with three *more different* ways of addressing transparency, responsiveness and accountability. Yet all three were ultimately supported by the Council of Ministers. The important point here is that, much as America's fifty states have been termed "laboratories of democracy," free to develop their own policies and procedures on matters of local concern so, too, does the OECD Council give great discretion to each Directorate to determine how best to run its affairs. The OECD likely never will develop a uniform approach for setting standards, negotiating Recommendations, or sanctioning noncompliance for the simple reason that different Directorates have different priorities and manners of dealing with these issues.

Or, to put it more accurately, the *Member state delegates* in each Directorate have different priorities and manners of operation. Thus it is not surprising that the most open and responsive of all the case study processes studied, the MAD system, is run by a part of the organization, the Environment Directorate, with the most experience in working

with NGOs (or, to be more precise, *the Member state delegates* making decisions in the Environment Directorate have extensive experience interacting with NGOs in their own countries). The MAI and Common Approaches, by contrast, were negotiated and directed by officials from treasury ministries, agencies hardly known for their efforts to engage civil society at a domestic level. So why would one expect anything different at the international level?

This sheds light on an issue likely addressed in some of the other chapters – the role of secretariats versus government representatives in determining administrative procedures. As Benedict Kingsbury has described, the question is:[89]

> whether the operation of OECD regulatory processes is the direct expression of the common sensibility of national government delegates in their network or alternatively whether the design of these regulatory processes interposes institutional features, e.g., a layer of fairly independent international bureaucrats between the network and the decisions.

From the cases studied, the OECD secretariat seems to play a relatively minor role in determining institutional processes. While none of the secretariat working on the Common Approaches with whom I spoke said this out loud, my sense was that they would have preferred a more open process but were under close control by the Member states to keep it closed. Yet given the traditional role of the OECD, the power of government delegates is not surprising. Perhaps more than any other IGO, the OECD is a Member state-driven organization, prioritizing its work program every year based on a vote of Member state preferences and working toward consensus in its day-to-day activities.

[89] Cite e-mail.