



Defining Global Business Principles: Options and Challenges

Discussion Paper for Insight Investment

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The views expressed in this report are those of the authors and do not necessarily reflect the views of Insight Investment.

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1. Introduction

In October 2002, Insight Investment ('Insight') launched its *Defining Global Business Principles*¹ report. The report suggested that companies operating in developing countries face a particularly challenging range of ethical issues, including those arising from widespread poverty, violent conflict, weak public institutions and limited civil society capacity. The report argued that while the ideal solution would be for these countries '...to establish comprehensive and fully effective systems of democratically accountable state regulation of business', this solution is many years away. Consequently, the report proposed that stronger self-regulation by companies, in line with accepted ethical principles, represents the only practical short-term answer to this problem.

This raises the important question of what principles and standards should be used to judge business behaviour. Insight has proposed two possible bases for such principles: (a) core ethical principles that are the subject of widespread consensus within the business community, and (b) the framework provided by international law. While the idea that business behaviour should be subject to regulation through some set of minimum acceptable ethical standards is not new, the question is whether the corporate social responsibility (CSR) debate has reached the point where it is possible to identify these globally applicable minimum acceptable standards of behaviour.

As part of its Global Business Principles work, Insight invited IIED, the International Institute for Environment and Development, to help it to work out how best to identify the content of a set of 'Global Business Principles'. This discussion paper highlights some of the choices that have to be made in any process to identify a set of Global Business Principles, and it proposes a basic analytical framework that could guide the process of selecting the content of Global Business Principles.

This discussion paper is structured as follows:

- *Section 2* provides an overview of Insight's Global Business Principles Project and presents some initial thoughts on the issues that it raises.
- *Section 3* provides an overview of the Insight/IIED collaboration and the steps that have led to this report.
- *Section 4* points to some of the challenges and possible approaches to defining Global Business Principles. Building on the *Defining Global Business Principles* report, two approaches are considered: (a) 'core ethical' principles, (b) 'legitimate ethical principles, especially those that have been codified in internationally authoritative conventions and guidelines'. The aim is to define more closely the norms and instruments that should form the starting point for identification of 'Global Business Principles.'
- *Section 5* outlines one possible structure for a set of Global Business Principles, reflecting a balance between different kinds of norms.

¹ Mackenzie, C. (2002), *Defining Global Business Principles: Towards a New Role for Investors in Promoting International Corporate Responsibility* (Insight Investment, London, UK).

- *Section 6* proposes a set of tests for determining the content of a set of Global Business Principles, with a particular focus on norms found in instruments associated with an intergovernmental process for global application.
- *Section 7* highlights some outstanding questions, specifically the trade-offs that need to be made in developing an agreed set of ethical principles for companies and some further research needs.
- *Section 8* offers some concluding comments on the important role of stakeholders, in particular those in developing countries, in the process of defining and, ultimately, enforcing global business principles.

2. Insight's Defining Global Business Principles Project

As noted in *Section 1* above, Insight's *Defining Global Business Principles*² project starts with the suggestion that companies operating in developing countries face particularly difficult issues. While Insight has argued that institutional investors have a responsibility to play an active part in the governance of the companies in which they invest, Insight acknowledges that there is limited consensus on what companies should do when faced with issues such as child labour, human rights violations, or extreme poverty. This absence of consensus raises the question of by what and by whose standards should business behaviour in these circumstances be judged?

Insight has suggested that shareholders should judge the behaviour of international companies against a set of legitimate ethical principles, and has proposed two possible approaches to defining such principles (see *Box 1* below). The first approach is to identify the core ethical principles that are the subject of widespread consensus within the business community, and the second is to use the framework provided by international law. The aim is that such Global Business Principles should provide a basis for Insight's engagement with the multinational corporations that it invests in – as well as potentially being applicable more widely within the investment community.

The idea that business behaviour should be subject to regulation through some set of minimum acceptable ethical standards, applicable worldwide, is far from new. There have been several attempts to define such standards. Within the OECD, the OECD Guidelines for Multinational Enterprises are one approach³. The UN Global Compact and the UN Norms on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights⁴ can also be understood in this way.

² Mackenzie (2002).

³ The Guidelines also apply to businesses in those non-OECD countries – currently eight – that have indicated their intention to adhere to the Guidelines.

⁴ Available online at E/CN.4/Sub.2/2003/12/Rev.2

Box 1: What Insight has said so far

“In the absence of a 'combined code' on corporate responsibility, our view is that the most credible basis for [Global Business Principles] is the framework provided by international law, in particular those instruments that have been established by the United Nations and widely ratified by governments. The most important of these are the Universal Declaration of Human Rights (UDHR)⁵ and the Rio Declaration on Environment and Development⁶ (and the associated conventions on climate change and biological diversity)”⁷

“...there are a number of core ethical principles that are the subject of widespread consensus: principles relating to honesty, the keeping of promises, the avoidance of harm, the provision of aid to those in need, respect for human rights and dignity, and ideas about fairness and equality. While there is scope for disagreement about the application of these principles in practice, there is little serious practical disagreement about their basic legitimacy...These principles are so much part of the background expectations of people in the modern world – including business–people – that they form an essential basis for practical corporate responsibility.”⁸

“We believe that the most credible basis for global business principles is provided by the extensive body of international norms, established by the United Nations and ratified by governments...Most important of all is the Universal Declaration of Human Rights and its associated conventions and instruments. Also important are the UN conventions relating to sustainable development.”⁹

“Another set of challenges relates to the relationship between global business principles and local laws. How do global principles relate to local laws? What happens when principles and laws conflict?”¹⁰

Business representatives frequently lament the confusion and additional costs that they potentially incur through efforts to comply with the current flowering of voluntary initiatives, guidelines, codes and principles. One response is harmonisation, or at least convergence among norms. The driver for this response is principally economic efficiency. In contrast, some NGO advocates (IIED among them) argue that, though there is indeed a need to minimise inefficiencies and to address the potentially inequitable market exclusion effect of a proliferation of voluntary initiatives, it is also important to foster a more inclusive CSR agenda that is more directly shaped by the interests of the range of stakeholders based in middle and low income countries. This concern may point, not to harmonisation, but to continued experimentation with voluntary guidelines, codes and principles. In turn, this may indicate that efforts to define a set of globally applicable minimum acceptable business principles should not have a chilling effect on longer-term efforts to build an equitable balance between globally acceptable (and credible) minimum acceptable standards, local circumstances, and locally appropriate visions of responsible business behaviour.

