The New OECD Guidelines for Multinational Enterprises: Better But Not Enough

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Abstract

The purpose of this Viewpoint is to addresses the extent to which the OECD Guidelines for Multinational Enterprises adequately serves as a system of global governance for MNEs. We argue that, while a 2011 revision has strengthened the Guidelines, their somewhat limited scope, voluntary nature and less-than satisfactory implementation render their potential utility unrealized.

Introduction

Multinational enterprises (MNEs) are profit-generating entities that engage in the production of goods and services in more than one county. In the context of socio-economic development, the process of foreign direct investment (FDI) in which MNEs engage can have both benefits and costs. Therefore, the purpose of governing the behavior of MNEs would be to enhance the advantages of FDI and, more importantly, to mitigate the disadvantages.[1] However, governing institutions of MNEs are *much weaker* than those in other realms of global economic activity. For example, while the World Trade Organization (WTO) governs international trade and the International Monetary Fund (IMF) governs international finance, no such institutional counterpart exists in the realm of international production.[2] This situation leaves a major lacuna in the global governance system that has been partially filled by the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines). The purpose of this Viewpoint is to address the extent to which the OECD Guidelines address this global governance failure. We argue that, while a recent revision has somewhat strengthened the Guidelines, their overall lack of binding power and less-than satisfactory implementation render their full utility unrealized.

History and Context

Efforts to influence and govern MNE behavior go back to the late 1960s. For example, in 1969, a panel convened by the United Nations (UN) Secretary General at the direction of the Economic and Social Counsel (ECOSOC) led to the adoption of an "Agreed Statement" that articulated several understandings and forward steps for MNEs to consider. It was agreed both that MNEs

need to recognize the development objectives of their host countries and that these objectives were best identified by the host countries themselves rather than by MNEs. While today the latter point might seem obvious, at the time, it was a significant policy step. In the late 1970s, under the auspices of the United Nations Conference on Trade and Development (UNCTAD), attention turned to the effects of restrictive business practices on the development processes of host countries. This led to a 1980 United Nations (UN) conference on restrictive business practices and an associated "Set of Principles and Rules."[3] At the time, an issue of debate was whether to make the guidelines mandatory or voluntary. Ultimately, it was decided that they were to be considered *recommendations* for national law rather than mandatory rules to be adjudicated by an international body (Benson, 1981), a decision that was to carry over into the OECD Guidelines.

Another panel was appointed by the UN Secretary General in 1972 in response to the perceived MNE influence on host country policies. Based on the panel's findings, the UN Secretariat prepared a report that identified many host-country concerns and concluded that a comprehensive Code of Conduct on MNEs should be prepared.[4] This process resulted in the establishment of the United Nations Commission on Transnational Corporations and the United Nations Center on Transnational Corporations. These entities initiated the negotiation of a multilateral Code of Conduct for MNEs. This Code laid out a number of responsibilities that pertained to the legal purview of states to monitor and regulate MNE activities, the alignment of MNE activities to development goals, MNE non-intervention in the political affairs of the country, MNE respect for cultural practices and traditions in host countries, and identifying the reporting requirements of MNEs. The Code also included anti-corruption provisions from the previously-described agreement on restrictive business practices. However, there was disagreement regarding the issue of technology transfer, the nationalization of foreign assets, and whether state-owned enterprises should be treated as MNEs. Once again, an issue of conflict was whether the Code should be mandatory or voluntary. Despite some significant effort to craft the Code and despite some success in reaching agreement, the tenor of meetings became contentious and work on the Code was abandoned.[5]

Moving forward in time, most of the existing frameworks on standards with regard to FDI address host-country polices and are geared towards protecting investors and ensuring

limited interference. These standards are often codified into bilateral investment treaties (BITs), defined by the United Nations Conference on Trade and Development (UNCTAD) as "agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country."[6] BITs have grown rapidly over time, from approximately 400 in 1990 to nearly 3,000 at the current time (UNCTAD, 2015). As noted by Anderson (2009-2010), "the substance of post-World War II bilateral investment treaties has not changed substantially over time, and they still omit many rights of and protections for individuals and communities in host countries" (p. 13). This focus on BITs rather than more multinational approaches to MNE governance is a significant shortcoming of current institutional arrangements to govern MNEs.

The OECD Guidelines

In 1976, the OECD adopted the OECD Guidelines for Multinational Enterprises, a framework for a non-binding, soft-law mechanism to help enforce MNE ethical conduct. The non-binding, soft-law approach was deliberate, because the intent of the Guidelines was and is not to legislate, but as the name suggests, to guide.[7] The 1976 version of the Guidelines originally appeared as an annex to the OECD's Declaration on International Investment and Multinational Enterprises and consisted of nine chapters. This version of the Guidelines did not apply outside of OECD countries and was limited to the standards of the countries in which MNEs operated.

The 2000 revision of Guidelines proved to be important. The 2000 version addressed concerns regarding human rights, local capacity building, labor relations, health and the environment, corporate governance, and science and technology. This version is summarized in the Appendix. An assessment of the 2000 revisions by Murray (2001) noted that the revised Guidelines formed a useful complement to the core labor standards of the International Labor Organization (ILO) and could serve as a point of reference for groups concerned with MNE behavior. There was also an increased emphasis on standards of conduct, closer connections to international law, and an increased global focus. The 2000 revision applied to 34 OECD member countries. However, additional countries agreed to the Guidelines, bringing the total number of adhering countries to 42.[8] This, plus endorsements by the G-8 and the United Nations Secretary General's Special Representative on Business and Human Rights, contributed to the evolving global reach and

relevance of the Guidelines. The 2000 revision also applied to MNE operations outside of OECD countries as well as within them.

