



The OECD Guidelines for Multinational Enterprises and non-adhering countries Opportunities and Challenges of engagement

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It is important that the Guidelines enjoin the active support of all relevant players, not least the developing countries as hosts to multinational corporations. But that support will not be forthcoming if the Guidelines are considered as an adjunct to investment-distorting policies, under the guise of concern for such issues as core labour standards and environmental protection.

Lauro Eduardo Soutello-Alves, Chief Negotiator for Brazil in the Working Party on the OECD Guidelines, A view from the South, OECD Observer, May 03, 2001¹

Overview

This paper outlines some of the opportunities and challenges that the OECD Guidelines for Multinational Enterprises present for the public sectors of those countries that have not declared their intention to adhere to the Guidelines² - 'non-adhering countries'. The paper briefly outlines key features of the Guidelines before considering three sources of answers to a basic question: why should non-adhering countries be interested in participating in the Guidelines?

The paper argues that there are potential benefits for non-adhering countries in engaging with the Guidelines' policy processes, and seeking to harness the various processes associated with the Guidelines to the pursuit of domestic policy goals. There are challenges too: the paper points in particular to the implications of the Guidelines in the context of historical efforts to develop a multilateral investment liberalisation architecture.

Introduction

The OECD Guidelines for Multinational Enterprises³ (the Guidelines) have been described as "the only multilaterally endorsed and comprehensive⁴ [business] code that governments are committed to promoting." They might also, with little fear of contradiction, be described as the principal intergovernmentally agreed 'soft law' tool of corporate accountability. The Guidelines are not directly binding on enterprises.

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¹ Available online at http://www.oecdobserver.org/news/fullstory.php/aid/445/A_view_from_the_South.html

² In Guidelines jargon, these countries are known as 'non-adhering countries', though there is no element of censure implicit in that terminology.

³ The OECD Guidelines for Multinational Enterprises, Revision 2000, Available online at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

⁴ This word distinguishes the Guidelines from the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which are available online at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>

Their force instead comes from a political commitment on the part of OECD members, along with those non-OECD countries that adhered or have indicated their intention to adhere, to take steps to secure their implementation on the part of multinational enterprises, wherever they may be operating.

The Guidelines form one of a quartet of instruments falling collectively under the umbrella of the OECD Declaration on International Investment and Multinational Enterprises. Whereas the Guidelines address the responsibilities of multinational enterprises in the global economy, the other constituent elements of the Declaration address key elements of the 'enabling environment' for foreign direct investment. Under a national treatment instrument, countries agree to treat foreign-controlled enterprises operating on their territories no less favourably than domestic enterprises in 'like' circumstances. An instrument on 'conflicting requirements' calls on adhering countries to avoid or minimise conflicting requirements imposed on multinational enterprises by governments of different countries. And an instrument on 'international investment incentives and disincentives' provides for efforts among adhering countries to improve cooperation in relation to such measures.

Today, the OECD Declaration and consequently the Guidelines have attracted the support, not only of the 30 OECD member countries, but also of eight non-OECD members: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia⁵. Together, these countries are referred to as 'adhering countries'. Taken as a whole, the adhering countries account for the sources of the large majority of the world's foreign direct investment. And they also account for the headquarters of a majority (though by no means all) of the world's largest multinational corporations.

The Guidelines have been revised twice since their initial adoption in 1976. A 1991 revision led to the addition of new provisions on environmental protection. Revisions adopted in 2000 made more wide-ranging changes, including the key clarification that the Guidelines apply beyond the territories of the adhering countries in relation to the activities of the enterprises that they address wherever they operate: *Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.*⁶ Other changes included an overhaul of the implementation procedures for the Guidelines; the incorporation of references to human rights and to sustainable development; revision of the environment section; new sections on combating bribery and consumer interests; expansion of the section on employment and industrial relations; updates to the section on disclosure; and the express inclusion of supply chain-related issues in the form of a recommendation that enterprises should *'encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.'*⁷

The centrepiece of the implementation mechanisms envisaged within the Guidelines process is a network of National Contact Points (NCPs) within adhering countries. NCPs may be senior government officials, or a government office headed by a senior official. Alternatively, NCPs may be established on a multistakeholder basis as a cooperative body including representatives of other government agencies. Representatives of the business community, employee organisations and other

⁵ Romania is also expected to become an adherent to the Declaration in November 2004.

⁶ Guidelines, Section I, Concepts and Principles, paragraph 2.

⁷ See e.g. Revised OECD Guidelines for Multinational Enterprises: Overview and Analysis, September 2000, USCIB website, at <http://www.uscib.org/index.asp?documentID=1839>

interested parties may also be included.⁸ In practice, a variety of approaches has been adopted by adhering countries.

The emphasis is not on judging firms but on promoting a real process of improvement in business conduct
OECD Secretariat, Frequently Asked Questions about the Guidelines

NCPs are charged with making the Guidelines known; disseminating them; responding to enquiries about the Guidelines (including from ‘Governments of non-adhering countries’); and reporting annually to the OECD’s Committee on Investment and Multinational Enterprises (CIME) on their activities. Though NCPs are required to respond to enquiries about the Guidelines from ‘governments of non-adhering countries,’ including their application in particular situations, it appears that so far no non-adhering countries have availed themselves of this opportunity.