The outstanding question then is whether the CSR agenda has already reached a point at which it is possible to identify a set of globally applicable minimum acceptable standards of behaviour with legitimacy, credibility and authority. This is far from well-trodden territory. As this paper shows, there are a number of dilemmas

⁵ <http://www.un.org/Overview/rights.html>

⁶ <http://www.unep.org/unep/rio.htm>

⁷ Mackenzie, C. and Sullivan, R. (2003), 'Editorial: Investor Activism and Corporate Responsibility', *Journal of Asset Management*, Vol. 3, No. 4, pp. 296-300.

⁸ Mackenzie (2002), p. 17.

⁹ Mackenzie (2002), p. 18.

¹⁰ Mackenzie (2002), p. 21.

inherent in the notion that ‘globally applicable minimum acceptable standards of behaviour’ can be drawn from existing international policy instruments. We have not sought conclusively to resolve the dilemmas. Rather, this paper is intended as an initial guide – for further discussion both within the investment community generally and the wider corporate social responsibility community – on an analytical framework for development of Global Business Principles.

3. Background to IIED/Insight Collaboration

IIED’s work with Insight has comprised two broad stages, both desk-based. Initially, we assessed the pros and cons of adopting the OECD Guidelines for Multinational Enterprises (the Guidelines) in their entirety as a basis for Global Business Principles. IIED prepared a summary note¹¹ that provided the basis for an initial workshop between IIED and Insight Investment. This work allowed us to develop our initial ideas on an analytical framework for identifying Global Business Principles, particularly by reflecting on the legitimacy and effectiveness of the Guidelines and the implementation procedures associated with the Guidelines. In the second stage, we focused on a) developing an analytical framework that could provide tests for inclusion of Global Business Principles within an overall set of principles, and b) highlighting some of the strategic and methodological challenges inherent in the development of a set of Global Business Principles. As part of this process, we looked at a range of potential source documents – all of them in some sense internationally agreed, or with international authority. Our aim was to test an initial set of selection criteria against a range of source documents. This paper is the outcome of this second stage in our work.

4. Core Ethical Principles and International Norms: Some Basic Challenges

Introduction

Insight’s statements in its *Defining Global Business Principles* report point to two overarching considerations in the development of a set of global business principles. The first is that Insight would like to claim external legitimacy or authority in relation to its eventual choice of ‘global business principles’, not start from scratch or seek to develop a completely new set of business principles. The second is that Insight sees that there are two principal routes for arriving at a claim of external legitimacy or authority, namely (a) core ethical principles that *are part of the background expectations of people in the modern world, or (b) international legal norms “established by the UN and ratified by governments.”* Some specific challenges associated with each entry point are highlighted in turn below.

Core Ethical Principles

Insight’s suggestion that Global Business Principles might be based in part on core ethical principles that are the essential basis for practical corporate responsibility contains an immediate challenge: how to go about identifying the content of a set of ‘core ethical principles’?

One entry point might be to look to the observed behaviour of business-people around the world, perhaps based on sampling or survey techniques. This would be based on the assumption that the ethical norms underpinning business behaviours

¹¹ The note was researched and written by Liza Lort-Phillips.

could be empirically identified. Yet even empirically-based identification of core ethical principles might deliver a surprisingly narrow sphere of consensus among business managers in different locations around the world, as indicated in *Box 2* below.

Box 2: Is it ethical? Russian vs American managers (% answering ‘yes’)¹²

| Issue | Russian managers | American managers |
|---------------------------------------------------|------------------|-------------------|
| Company time for non-company benefits | 27.7 | 19.3 |
| Things that are illegal are ethically wrong | 51.9 | 52.5 |
| Personal ethics sacrificed to business | 64.6 | 52.1 |
| Purchasing shares on insider information | 53.8 | 11.1 |
| Authorizing violation of company policy | 34.2 | 4.9 |
| Giving gifts in return for preferential treatment | 50.3 | 15.2 |
| Accepting gifts for preferential treatment | 38.3 | 3.9 |
| Man is basically good | 66 | 88.8 |

A second entry point might be to look to authoritative statements of what constitute ‘core ethical principles’ of business conduct, although stopping short of an exclusively legally grounded analysis. There are at least three different ways to do this.

1. The first approach might be to start a process specifically designed to identify the financial services sector’s concerns (or more specifically those of institutional investors). Indeed, with the launch of the UN Environment Programme’s Responsible Investment Initiative,¹³ announced in July 2004 (under which UNEP is working with a group of major institutional investors to develop a set of ‘globally recognised principles for responsible investment’), such an approach may be increasingly practicable.
2. A second approach, albeit more complicated, could see core ethical principles being identified on an industry-by-industry basis – for example drawing authority from some of the major multi-stakeholder assessments of individual sectors’ contributions to sustainable development. However, it is important to recognise that there are few multi-stakeholder initiatives that are without their detractors.
3. The third approach could be to refer to the statements of authoritative individuals. For example, rhetorically, the UN Global Compact could be understood as a reflection of Kofi Annan’s vision of nine (now ten¹⁴) ‘universal

¹² Ward, H. (2001), ‘Corporate Citizenship: Exploring the New Responsibilities. July 2001’ (RIIA, London, UK) citing a conference presentation by Professor Mikhail Gratchev (Institute of World Economic and International Relations, Russian Academy of Science), based on findings from the Wharton School’s GLOBE (Global Leadership and Organizational Behavior) project.