In addition to these general roles, NCPs are also required to contribute to the “*resolution of issues that arise relating to implementation of the Guidelines in specific instances*”. The ‘specific instances’ procedure, which is amplified in a Decision of the OECD Council,⁹ is designed to offer a non-confrontational channel for concerns to be raised about instances of non-conformity with the Guidelines. NCPs must make an initial assessment of whether the issues raised merit further examination and offer good offices to help the parties involved to resolve the issues. In the event that the parties do not reach agreement on the issues raised, the NCP must issue a statement and make recommendations, as appropriate, on the implementation of the Guidelines.

Each year, the National Contact Points meet to share experience with the implementation of the Guidelines. From existing discussions among national contact points at their annual meetings, it is clear that many of the most challenging issues that have arisen in their work concern those specific instances that relate to business operations in non-adhering countries. Among the key issues that have been discussed to date are a) the so-called ‘parallel legal proceedings issue’ – when issues under consideration in a specific instance are simultaneously the subject of legal proceedings in host countries (considered further below); b) the relevance of the Guidelines to international trade and supply chain issues; and c) challenges of accessing information in non-adhering countries. For NCPs to prove their worth in tackling specific instances, they will need to find ways to deal with these – and other - issues whilst demonstrating their ability to act effectively as neutral third party facilitators in what are often contentious investment projects that are the subject of considerable media attention and NGO campaign pressure.

The OECD Guidelines in the context of trade and investment liberalisation

For non-adhering countries thinking through their relationship with the Guidelines, it is helpful to site them in the context of two distinct, but related agendas: the corporate social responsibility (CSR) agenda, and the trade and investment liberalisation agenda.

⁸ Decision of the Council on the OECD Guidelines for Multinational Enterprises (adopted by the Council at its 982nd session on 26-27 June 2000 [C/M(2000)17/PROV]), available online at http://www.oecd.org/document/39/0,2340,fr_2649_201185_1933095_1_1_1_1,00.html, Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Procedural Guidance, I, A.

⁹ Decision of the Council on the OECD Guidelines for Multinational Enterprises (adopted by the Council at its 982nd session on 26-27 June 2000 [C/M(2000)17/PROV]), available online at http://www.oecd.org/document/39/0,2340,fr_2649_201185_1933095_1_1_1_1,00.html

The timing for the initial adoption of the Guidelines in 1976 was influenced by the wider political environment for foreign direct investment at that time. The 1970s saw significant political backlash against instances of meddling by multinational corporations in the domestic politics of host countries – most notably in the implication of US interests, including those of US multinational corporations, in the controversy surrounding events leading to the overthrow by military coup of Chilean President Allende in 1973. The political debate on the implications of the ‘New International Economic Order’ was in full swing. Discussions began in 1977 within the UN on the negotiation of a potentially legally binding Code of Conduct on Transnational Corporations, which eventually fell away in 1992 after negotiations on several iterations failed to arrive at consensus.

The OECD’s Declaration on Investment, incorporating as it did a non-legally binding set of guidelines on the conduct of multinational enterprises, presented an attractive way forward for OECD members seeking to regain support for the process of foreign direct investment. The Declaration offered the potential to outline a consensus among OECD members on the basic terms of engagement for ‘acceptable’ foreign investment. In the terms of the OECD’s website, the Declaration: “*constitutes a policy commitment to improve the investment climate, encourage the positive contribution multinational enterprises can make to economic and social progress and minimise and resolve difficulties which may arise from their operations*”.¹⁰

Beyond its immediate goals, the OECD Investment Declaration has also offered a platform from which to launch subsequent efforts to ‘multilateralise’ the basic understanding on principles for acceptable foreign investment beyond the OECD member countries. Precisely such an effort was reflected in the OECD Council’s decision, in 1995, to commit the OECD to launching negotiations towards a multilateral agreement on investment (MAI). Whilst negotiations were led by OECD members, the expressed goal was for the MAI to be a freestanding international agreement, open to all OECD members as well as to accession by non-OECD members. Non-OECD members were to be consulted as the negotiations progressed. Nonetheless, many non-member countries feared that agreement on an MAI would provide the basis of a consensus-based position within a powerful negotiating block of countries seeking subsequently further to ‘multilateralise’ their basic consensus on investment liberalisation within the newly-created World Trade Organization.