¹³ See http://unepfi.net/stocks/20040715_unep_press_release.pdf

¹⁴ A tenth principle on corruption was added in June 2004.

values' that are capable of application to companies around the world wherever they may be operating.

Each approach has its drawbacks. The overarching outstanding challenge is to develop a robust methodological foundation for identifying 'core ethical principles', including particularly for identifying which stakeholders' views should be taken as the basis for the exercise. We have highlighted a number of options – by no means exhaustive – and some of the issues that they raise.

Norms 'established by the UN and ratified by governments'

Insight's proposed alternative to identifying 'core ethical principles' is to identify a relevant body of international norms 'established by the UN and ratified by governments'. This exercise involves asking which internationally agreed principles and norms should be applied to businesses as part of a set of Global Business Principles – and on what basis.

In practice, as with identification of core ethical principles, there are grounds for challenging almost every candidate set of norms. These include the following.

1. Even international norms established by the UN and ratified by governments are frequently far from globally endorsed or ratified. For example, the Kyoto Protocol and the UN Convention on Biological Biodiversity have not been formally ratified by the United States, even though the US has signed both¹⁵ – a precursor to formal ratification which carries fewer legal consequences.
2. Not all 'international norms' or international norm-setting processes that are potentially relevant lie within the UN family of international organisations. For example, the 1997 OECD Convention on Combating Bribery of Foreign Officials¹⁶ ('OECD Bribery Convention') is not a UN instrument.
3. International norms established by the UN and ratified by governments often do not address businesses directly. This means that such norms are often not very helpful sources of practical guidance on 'global business principles' and need to be translated into a form that is more useful for business. This can be achieved through (a) discrete research projects (as with the Danish Institute for Human Rights Human Rights and Business Project¹⁷), (b) committees of experts (as was the case with the UN Norms on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights¹⁸ which seek to translate international human rights law into obligations), or (c) partnership based activities (as with the 2002 Transparency International/Social Accountability International Business Principles for Combating Bribery¹⁹ or perhaps the Voluntary Principles on Security and Human Rights²⁰). However, the fact that a norm has not yet been translated into a form capable of direct application by business should

¹⁵ Signature is generally interpreted as a signal that a government intends to ratify the treaty but does not, of itself, create binding obligations on the government to ratify.

¹⁶ Available online at

http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1.00.html

¹⁷ See <http://www.humanrightsbusiness.org>

¹⁸ Available online at

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?OpenDocument)

¹⁹ Available online at <http://www.cepaa.org/Document%20Center/AntiBribery.htm>

²⁰ Available online at <http://www.state.gov/g/drl/rls/2931.htm>

not, in our view, prevent it from being included at the level of principle within any overall set of Global Business Principles. We address this further in the next section, where we set out some ideas on the form that Global Business Principles might take.

4. Not all potentially relevant norms are globally endorsed, even if they are applicable worldwide for those businesses that they address. For example, the OECD Bribery Convention or the OECD Guidelines for Multinational Enterprises only formally apply to businesses operating in or from those countries that have committed to them. However, the reach of norms may also extend over time. For example, the OECD Guidelines for Multinational Enterprises have attracted declarations of adherence from eight non-OECD countries, in addition to the OECD member countries.
5. Not all international norms are 'ratified' by governments. Ratification implies a legal status that many important sets of norms (e.g. the OECD Guidelines for Multinational Enterprises or the Rio Declaration or the ILO Declaration on Fundamental Rights) do not have. Some potentially relevant norms have not been developed by governments, even though they may have been developed under the auspices of the UN system. Examples include the UN Norms on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, or the UN Global Compact.²¹ These norms are derived from intergovernmentally agreed instruments, but have not been the subject of a process of authoritative intergovernmental adoption.
6. International instruments that may at first sight appear to form the basis for a core set of 'Global Business Principles' are often far from reflective of fundamental norms of international law, or even globally or near-globally accepted international legal obligations as they affect states. Four examples which illustrate the general problem are a) lack of consensus on which standards to select (e.g. in relation to environmental issues); b) the use of 'soft law' commitments as a means to achieve political consensus in areas where legally binding agreement would not be achievable (e.g. the ILO Declaration on Fundamental Rights and Principles at Work); c) lack of clarity over the legal status of some principles as a matter of international law (e.g. the precautionary principle); d) the distinction between the legal and campaign uses of certain principles (e.g. 'complicity' in human rights abuses). These four issues are considered further in the paragraphs that follow.
 - a) The most commonly cited bases for the development of generally applicable minimum standards of business conduct appear to be the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work (comments on the latter are offered later in this section). It is more difficult to identify a basis for environmental principles. In the absence of a single clear source document, two options are the Rio Declaration on Environment and Development, adopted at the 1992 UN Conference on Environment and Development, and the environmental guidelines applied by the World Bank Group, in particular the environment-related safeguards

²¹ Though the substantive principles of the Compact are derived from intergovernmentally agreed documents.

policies of the International Finance Corporation.²² Yet these two documents are quite different in character to either the Universal Declaration of Human Rights or the ILO Declaration on Fundamental Principles and Rights at Work. The Rio Declaration was a 'soft law' statement of principles of sustainable development negotiated by countries participating in the 1992 UN Conference on Environment and Development. Its principal significance lies in its ability to guide progressive development of sustainable development policy on the part of governments. The application of the Rio Principles to business actors (e.g. through the UN Global Compact) is a much more recent development. The IFC's safeguards policies were developed to provide safeguards in relation to IFC activities. But it should not automatically be assumed that the balance drawn within an intergovernmental institutions like the IFC – for example between environmental protection, poverty reduction and political and commercial practicability, represents an appropriate set of balancing criteria for Global Business Principles applied by private institutional investors that are not subject to the same political considerations of intergovernmental relations. Further consideration would need to be given to the key differentiating characteristics of the two kinds of process. Though it may appear attractive - as a matter of convenience - to point to these two intergovernmentally agreed sources of guidance as appropriate, neither were initially developed with the concerns of private institutional investors in mind.²³ Further analysis would need to be done better to understand how and where the different business activities represented by project finance and institutional investment activities might lead to distinct sets of Principles.

- b) Second, one might consider the 1998 ILO Declaration on Fundamental Principles and Rights at Work.²⁴ The ILO's website describes the Declaration as: "an expression of commitment by governments, employers' and workers' organisations to uphold basic human values – values that are vital to our social and economic lives."²⁵ The Declaration addresses four areas, each supported by ILO conventions, namely:
- Freedom of association and the right to collective bargaining;
 - The elimination of forced and compulsory labour;
 - The abolition of child labour; and
 - The elimination of discrimination in the workplace.

²² Available online at <http://ifcln1.ifc.org/ifcext/enviro.nsf/e11ffa331b366c54ca2569210006982f/dfdb9deca1fd65af85256d800068e29e?OpenDocument>. The IFC's safeguards policies are currently being revised. See <http://www.ifc.org/ifcext/policyreview.nsf/e11ffa331b366c54ca2569210006982f/a71b80c68ca134e085256dfd007cc535?OpenDocument>.

²³ Notwithstanding their application to commercial banks in the context of project financing by virtue of the Equator Principles. See www.equatorprinciples.org.

²⁴ Available online at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_page_name=DECLARATIONTEXT

²⁵ See further, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN

As a 'soft law' reflection of international treaty obligations, the ILO Declaration is a helpful source of guidance on core business principles. However, the international conventions that it is based on are not universally ratified by ILO member countries. Indeed, the Declaration can in part be understood as a political compromise among states – a promotional tool reflecting 'soft law' commitments to the follow-up procedure that it outlines. The Declaration can be understood as a politically achievable alternative to universal ratification of the individual conventions at a time when controversy over the idea of a social clause in the World Trade Organisation was at its height.

- c) A third example concerns the 'precautionary approach,' which has been adopted by companies that are signatories to the UN Global Compact.²⁶ The status of the precautionary approach itself as a matter of international law has been a subject of intense debate and legal argument – both within and outside the courts – since at least the mid 1990s. Many international environment lawyers would like to see a 'precautionary principle' become a generally accepted principle of international law, and have sought to bring together evidence of its crystallisation in this way. So far, however, there has not been any consistent body of authoritative statements from legal tribunals that would support this view. This raises the question of whether the inclusion of the precautionary principle within the UN Global Compact can be interpreted as signifying that the precautionary principle is *de facto* a 'global business principle'?

- d) A fourth example concerns the notion of 'complicity' in human rights abuses. This too has been adopted as one of the nine principles of the UN Global Compact²⁷ and appears, to varying extents, in a number of other voluntary initiatives within the CSR agenda.²⁸ The notion of 'complicity' in human rights abuses has a legal meaning as well as a broader ethical sense. The legal meaning is currently being tested in a number of ongoing court cases in the USA under the Alien Tort Claims Act – including actions against Shell over the impacts of its investment in the Niger Delta, and Unocal over its stake in an investment in Myanmar. Applying a principle of avoiding 'complicity in human rights abuses' as a minimum standard is problematic at a time when the boundaries of 'complicity' are difficult to define.

In conclusion we suggest that the basic 'high level' criterion for identifying norms to be included within the Global Business Principles should be simply whether a norm is 'associated with an intergovernmental process' for application globally. This avoids the problematic entry point of 'ratification' and the need to identify a source process based within the UN system (as distinct from intergovernmental processes outside the UN system). At the same time it emphasises the need to look for global reach, and to broaden the scope of the identification exercise beyond a purely legally based inquiry. In effect, this section has applied a largely legally based analysis to point to

²⁶ Principle 7: "Businesses should adopt a precautionary approach to environmental challenges."

²⁷ Principle 2: "Businesses should make sure that they are not complicit in human rights abuses"

²⁸ See, for example, the International Code of Ethics for Canadian Business, available online at <http://www.cdp-hrc.uottawa.ca/globalization/busethics/codeint.html>

unresolved dilemmas and identify a pragmatic starting point for a more qualitative exercise that is better suited to the dynamic nature of corporate social responsibility and its affinity with the directly expressed preferences of business stakeholders.

5. The format of Global Business Principles

Even agreement on either 'core ethical principles' or on relevant norms associated with an intergovernmental process would not provide guidance to businesses on the practical challenges of implementation. For example, an argument could be made, on both legal and ethical grounds, that a norm against bribery of public officials by business people should find its place in an overall set of Global Business Principles. The problem is that such a principle, at a high level of generality, would still fail to address many borderline cases – for example, concerning so-called 'facilitation payments' or gifts, or payment of bribes by third party 'agents'. Help is at hand in the case of bribery and corruption and a small number of other issues where detailed 'implementation standards' have been developed, whether through detailed legal provisions implementing existing international agreements, or partnership-based standards such as the 2002 Transparency International/Social Accountability International Business Principles for Combating Bribery. These detailed implementation standards might usefully be referred to in an overall set of Global Business Principles, but we suggest that they may be too prescriptive to provide an appropriate basis for engagement by shareholders with management on issues of 'ethical corporate governance'. This is likely to be particularly the case in situations where such engagement may mean making one country's domestic legislation (e.g. the US Foreign Corrupt Practices Act) the basis of a detailed implementation standard applied globally beyond the context for which it was originally intended. The basic problem is that norms can be categorised in a variety of ways depending, for example, on their level of generality – from broad values statements at the highest level of generalisation through to implementation standards at the most detailed.