The MAI talks collapsed in 1998. But the goal of securing a multilateral investment framework became incorporated in paragraphs 20-22 of the WTO Doha Ministerial Declaration which provides the basis for the so-called ‘Doha Development Round’ of the WTO.¹¹ In the event, it did not prove possible at the WTO’s 2003 Cancún Ministerial to secure the necessary consensus for substantive investment negotiations to begin. But the substantive discussion has by no means disappeared. The gradual process of investment liberalisation in developing countries is continuing. Developments in thinking within the OECD continue to exert an influence on the evolution of various bilateral and plurilateral investment arrangements – including between OECD and non-OECD members. Already, the OECD Guidelines themselves have become a reference point in the negotiation of bilateral trade and investment agreements – though not, so far, those involving non-adhering countries. Thus, for example, a Joint Declaration of the parties to the 2002 EU-Chile association agreement titled ‘Joint Declaration Concerning Guidelines to Investors’ states that

¹⁰ http://www.oecd.org/document/24/0,2340,en_2649_34889_1875736_1_1_1_1.00.html

¹¹ http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#relationship

*“The Parties remind their multinational enterprises of their recommendations to observe the OECD Guidelines for Multinational Enterprises wherever they operate”.*¹²

The ‘deepest’ way for non-adhering countries to become engaged in the Guidelines is to declare their intention to adhere – to become an adhering country to the Declaration, establishing a national contact point and participating in ongoing discussions within the Guidelines process. In principle, any non-adhering country may declare its intention to adhere to the Declaration and the Guidelines. In fact, the OECD Council has explicitly opened the possibility for any non-Member country meeting the requirements of the Declaration to adhere to it. Yet the OECD Council has never explicitly envisaged a country declaring its intention to adhere to the OECD Guidelines without simultaneously doing so for each of the other instruments within the OECD Declaration.¹³ Investor ‘rights’ and investor ‘responsibilities’ in the OECD Declaration are part of a single, unified package. A non-adhering country indicating that it would like only to adhere to the OECD Guidelines would create a dilemma. Even so, non-adhering countries are free unilaterally to decide to apply Guidelines norms to their own enterprises.

Given the history of the Guidelines, a political consideration for non-adhering countries is whether participation in the Guidelines processes – even in ways that fall short of full adherence - might be taken to signify support for the Guidelines approach in any future discussions on the establishment of a multilateral investment liberalisation architecture. These discussions have, so far, been opposed by a large number of non-adhering countries notwithstanding the ongoing processes of unilateral, bilateral and plurilateral investment liberalisation. But engagement in the Guidelines need not carry this implication – and indeed participation in the Guidelines may be the most appropriate way to test and shape their relevance for the policy concerns and individual circumstances of non-adhering countries.

The OECD Guidelines in the context of Corporate Social Responsibility

The contemporary corporate social responsibility (CSR) agenda emerged alongside the great debate of the 1990s over the nature and consequences of globalisation. Alongside continued advocacy of trade and investment liberalisation, evidence also began to emerge of circumstances in which the core strategies of economic globalisation had been associated with impoverishment and marginalisation of poor people or damage to the environment.

As in the 1970s, concern over the negative impacts of economic globalisation began increasingly to focus on the role of business – particularly big businesses – in lobbying governments to adopt investment-friendly policies without placing any matching emphasis on the need to develop and maintain strong environmental and social institutions, or to sustain the respect for human rights that could facilitate overall improvements in quality of life and progress towards sustainable development. Concerns came to the fore once more that the economic power of big business when expressed as political power lay behind a ‘race to the bottom’ among some host countries, in which maintenance of low environmental or social standards, or in some cases even a lowering of standards could be applied as a strategy to attract foreign direct investment. At the same time, these concerns were countered by continued advocacy of the benefits of foreign direct investment, including in terms

¹² See http://europa.eu.int/comm/external_relations/chile/assoc_agr

¹³ e.g the OECD’s website says that “Several non-OECD members have already adhered to the Guidelines and others that are *willing and able to meet the disciplines in the Declaration* would be welcome too”. See http://www.oecd.org/document/58/0,2340,en_2649_34889_2349370_1_1_1_1,00.html

of technology transfer, skills development, job creation and the potential to bring insights into 'best practices' on environmental and social issues.

There is no consensus on the meaning of the terms 'corporate social responsibility' (CSR), 'corporate responsibility' (CR) or 'corporate citizenship'. In essence, the overall focus lies with the goal of maximising the positive contributions that businesses make to societal goals such as environmental protection, social justice or maintenance of respect for human rights. Commentators remain divided on the extent to which efforts to minimise the negative impacts of business activity belong within the corporate responsibility agenda, or whether they should instead be considered within a distinct 'corporate accountability' agenda, with a focus on the establishment of legally binding norms. The OECD Guidelines are founded in a broad view, supporting the notion that CSR or CR are both about maximising the positive impacts or contributions of business activity to society, and minimising the negatives. The Guidelines note (at paragraph 10 of the Preface) that "*The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.*"

The CSR agenda has sometimes been associated with a call for the development of minimum globally applicable standards for business conduct below which no business should be allowed to fall.¹⁴ The Guidelines are potentially one candidate for meeting that demand, offering an alternative basis for engagement by non-adhering countries: to shape the content of what is a likely candidate for eventual evolution into a globally applicable minimum set of standards for business behaviour. Yet even leaving aside their 'voluntary' status, there is little consensus on the most appropriate basis for selecting the norms for inclusion in such a baseline. In particular, there is a tension between the demands of the CSR agenda for clarity on a globally applicable set of minimum standards and the international law notion of 'fundamental principles of international law' that is sometimes invoked as a basis for identifying the content of such norms. What may, from a CSR perspective, appear to form the basis for 'minimum standards' – e.g. the ILO Declaration on Fundamental Principles and Rights at Work or the substantive provisions of the OECD Guidelines themselves – are often far from reflecting fundamental norms of international law, or even globally or near-globally accepted international legal obligations as they affect states.

Professor Roger Blanpain has pointed to an alternative non-legally derived basis for the authority and weight of the OECD Guidelines. He suggests that, even though the Guidelines are not legally enforceable the fact that they have been agreed and promulgated by many countries, companies, and labour organizations gives them moral force.¹⁵ Whilst a pragmatic argument can certainly be made for engagement by non-adhering countries in the Guidelines on this basis, much depends on possible criteria for selecting norms for inclusion in a globally applicable minimum set of standards. Possible criteria include: links to generally agreed principles of international law; extent of engagement in the development of the norms; legitimacy;

¹⁴ See generally *Defining Global Business Principles: Options and Challenges*, IIED for Insight Investment, forthcoming, 2004

¹⁵ See the report of "Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal possibilities, initiatives and strategies for civil society", Report of the international IRENE seminar on corporate liability and workers' rights held at the University of Warwick, Coventry, United Kingdom, 20 and 21 March 2000, available online at <http://www.cleanclothes.org/publications/corp-4.htm>

flexibility to respond to changing policy contexts; and sensitivity to different national or local circumstances.

Why should adhering countries engage in the Guidelines process?

A basic question still remains: why should non-adhering countries be interested in participating in the Guidelines? The remainder of this paper considers three sources of answers to this basic question:

- The relevance of arguments for ‘home country’ responsibilities advanced by a group of six countries in the WTO’s Working Group on the Relationship between Trade and Investment
- The wider implications of the CSR agenda for actions by public sector actors, particularly in middle and low income countries
- Opportunities offered by the substantive text of the Guidelines themselves.

Investors’ and Home Governments’ Obligations

In 2002, a group of six countries – China, Cuba, India, Kenya, Pakistan and Zimbabwe, submitted a Communication on investors’ and home governments’ obligations to the WTO’s working group on the relationship between trade and investment.¹⁶ The paper was submitted as an ‘initial reflection’ of the views of its co-sponsors with regard to the balance of interests between home and host countries in the relationship between trade and investment. At its heart lay a proposal for a legally enforceable code of conduct for foreign investors.

Whilst the voluntary, market-based CSR agenda has taken off, a parallel and closely related agenda on how to ensure that adequate minimum *legal* requirements exist to address most exploitative forms of business behaviour from the global economy has not attracted the same attention from either businesses or OECD governments though it has been the subject of much NGO campaign activity. The Communication on investors’ and home governments’ obligations spoke to this ‘corporate accountability’ agenda, but focused in the main on the negative economic policy issues associated with the practices of multinational enterprises, not on issues such as labour standards or human rights that have been a focus of attention in the CSR agenda.

The paper argued that *“In view of [multinational enterprises’] objective of global profit maximization, there could be conflict of interests between their objectives and the development policy objectives of the host countries and they could indulge in restrictive business practices, manipulation of transfer prices and other such practices. There is therefore a need to address the negative effects of FDI activities by the MNEs that they may have on the host members, particularly the developing ones, while recognizing the positive role of the FDI”*. The co-sponsors pointed to the collapse of large MNEs such as Enron and WorldCom, and the series of financial crises in a number of developing countries, as further justifications for the adoption of legally enforceable norms of investors’ or corporate conduct.

The co-sponsors of the Communication saw a central role for home countries in regulating the behaviour of multinational enterprises. Given the massive power and the global operations of multinational enterprises, the paper argued, “host governments have their limitations in regulating their conduct”. “In order to ensure that the foreign investor meets its obligations to the host member, the cooperation of the home member’s government is often necessary as the latter can, and should, impose the necessary disciplines on the investors.” The co-sponsors proposed a

¹⁶ As Friends of the Earth pointed out at the time, the co-sponsor countries represented ‘more than 50% of the world’s population’. See http://community.foe.co.uk/resource/misc/cancun_activist_guide.pdf

number of General Principles and areas for more specific obligations in areas spanning restrictive business practices, technology transfer, balance of payments, ownership and control, consumer protection and environmental protection, disclosure and accounting, and home governments' obligations.

In practice, many (though not all) of the substantive areas in which proposed obligations are put forward are addressed by the existing OECD Guidelines – though there is a difference of emphasis in the Communication's principal focus on economic impacts and implications of MNE investment. But whereas the Communication proposes a legally binding framework, the Guidelines offer the consensus-building procedures of NCPs as their central implementation mechanism. The arguments in the Communication for home country governments to accept greater oversight responsibilities over the activities of MNEs are congruent with the rationale for the OECD Guidelines. The question, though, is whether their non legally-binding status should deter engagement by those non-adhering countries favouring a legally binding approach?