To illustrate these points, *Box 3* below sets out one option for the format of a set of Global Business Principles based on an overall hierarchy of norms from the general to the specific. But its adoption as presented here raises questions in two broad areas:

- How will Global Business Principles be applied in practice? Our assumptions are that (a) they will be applied in a way that is only prescriptive at the highest level of general principle, and (b) they will be applied in the context of a process of engagement that recognises that there may be multiple means to reach defined ends.
- How to balance principles that define the minimum standards below which no business should be allowed to fall, and those that reflect 'aspirational' standards of behaviour? Our assumption – though it is not necessarily a comfortable one (discussed further in *Section 7* - is that both could, at least in principle, play a role.

Box 3: Possible Format for Global Business Principles

| TYPE OF NORM | COMMENTS |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Value statement | Norms at the highest level of generality – reflecting Insight’s overall values or ‘core ethical principles’ in relation to issues within the corporate social responsibility agenda. The values statement should be capable of standing the test of time. The assumption should be that it will not be changed frequently, save for in the event of extraordinary circumstances or as part of a scheduled review process – say once every five years |
| Principles | The basic norms – expressed at a fairly high level of generality – for application by Insight in its engagement with companies. The principles are likely to include a mix of norms derived from international processes, and norms associated with actual or emergent ‘core ethical principles’. This paper sets out some of the choices to be made in identifying norms under each of these headings |
| Standards | Some principles (for example those relating to corruption or to the use of armed security forces) are now associated with detailed ‘third party’ implementation standards, which may or may not be applicable globally. These standards should probably not form part of the ‘global business principles’ themselves but might be presented as a ‘preferred basis for implementation’ or ‘optional implementation standards’. Insight should, through dialogue, be prepared to accept the adoption of alternative implementation standards as equivalent, at the same time as pointing companies to relevant ‘implementation standards’ where they exist. |
| Guidance | Some principles – e.g. those relating to child labour, freedom of association, or complicity in human rights abuses – may not be associated with detailed implementation standards. Yet failure to offer guidance on implementation could result in undesirable consequences – either for key stakeholders (e.g. children forced out of employment without alternatives), or for companies (e.g. companies working their way through the definitional challenges inherent in the notion of ‘complicity’ in human rights abuses). Here, Insight may choose to develop its own guidance, to help set expectations for its engagement with companies. But guidance should provide only an entry point for discussions, not an absolute standard. Insight might then choose to develop its standards in consultation with external stakeholders, including NGOs and businesses. |

6. Criteria for identifying ‘Global Business Principles’

In earlier sections, this paper offered some reactions to the idea that Global Business Principles could be based on 'core ethical principles' for business responsibility and reflected on Insight's suggestion that a basic starting point for identifying Global Business Principles could be instruments that have been 'established by the United Nations and widely ratified by governments' We have suggested that a more appropriate starting point might be norms “associated with intergovernmental processes for global application.” We have also outlined one possible approach to structuring a set of Global Business Principles.

Along the way, we have highlighted, without resolving, a number of issues for further consideration. These include:

- The key question of ‘whose views of core ethical principles’? This question cannot be avoided simply by choosing to focus on norms associated with intergovernmental processes
- The myth that a clear set of ‘Global Business Principles’ can be readily derived through legal analysis. The reality is that criteria for identification of Global Business Principles will need to have a much messier qualitative basis – one that resonates with the CSR agenda more generally. International legal analysis alone cannot resolve some of the outstanding dilemmas –in particular the problem of translating general statements of principles into norms capable of application directly by businesses – because, with relatively few exceptions, international law does not directly address businesses.

In our view, these issues become much easier to resolve once consensus has been reached on two issues:

- The function of the Global Business Principles within Insight’s (or, more generally, the investment industry’s) overall engagement strategy. This requires that attention be paid to the role that such principles will play in the engagement process and what, if any, ‘sanctions’ or consequences Insight (or institutional investors more generally) will seek to bring to bear in the event that businesses are unable to demonstrate a) compliance and/or b) a commitment to comply.
- The overall framework for the Global Business Principles. We proposed one possible framework in *Box 3* above – ranging from principles at a high level of generality through to detailed implementation guidance. Whether that, or an alternative framework is considered most appropriate will depend, as we have indicated, on the function of the Global Business Principles.

Taking a pragmatic approach, and with these major caveats in place, we suggest that an overall analytical framework for identifying ‘Global Business Principles’ needs to be capable of guiding decision-making on the extent to which each candidate norm for inclusion is **legitimate**, **workable** and **effective** (we call these ‘parameters’). So far, many of the challenges that we have pinpointed relate to the question of ‘legitimacy’. However, for businesses and their external stakeholders, the issues of ‘workability’ and ‘effectiveness’ are also key considerations.

In the remainder of this report we outline some possible ‘tests’ for application under each of the three parameters and point to outstanding issues for further exploration and consideration. Our focus throughout lies with norms associated with intergovernmental processes. Our overall suggested set of tests is set out in summary form in *Box 4* below.

Box 4: Overall Suggested Tests

| PARAMETER | ASSOCIATED TEST(S) |
|----------------------|---------------------------------------------------------------------------------------------------------------------|
| Legitimacy | 1. Was the norm created by legitimate institutions through a legitimate process? |
| | 2. Does the norm enjoy the support of relevant stakeholders? |
| Workability | 3. Is the norm addressed to companies? |
| | 4. Is the wording of the norm clear and unambiguous? |
| | 5. Can the norm be implemented in the political, environmental and geographic contexts in which businesses operate? |
| | 6. Does the norm limit flexibility by prescribing the means to achieve the desired outcome? |
| | 7. Is the norm sensitive to political and market realities? |
| Effectiveness | 8. Is the norm outcome oriented? |
| | 9. Is the norm likely to have unacceptable unintended consequences? |

Parameter 1: Legitimacy

The legitimacy of a norm or principle can be understood in a number of ways. Depending on the context, the term ‘legitimate’ may have the following meanings:

- Accordant with law or with established legal forms and requirements
- Conforming to known principles, or accepted rules
- Serving “the good” of all concerned
- Logically admissible
- Undisputedly credible

For our purposes, it is useful to consider the distinction between two approaches to understanding legitimacy: *“The first view - rooted in international law - contends that a rule or a norm is legitimate if it is created by legitimate institutions. This understanding of legitimacy has led to the importance of “right process” as a standard for assessing international law and legal rules. A second view, however, contends that legitimacy exists primarily at the level of the individual actor rather than the community. That is, a particular rule or norm is legitimate if it enjoys support from the relevant set of actors.”*²⁹ Both of these approaches can form useful tests of the legitimacy of business-related norms.

²⁹ Gelpi, C, *The Power of Legitimacy: Assessing the Role of Norms in Crisis Bargaining* (Princeton University Press, Princeton New Jersey, 2003), p. 14, cited in Maire Dugan’s discussion of legitimacy at <http://www.intractableconflict.org/m/legitimacy.jsp>.

Test 1: Was the norm created by legitimate institutions through a legitimate process?

The origins of a norm are significant. Even if its content is useful, the norm may be tarnished by association with a flawed process or institutional genesis. This is most likely (although not inevitable) if the norm was developed (a) with an original objective different from the current purpose or effect of the norm (e.g. the UN Global Compact Secretariat has repeatedly stressed, against considerable NGO opposition, that the ten principles of the Global Compact are intended to provide a basis for dialogue and engagement; the Compact is not a regulatory mechanism notwithstanding the sources of its principles in international legal instruments. This raises the issue of the extent to which principles designed to provide a basis for dialogue and engagement provide an appropriate basis for 'global business principles'), (b) through a process that was dominated or led by either a limited number of stakeholders, or a limited set of stakeholder interests (e.g. as to the former, the process for developing the UN Norms, which were drafted by a working group composed of just five experts, together with ten other members or alternates of the UN Sub-Commission on the Promotion and Protection of Human Rights who, whilst not members, also attended meetings³⁰) or (c) associated with political controversy (e.g. the 2000 revision of the OECD Guidelines for Multinational Enterprises were to have formed part of the proposed, and ultimately abandoned, OECD Multilateral Agreement on Investment, which attracted widespread opposition from developing country governments. The issue that arises is whether the 'legitimacy' of the Guidelines may be said to be tarnished as a result of this association.). On the other hand, having the pedigree of a legitimate process is likely to enhance the acceptability of a norm to businesses and their stakeholders.

So how could we measure the legitimacy of the institution or process that created the norm? The three points above could possibly be used as subtests here:

- Was the original objective of the norm different from the current purpose or effect of the norm?
- Was the process dominated by particular stakeholders?
- Was the process associated with political controversy?

There may be some clear shortcuts if one assumes that the legitimacy of a process or an institution can be indicated by other factors, such as:

- To what extent is the norm derived from fundamental principles of international law?
- To what extent were states involved in the process?
- To what extent were multilateral organisations involved in the process?

This approach relies on the assumption that connections to legal principles and/or the involvement of governmental or intergovernmental bodies inherently imply that the interests of different stakeholder groups and of society as a whole have been taken into account. In this sense a derivation of norms from international law allows us to bypass the need to repeat this process in the development of the norm. But this assumption is problematic and needs to be discussed further, particularly with respect to the following issues:

- What does 'fundamental' mean in relation to the substance of different norms?

³⁰ For an account of the process, see <http://www.hri.ca/fortherecord2002/documentation/commission/e-cn4-sub2-2002-13.htm>

- Are there different levels of legitimacy among governmental and intergovernmental institutions and processes?
- What is the implication of undemocratic governments being involved in these processes?
- What is the significance of capacity constraints to full participation by developing country governments?
- How significant would it be if some states were not party to the convention or other instrument from which a norm was derived?

For practical purposes, the most straightforward way to measure the legitimacy of the institution or process may be to consider the opinions of relevant stakeholders. This approach derives from the principle of stakeholder engagement which is a recurring theme of corporate social responsibility.³¹ Even where stakeholders recognise that the norm emerged from a process that was not viewed as legitimate, those same stakeholders may nevertheless accept that the norm itself is reasonable. Thus, even if the norm apparently fails Test 1, it may be that this could be overridden by a favourable result in Test 2, as follows.

Test 2: Does the norm enjoy the support of relevant stakeholders?

As noted above, the opinions of stakeholders are key to the legitimacy of a norm. Perceptions of the value and legitimacy of a norm may be more important determinants of its overall legitimacy than the content of the norm itself. However, this approach raises difficult issues which need to be discussed further, as follows:

- Which stakeholders are significant? Is there scope to rank stakeholder groups on the basis of the extent to which they are directly affected by the norm? Or is the selection of stakeholders simply defined by political expediency (e.g. who Insight or the respective company considers as its key stakeholders)?
- To what extent does there need to be consensus among stakeholder groups that the norm is acceptable? Is it sufficient to assess whether each major stakeholder group can 'live with' the norm?

Parameter 2: Workability

The concept of workability is easier to deal with than legitimacy. 'Workability' can be understood as broadly synonymous with "practicable", that is, to take a dictionary definition, "capable of being done with means at hand and circumstances as they are"³². For present purposes, it could also be understood as providing a test that allows filtering of norms that are "meaningful and understandable for businesses". In the context of business-related norms, this parameter could be broken down into the following tests.