The implications of the CSR agenda for Public sector roles in strengthening responsible business behaviour

Beyond the policy judgement about whether engagement in the OECD Guidelines is congruent with the goal of achieving an internationally agreed legally binding framework for investor responsibilities, the CSR agenda has wider implications for public sector actors in middle and low income countries.

Box 1 Five public sector roles in strengthening CSR

Mandating: laws, regulations, penalties, and associated public sector institutions that relate to the control of some aspect of business investment or operations.

Facilitating: setting clear overall policy frameworks and positions to guide business investment in corporate social responsibility, development of nonbinding guidance and labels or codes for application in the marketplace, laws and regulations that facilitate and provide incentives for business investment in CSR by mandating transparency or disclosure on various issue, tax incentives, investment in awareness raising and research, and facilitating processes of stakeholder dialogue.

Partnering: Combining public resources with those of business and other actors to leverage complementary skills and resources to tackle issues within the CSR agenda, whether as participants, convenors, or catalysts.

Endorsing: Showing public political support for particular kinds of CSR practice in the marketplace or for individual companies; endorsing specific award schemes or nongovernmental metrics, indicators, guidelines and standards; and leading by example, for example through public procurement practices.

Demonstrating: Public sector agencies demonstrating leadership to business in the exemplary way in which they themselves engage with stakeholders; promote and uphold respect for fundamental rights; or support transparency about their own activities in relations with external stakeholders.

In 2002, IIED was tasked by the World Bank Group's CSR Practice with developing an initial framework for understanding the range of roles that public sector actors in middle and low income countries can play in enabling responsible business behaviour. We found an extensive range of public sector actions beyond traditional 'command and control' regulation. We arrived at a typology of five¹⁷ public sector roles (highlighted in *Box 1* above).

¹⁷ Initially only four roles – the fifth, 'demonstrating' was added in Halina Ward, *Public Sector roles in Strengthening Corporate Social Responsibility: Taking Stock*, ('Taking Stock') World Bank Group, February 2004,

More directly relevant for present purposes, we looked at the relevance of a number of potential ‘drivers’ of public sector action in the light of the range of initiatives that we identified.¹⁸

Trade and investment promotion: Much existing public sector engagement in CSR in low and middle income countries appears driven by the need to maintain sectoral or national competitiveness. CSR-related demands are often expressed through supply chains or international campaign pressure on foreign investors. Understanding those demands and the CSR agenda that they are part of may offer the potential to inform the development of national competitiveness approaches. Possible public sector strategies include:

- 1) aligning national investment promotion strategies with the CSR interest of foreign investors
- 2) turning the market access implications of CSR in supply chain requirements to positive competitive advantage
- 3) Aligning foreign investors’ existing CSR practices with broader public goods – such as health, or education - that are a fundamental underpinning of national competitiveness alongside a favourable investment regulatory environment.

Strategic public sector engagement at the international policy level offers the potential to align the CSR/trade and investment promotion nexus to domestic policy concerns and local contexts. Realising that potential will call for public sector actors to work increasingly to influence the practices of international NGOs, foreign buyers, parent companies of foreign investors, and home country governments. Engagement in the OECD Guidelines potentially offers one space in which to pursue that end as well as potentially offering insights into strategies for host country policy development.

Engagement in CSR by public sector actors in non-adhering countries offers a pathway effectively to ‘localise’ the CSR agenda so that it is properly grounded in an understanding of and respect for local, national and regional development priorities and public policy goals. A ‘localised’ CSR agenda would likely build on the strengths of local enterprises as well as those of foreign multinational corporations; it would offer the potential to build a more legitimate and ultimately more sustainable CSR agenda that in turn could be better placed to meet both the needs of citizens in developing countries and those of businesses investing in or sourcing from developing countries.

The OECD Guidelines process is founded in an understanding of the connection between core ‘investment climate’ issues and ‘responsible’ business practices. Non-adhering country engagement in the Guidelines could help to bring practical insights into the business and developmental impacts of trade and investment-related CSR pressures, whilst offering the potential to shape an agenda better attuned to local realities.

Business demands for more effective public sector implementation and enforcement of minimum standards and good public sector governance. It has sometimes been suggested that the Guidelines’ NCP process offers opportunities for concerns to be raised about the behaviour of multinational enterprises when it is difficult to access

available online via www.iied.org/cred/pubs.html and http://www.worldbank.org/privatesector/csr/doc/Taking_Stock.pdf

¹⁸ This next section draws largely on the analysis in *Taking Stock*.

the legal system of host countries, or where the legal framework of host countries isn't functioning smoothly. Yet the use of the NCP process needs to be carefully moderated. It is very unlikely that the non-confrontational process of mediation offered by NCPs could ever prove adequate to deliver redress in worst case scenarios of corporate abuse. The Guidelines need to be given their appropriate space in the overall policy mix – no more, and no less. The NCP process, at its best, can only be as valuable as any process of mediation and consensus-building. It cannot be a substitute for effective public governance in host countries.