Test 3: Is the norm addressed to companies?

This relates primarily to the degree to which a general principle has been translated into a form that is either directly addressed to companies, or capable of direct application by companies.

³¹ See, e.g., Business for Social Responsibility's online Overview of Corporate Social Responsibility at <http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=48809>.

³² For these purposes we have simply taken a definition from www.dictionary.com.

Test 4: Is the wording of the norm clear and unambiguous?

This test aims to provide a filtering mechanism for norms that have ‘woolly’ wording, both so that businesses can understand what is expected of them, and to minimise the potential for technical’ avoidance. However, in some cases – for example, in areas where business principles are still crystallising (e.g. ‘complicity’ in human rights abuses) - such a lack of specificity may be an acceptable price for entry into dialogue with businesses. Whether this matters depends in part on how Insight intends to apply its business principles. If principles are intended to provide a basis for dialogue, rather than a screening mechanism, some ambiguity may be acceptable and even desirable.

Test 5: Can the norm be implemented in the political, environmental and geographic contexts in which businesses operate?

To be realistic and meaningful, it should be possible for the norm to be universally applied. However, this raises problematic issues where compliance is not possible for reasons beyond the control of the business (see discussion below). Therefore, the norm may need to build in scope for exceptions (and guidance on when these exceptions are acceptable), or remain at such a level of abstraction as to allow universal application.

Test 6: Does the norm limit flexibility by prescribing the means to achieve the desired outcome?

Our understanding is that Insight is interested in ensuring that certain business principles are internalised in businesses’ internal ‘corporate citizenship governance’ approaches – not in mandating detailed standards for implementation of business principles. This suggests that global business principles based on general ‘outcome-oriented’ principles might need to be accompanied by regularly updated guidance notes that could be shared not only with businesses but with other key stakeholders – or, in some cases, e.g. corruption, by detailed ‘preferred implementation standards’ such as the 2002 Business Principles for Combating Bribery.

Test 7: Is the norm sensitive to political and market realities?

There is a need to recognise that there are situations in which perfect compliance is not immediately possible, either due to political or institutional circumstances (e.g. national industrial relations practices that contradict internationally accepted norms, such as non-discrimination in Saudi Arabia or freedom of association in China) or economic circumstances (e.g. where introducing a living wage immediately would mean that the company goes out of business). Screening out all norms that generate such challenges could be counter-productive. Nonetheless, this test reflects one set of considerations that will need to be added, and weighted, within the overall mix. Insight will need to make a decision about the balance between ‘minimum’ and ‘aspirational’ principles within an overall set of Global Business Principles. This is considered further below, in *Section 7*.

Parameter 3: Effectiveness

The third parameter relates to the performance value of the substance of the norm. This can be broken down into the following tests:

Test 8: Is the norm outcome oriented?

Although norms are likely to be based on general principles, and to some extent process rather than performance requirements, it should be possible to specify desired outcomes in the context of each company. A norm should not simply be based on the notion of continuous improvement from a low starting point without reference to the eventual desired outcome.

Test 9: Is the norm likely to have unacceptable unintended consequences?

There should be some analysis of the likely side effects of implementation of each norm. Where there are significant negative consequences, including those that prevent the implementation of other norms, this may be a reason for rejection. However, in most cases it is likely that the unacceptable consequences could be avoided, depending on how the norm is interpreted or implemented. Thus, it is probably sufficient to provide guidance notes on flanking measures (e.g. educational opportunities and a gradual removal of child labour from supply chains, rather than an outright ban without regard for livelihood impacts and how harmful alternative employment is likely to be).³³

7. Balancing acts and choices: issues for further exploration

Finding a way through the CSR-driven demand for minimum globally applicable standards of ethical business conduct; the ways in which principles or rules of international law emerge; and the notion of 'core ethical principles' for practical application by business, has highlighted a number of issues for further exploration.

- 1. An initial model of CSR:** The CSR agenda – understood as an agenda that focuses essentially on maximising positive business impacts whilst minimising negatives – is extremely broad. In order to decide which issues fall within the scope of the agenda – and consequently which international instruments are relevant - some initial starting point is needed as a basis for drawing out the scope of the norms to which the more detailed parameters and tests that we have identified would be applied. Even a desire to base Global Business Principles entirely on norms associated with intergovernmental processes is usefully supplemented by this kind of initial framework. Clearly, any overarching vision of CSR must span human rights, economic, social, environmental, and human development issues as well as poverty reduction. However, one of the critical 'boundary' issues that has been addressed by intergovernmental processes, but not, so far, the CSR agenda, is the 'economic pillar' of CSR. The CSR agenda needs to engage more fully with economic issues such as competition policy, technology transfer, transfer pricing, and the notion of 'fair' contractual bargaining. If one adopts this wider perspective on the CSR agenda, additional norms become immediately relevant that might not at first sight have appeared so, including for example a variety of international tax agreements. One instrument that does address these aspects of the agenda in a form capable of direct application by

³³ See e.g. Marcus, R. and Harper, C. *Small Hands: Children in the Working World* (Save the Children Fund UK, London, 1997) summarised in <http://www.id21.org/insights/insights28/insights-iss28-art04.html>.

businesses is the OECD Guidelines for Multinational Enterprises. In the specific context of the financial services sector UNEP's New Responsible Investment Initiative³⁴ may offer an opportunity for institutional investors to explore these issues in more detail.