Development of public policy frameworks and the even-handed implementation and enforcement of basic legal requirements are areas that lie within the fundamental competences of public sector agencies. Good business needs not only the basic characteristics of an 'enabling investment climate' to be in place – it also needs effective government regulation of minimum social and environmental requirements. If the baseline is not in place, the market-based signals that can work to reward those businesses who go further cannot be effective. Without basic public sector capacity or attention to fundamental citizens' rights it can be hard for businesses to maintain appropriate boundaries for their corporate social responsibility interventions. In short, the voluntary, market-driven CSR practices of businesses cannot be a substitute for public governance in the public interest. And the voluntary CSR practices of business should not be allowed to undermine or supplant the expression and development of public sector governance functions. Only when good public governance is integrated in CSR – and CSR in good public governance – will the potential value of the CSR agenda be maximised.

CSR, then, leads directly to the public sector. Yet what is conspicuously missing in the CSR agenda is any institutional setting for arriving at a comprehensive understanding on the relationship between good governance, corporate responsibility and corporate accountability in an era of economic globalisation. The OECD Guidelines processes potentially offer one forum in which, with engagement by non-adhering countries, this gap could begin to be filled.

Local, national and international civil society demands for responsible business are a potentially important driver of public sector engagement in CSR in middle and low income countries. What has not yet been directly addressed in the CSR agenda as a whole is the potential value of public sector support for the development of strong indigenous civil society and trade union capacity to engage with the CSR agenda. With such capacities in place, the chances are considerably increased that a market-based approach might deliver a more equitable agenda CSR balanced among the interests of different stakeholders. Non-adhering country support or endorsement for processes of civil society and trade union capacity-building for CSR – including in relation to the NCP process of the OECD Guidelines – offers one route to enhancing the overall legitimacy and accountability of the Guidelines process and thus strengthening their effectiveness within the CSR agenda.¹⁹

International policy processes are not yet a major driver of public sector action to strengthen CSR, but indications are that they are likely to become increasingly significant. Initiatives such as the UN Global Compact are increasingly triggering distinct processes in developing countries. The body of bilateral trade agreements is

¹⁹ Some specific instances have been raised by local NGOs and trade unions. TUAC has worked to raise awareness of the Guidelines among business, government and civil society in non-OECD countries. In their submission to the 2004 annual meeting of national contact points, they recommended continued efforts to promote the Guidelines, particularly in the Middle East and North Africa, and collaboration to strengthen local capacity building to use the Guidelines effectively. See TUAC Submission to the Annual Meeting of National Contact Points 2004, June 2004.

beginning to incorporate references to promotion of various kinds of voluntary CSR initiatives, for example on implementation of codes of conduct by domestic suppliers. And the emerging agenda on the links between CSR and competitiveness (based on the hypothesis that public sector encouragement of responsible business practices could be a foundation of national comparative advantage) may also for the future lead to the evolution of regional approaches in which cooperation among nations is a means to link the voluntary CSR practices of businesses to delivering both public policy goals and regional comparative advantages.

For those non-OECD members that are already adhering countries, the Guidelines themselves are, through their requirement to establish an NCP, already exerting an impact on public sector initiatives to support responsible business. But it is early days in the evolution of the current Guidelines implementation procedure and too soon to offer solid conclusions on the impact of the Guidelines on public sector action in support of responsible business behaviour. Certainly, information generated through the annual round tables, and meetings of NCPs could offer valuable sources of inspiration to inspire public sector action in support of responsible business practices. But it would be hard to assert that the Guidelines have as yet had any significant impact on public sector action in non-adhering countries.

Opportunities for non-adhering country engagement arising from the provisions of the Guidelines and their implementation processes

This paper has already raised a number of general policy considerations for non-adhering countries in determining whether, and how, to engage with the OECD Guidelines. But there is also a range of more specific points of intersection between the Guidelines and non-adhering countries as a direct result of the text of the Guidelines themselves and their associated implementation procedures. Three in particular are highlighted here:

- The general deference given in the Guidelines to policies and laws of non-adhering countries and, related to this, the direct references in the Guidelines to links between multinational enterprises and the policy goals and developmental priorities of the countries in which they operate
- The implications of the Guidelines' implementation processes for domestic policy-making processes in specific instances, and opportunities for non-adhering countries to raise issues arising in specific instances with National Contact Points.
- Opportunities for non-adhering countries to contribute directly to the overall policy development of the Guidelines

Each is considered briefly in turn below.

General deference to the policies and laws of non-adhering countries

The incorporation of social and environmental considerations into investment frameworks has often been associated with allegations of 'disguised protectionism' – that the adoption of high environmental or social standards in international trade or investment frameworks could be a pretext for squeezing developing country-headquartered enterprises out of business. Indeed, there have been reports that such concerns were raised by countries negotiating the 2000 revisions to the Guidelines and fearful that the new Guidelines would harm their economy by introducing costly richer-country standards.²⁰

²⁰ See Duncan McLaren, *Revised OECD Guidelines – new dawn or old wine?*, Amnesty International UK Business Group Newsletter, Autumn 2000/Winter 2001, available online at <http://www.amnesty.org.uk/business/newslet/autumn00/oecd.shtml>

The text of the Guidelines go some way to directly addressing these concerns of 'disguised protectionism'. Thus, for example, the introductory section of the Guidelines on Concepts and Principles notes that

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

7. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries".