2. **Balance between the parameters:** Does a norm need to satisfy all three parameters (legitimate, workable and effective)? If not, which take priority? For example, if a norm was established through a flawed process and does not enjoy the support of key stakeholders, it would fail the legitimacy test. But if the content is useful and meaningful, does this matter?
3. **The question of degree:** To what extent should legitimacy as a matter of international law play a part in determining a norm's 'place at the table' in a global set of standards for application by Insight Investment? Related to this, what is the 'added value' of legitimacy of a norm, for Insight's purposes, in terms of its status (or that of a closely related norm) as a matter of international law?
4. **The balance between different kinds of 'inclusion test':** The question of degree is closely related to an overall question of balance. Specifically, what should be the balance between the two exercises that Insight has identified, namely the identification of norms that reflect 'core ethical principles' and the identification of norms that are based on intergovernmental agreement?
5. **Emerging norms:** To what extent should any set of global business principles reflect key topics that are not yet associated with core ethical principles or intergovernmentally agreed norms? Examples include the issues of HIV/AIDs and drugs pricing. Some of the sources of 'CSR controversy' that Insight has identified are not yet the subject of international norms— and may never be. Drugs pricing is a good example: the headline demand is clear, namely 'fair pricing' and, to some extent, a shift in corporate behaviour has been achieved. However, it would probably go too far to suggest that 'fair pricing of drugs' has become a 'core ethical principle' of business practice. One possible conclusion from this example is that there may be some areas where the institutional investors can look to crystallising values or emerging practices as starting points for the development of 'Global Business Principles.' How this set of additional principles is identified is in turn likely to be a consequence of the underlying model of CSR that is reflected in the Global Business Principles.
6. **Presentation of a norm:** Where a norm might be rejected on grounds of legitimacy due to its association with a particularly controversial initiative (e.g, potentially, the OECD Guidelines for Multinational Enterprises or the UN Norms) it may make sense to isolate the individual norm or clause rather than presenting it as part of that source document. The opposite approach may be helpful in other situations, where an individual norm may be more widely respected if it is presented specifically as emerging from a wider package or process. Consequently, there is a need to think carefully about how individual norms are described and presented.
7. **When is it acceptable not to comply?** This question relates particularly to Tests 5 and 7 above. For example, where a norm specifies a different (but not conflicting) standard than domestic legislation, this is not a problem – the

³⁴ See http://unepfi.net/stocks/20040715_unep_press_release.pdf

norm is the minimum, irrespective of domestic legislative requirements. The situation is more problematic in those situations where there are inherent conflicts between a norm and domestic legislation, raising the question of whether domestic legislation or the norm takes precedence. Should Insight take a public position that companies are expected to advocate changes in national legislation that prevent compliance with norms, at the same time as accepting that the primary duty is to comply with national legislation?

8. **Balance between absolute and phased approach:** A related issue is how to deal with norms that are incapable of immediate application on financial or political grounds. What is a 'minimum' to some is an 'aspirational goal' to others. The ongoing debate on the adoption globally of a 'living wage' is a good example. The need to distinguish between what is a 'minimum' and what should be 'aspirational' depends in part on what model of CSR Insight (or institutional investors more generally) would like to apply and how it wishes to position its entry point for engagement with companies. In the absence of a 'CSR model' against which to judge what themes are relevant or irrelevant, it is difficult to develop a coherent set of criteria for distinguishing between minimum and aspirational principles. Adding aspirational goals to the overall mix could detract, in some peoples' eyes, from the status of Global Business Principles as the minimum below which no business should fall. Nonetheless it might perhaps be argued that as a globally applicable minimum *aspiration*, the notion of a 'living wage' is attractive, notwithstanding the considerable challenges in operationalising it. There is a clear need to avoid unachievable starting points and unreasonable expectations (including that of open-ended continuous improvement). In some circumstances there may be a legitimate need for a phased rather than an absolutist approach. But how can this be applied without weakening the purpose of setting absolute norms? Is it useful to distinguish between absolute and aspirational norms (the latter being impractical immediately but too important to leave out altogether)? Deciding whether to include such principles within an overall set of Global Business Principles will need further reflection.
9. **Contested norms:** There are many instances where norms are contested, or there is no agreement on how a (often widely recognised) principle should be translated into practice (e.g. living wage, complicity with human rights abuses, precautionary principle). Insight will need to consider how to deal with such cases.

8. **Concluding comments: whose values and who decides?**

Discussion on the potential role of a set of Global Business Principles for institutional investors has not yet reached a point where it is possible to map a coherent set of next steps for a single institutional investor. Strategic choices over the form in which Global Business Principles are applied, the definitional starting points, and methodological approaches, are all intertwined. This paper has highlighted some key issues for further consideration with others in the wider institutional investment and corporate responsibility communities.

As commercial enterprises, institutional investors have their own set of business priorities. They work to improve the ethical conduct of the businesses that they invest in through a variety of engagement activities that seek to retain, not destroy, shareholder value. They tend to move in packs with other stakeholders rather than leading in the process of norm development beyond their own sectors. These factors

pose particular challenges in any endeavour to develop Global Business Principles. Perhaps with the exception of human rights organisations, corporate campaign pressure rarely majors on references to breaches of possible 'global business principles' where they are not binding as a matter of law.

The single largest challenge as the Global Business Principles project moves forward is to identify an appropriate *process* for defining Principles and addressing the overall strategic choices and key challenges that we have set out. Pointing to norms associated with intergovernmental processes as the basis for Global Business Principles, as we have found, offers few shortcuts. Questions such as: whose values, who decides, when, and how, cannot be sidestepped.

The overall corporate social responsibility agenda has not yet reached a level of maturity where it is credible to begin other than from first principles. At IIED, our clear preference would be, to the greatest extent possible, to seek to devise a process that stretches beyond the institutional investment industry itself to reach stakeholders in developing countries. Whether that is commercially feasible for the sector itself remains to be seen. This is by no means to suggest that the idea of basing Global Business Principles on norms associated with intergovernmental processes is flawed – simply that it cannot be undertaken effectively, or indeed credibly, as a desk exercise divorced from a process of stakeholder engagement and dialogue. We hope that this discussion paper may provide a basis for such an exercise.