Similarly, a number of passages in the Guidelines incorporate direct references to the need to align the practices of multinational enterprises with the policy goals and developmental priorities of the countries in which they operate. For example, Part VIII of the Guidelines on science and technology states that Enterprises should *"Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity"*. And it calls on enterprises when appropriate to *'perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an S&T capacity and encourage their training, taking into account commercial needs.'*

Section II of the Guidelines outlines eleven distinct 'general policies', all prefaced by the note that 'Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders'. The general policies include references to contributing to economic, social and environmental progress with a view to achieving sustainable development, encouraging local capacity building, refraining from seeking or accepting regulatory exemptions, and abstaining from any improper involvement in local political activities. The environmental provisions of the Guidelines call on enterprises to 'contribute to the development of environmentally meaningful and economically efficient public policy'. And Part IV, on employment and industrial relations, calls on companies in their operations to, 'to the greatest extent practicable, employ local personnel and provide training with a view to improving the skill levels, in cooperation with employee representatives and, where appropriate, relevant governmental authorities'.

The introductory Concepts and Principles section of the Guidelines affirms that *"Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries."* And in the text that follows, the Guidelines are peppered throughout with references to applicable laws or to compliance with domestic laws and regulations (e.g. in section IX on Competition, IV on Employment and Industrial Relations, V on environment, VII on consumer interests, IX on Competition and X on taxation).

In short, the text of the Guidelines reflects an effort to ensure that the enterprises that they address contribute to the policy goals of the countries in which they invest. And whilst views on whether it reflect the most appropriate overall balance will of course differ, references in the Guidelines to the contribution of enterprises to host country policy goals offer a basis for discussion, perhaps in the context of the Guidelines annual round table process, on how best to align voluntary CSR practices with national and local development priorities. Multinational enterprises are often chary of open engagement in public policy processes in the countries in which they invest.

The Guidelines process potentially offers one space in which to progress discussion on how to encourage positive public policy engagement on the part of enterprises so that their skills and capacities are matched to public policy goals.

Non-adhering country engagement with National Contact Points and Specific Instances

A significant proportion of ‘specific instances’ raised to date with National Contact Points have related to activities by multinational enterprises in non-adhering countries. The Guidelines Implementation procedures say that in those cases where issues arise in non-adhering countries, NCPs must ‘*take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.*’ Yet in individual cases, NCPs can face real challenges in accessing accurate information about local circumstances. They may be desk-bound, with no first-hand insight into local conditions in relation to the specific instance under consideration. In practice, a variety of approaches have been deployed – with one NCP for example, travelling to the host country in question, and others using Embassies as a source of information.²¹

The incorporation of references to basic compliance with host country legal requirements within the overall framework of the Guidelines provides the basis for National Contact Points to deal with specific instances concerning alleged breaches of domestic legislation. In the absence of host country assent to such enquiries, or detailed knowledge of host country laws and regulations, this could be perceived as an interference in domestic concerns. Yet it has also been pointed out that the NCP procedure also offers a useful and potentially complementary supplement to host country regulatory and compliance capacities.

In addition to the general problems of accessing information about circumstances in host countries, there is as yet little agreement on how NCPs should apply the Guidelines in circumstances where legal, regulatory or administrative procedures are also under way in host countries. This particular dilemma has come to be referred to as the ‘parallel legal proceedings’ issue. At the 2004 annual meeting of National Contact Points,²² the Japanese NCP presented its experiences working on specific instances that were considered at the same time as legal proceedings were under way in host countries. The NCP ‘*noted that it was difficult to make contact with the parties directly concerned by the instance and it feared (unintentionally) interfering with the domestic affairs of these countries. The Japanese NCP stated that its current thinking was that it ought to give priority to the domestic institutional and legal framework. When domestic legal processes are under way, NCPs should seek to collect relevant information and to develop an understanding of the issue. When the domestic proceedings have reached a conclusion, the Japanese NCP views its role as ‘keeping an eye on the implementation of the binding conclusions.’*

The ability to engage, on an ongoing basis, with a network of non-adhering countries, to gauge views and exchange information, could substantially strengthen the authority of the Guidelines, as well as empowering NCPs to take a stronger line where that is required. As pressure for legally binding investor accountability mechanisms in home countries mounts, the adhering countries also face the fundamental challenge of demonstrating that the non-confrontational procedure represented by the Guidelines can deliver outcomes that are satisfactory to all

²¹ See 2004 Annual Meeting of the National Contact Points, Report by the Chair, available online at <http://www.oecd.org/dataoecd/5/36/33734844.pdf>

²² Available online at http://www.oecd.org/departement/0,2688,en_2649_34889_1_1_1_1_1,00.html, at page 16 of the report

parties. The development of clear channels for communication between adhering countries and non-adhering host countries in individual specific instances offers the clear potential to strengthen NCP capacities to effectively carry out their work. There is a strong 'internal' argument from within the Guidelines process for some kind of streamlined process offering ready access to non-adhering country public sector agencies in specific instances where doing so could help to resolve issues raised under the NCP process.

In the area of 'parallel legal proceedings', there may also be unrealised opportunities for non-adhering countries to seek support from NCPs in putting pressure on enterprises to resolve issues left unaddressed by domestic legal proceedings. Engaging a home country NCP to facilitate direct discussions between a foreign investor and a host country government could potentially offer a useful mechanism for bringing additional pressure to bear on foreign investors in cases where undercapitalised subsidiaries have failed to pay adequate compensation for environmental damage or disinvested leaving behind an uncompensated legacy of waste. Similarly, in circumstances where a domestic legal proceeding in a host country has led to a clear judgment that has proved unenforceable or that has simply been ignored, NCPs could, without interfering in domestic legal proceedings, assist non-adhering countries to bring additional pressure to bear on parent companies to ensure that the spirit of domestic court judgments are complied with.

Opportunities for non-adhering countries to contribute directly to the overall policy development of the Guidelines

As indicated, there is a strong 'internal' case for finding some mechanism for soliciting the engagement and views of non-adhering countries in individual specific instances. There may be circumstances where non-adhering countries might find it useful to raise specific instances themselves. This may be the case where legal proceedings in host countries have already generated clear findings of illegal conduct, but host countries have limited means at their disposal for engaging directly with parent companies of multinational enterprises in their home countries. Or it may be the case where the non-confrontational mechanism offered by an NCP, with its implication of association with public authorities of home countries, may offer a useful route to ongoing engagement.

Cooperation with non-adhering countries is further encouraged through CIME. Paragraph 2 of the first section of the Guidelines (on Concepts and Principles) notes that "2. *Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries...*" The Guidelines' implementation procedures expressly envisage that CIME 'may decide to hold exchanges of views on matters covered by the Guidelines with representatives of non-adhering countries.' Each year, the OECD convenes a multistakeholder 'round table' on some aspect of corporate responsibility as it relates to the Guidelines.²³ Next year's Guidelines round table discussion is likely to focus on the implications of the Guidelines for non-adhering countries. The Global Investment Forum meeting in New Delhi offers an initial opportunity to explore these issues.

Conclusions

There is a strong 'internal' interest on the part of those countries currently adhering to the OECD Guidelines to ensure the effective engagement of public sector authorities in non-adhering countries. This arises at a number of levels:

²³ This year's round table, in June 2004, considered the environmental provisions of the Guidelines. See http://www.oecd.org/document/1/0,2340,en_2649_37425_31711425_1_1_1_37425,00.html

- The implementation processes associated with the Guidelines would be considerably strengthened through formalised arrangements with public sector actors for access to information relevant to the resolution of specific instances
- The credibility of the Guidelines would be enhanced if non-adhering country stakeholders, including governments and public authorities, took advantage of the opportunities presented by the Guidelines to raise specific instances with national contact points
- The global application, authority and credibility of the Guidelines would be strengthened by broadening the range of adhering countries to include a larger number of middle and low income countries.

To fulfil their potential, the Guidelines need the effective engagement of non-adhering countries. For non-adhering countries, the case for engagement is based principally on the opportunities that the Guidelines present to harness foreign investment and supply chain management to the fulfilment of domestic public policy goals in the areas addressed by the Guidelines, whilst shaping norms of corporate social responsibility that are better attuned to national and regional circumstances. Whether these cases for engagement are sufficient to trigger investment of scarce public resources in the Guidelines process, or indeed to overcome potential political objections to engagement derived from the non legally-binding nature of the investor obligations contained in the Guidelines and their origins in the 'rich nations' club, remains to be seen. At its best, engagement by non-adhering countries could ensure not only that development perspectives are brought to the Northern CSR agenda, but that the perspectives of stakeholders in middle and low income countries inform the development of the Guidelines, lending them enhanced credibility and stability as a globally applicable instrument.

Questions for discussion

- How best to make the case for non-adhering countries to engage in the processes associated with the OECD Guidelines?
- How best to create effective channels of communication between adhering and non-adhering countries on the Guidelines and corporate responsibility issues more widely?
- What (if anything) could make the Guidelines better suited to the interests and priorities of non-adhering countries in the economic, social and environmental spheres?
- Might it be a) desirable or b) feasible for non-adhering countries to identify informal contact points for existing NCPs?
- What are appropriate long-term aspirations for the Guidelines? For example, should they aspire to becoming an instrument with global adherence, or should they remain the norms of a 'like-minded' group of countries for global application, informed by the engagement of non-adhering host countries?
- What further dissemination or assistance might be appropriate to encourage the engagement of non-adhering countries in the OECD Guidelines processes?