While the 2000 revision was still non-binding, two developments contributed to its applicability. First, the 2000 Guidelines somewhat strengthened an implementation mechanism known as National Contact Points (NCPs) that had been initiated as part of the 1979 Guidelines Review. The 2000 version introduced a set of enhanced procedural guidelines, annual meetings and transparency-enhancing reporting requirements for the NCPs. It also facilitated the ability of labor organizations, businesses and non-governmental organizations (NGOs) to become involved in processes related to the Guidelines, including requesting consultations with NCPs.[9] As of the end of 2015, over 330 "instances" of NCP activity had taken place.[10]

Second, in 2006, the OECD adopted a Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. This related to a point previously made by Murray (2001): While other global guidelines such as the core labor standards of the International Labor Organization (ILO) assume a modicum of governance on the part of states who have signed on to the standards, many MNEs operate in environments where governance structures are quite weak. Consequently, to some extent, the Guidelines became a supplement to ILO standards.[11]

The 2011 Guidelines

The most recent update of the OECD Guidelines occurred in 2011, and this new iteration is also presented in the Appendix. As seen in the Appendix, the guidelines were expanded from 11 to 15. The Guidelines are still presented as "recommendations" and "non-binding principles and standards" by the OECD (OECD, 2011) and have been adopted by 45 countries.[12] While the 2011 Guidelines are non-binding on MNEs, countries adhering to them make a "binding commitment to implement them." As such, aspects of the Guidelines are binding on countries but not on MNEs, in keeping with a long tradition of avoiding any real requirements on MNEs themselves, while attempting to influence the social and economic policy and legislation of adhering states.[13]

The United Nations Special Representative on Human Rights and Transnational Corporations (2010) had suggested that human rights be given a stand-alone chapter within the Guidelines. This concern has been addressed. The second guideline of the 2000 version was to:

"Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." This has been modified to: "Respect the internationally recognized human rights of those affected by their activities." With this change, the 2011 version has reduced the ambiguity of the previous version in that it applies to *all* internationally recognized human rights.[14] The 2011 update suggests a "risk based due diligence procedure" in order to identify and remedy human rights infractions.

A risked-based due diligence approach is also applied in Guidelines 12 and 13 to "responsible supply chain management." As such, the Guidelines' recommendations extend beyond the actions of the MNE to their suppliers and business partners, and an MNE can thereby in principle be held responsible for the infractions of their business partners, a step in the right direction.

The previously-discussed NCPs remain a part of the 2011 version of the Guidelines, and this is where some observers suggest that the Guidelines are binding on countries.[15] The document states: "Governments adhering to the Guidelines will implement them and encourage their use. They *will establish* National Contact Points that promote the Guidelines and act as a forum for discussion of all matters relating to the Guidelines" (OECD, 2011, p. 18, emphasis added). The Guidelines mandate that NCPs respond to other NCPs, the business community, worker organizations, NGOs, and the public at large. The NCP remit is therefore quite large.

While the NCPs continue to be somewhat useful in addressing inquiries and concerns, they have two major flaws. First, they lack a standard structure, and the question of how to implement them is left entirely up to the individual country, resulting in many different manifestations of NCPs with varying degrees of effectiveness. Second, NCPs do not have the resources and capabilities to carry out their functions even when their responsibilities are made clear. For example, they lack the power to adjudicate violations of the Guidelines or to enforce agreements stemming from deliberations that take place in their jurisdictions. Unfortunately, the 2011 revision of the Guidelines has not adequately addressed these ongoing issues.[16] While the NCP process is potentially binding on countries, there is no real authority to ensure that country governments act in ways to enforce the MNE behavior prescribed in the Guidelines.

Somewhat more positively, the human rights and NCP issues intersect in the 2011 Guidelines. Between 2001 and 2011, there were 5 NCP "instances" on human rights issues.

From 2011 to 2015, there were 73 additional human rights "instances." While still not evidence of any *effectiveness* of the NCP process in the human rights realm, a significant change can be observed.

Promise and Limitations

In their review of the role of FDI and MNEs in global development processes, Goldin and Reinert (2012) called for *binding, de minimis* guidelines for MNE behavior. Similarly, Anderson (2009-2010) called for a "mandatory legal framework" in this area. The OECD Guidelines represent a fairly comprehensive, non-binding code of conduct for the behavior of MNEs across a number of issue areas. Although often described by the OECD as "multilateral," they are perhaps best seen as "plurilateral" in the trade policy sense. That is, they apply to a restricted number of agreeing countries. Their non-binding, plurilateral nature limits the utility of the Guidelines, but limited utility is still utility, and the scope of the Guidelines across a number of issue areas remains useful.

The 2011 version of the Guidelines retained the non-binding, plurilateral nature of the 2000 version. Although the new changes address issues not adequately covered in the 2000 version, the method of execution still falls short. The NCP system is inherently flawed due to there being no real authority on what form NCPs should take and how they should operate. While they have made some progress over the 2000 version, until the global policy community is prepared to embrace a subset of the Guidelines in *binding* form and extend the binding requirements to a larger number of countries, the regulatory environment for MNEs will remain woefully incomplete.

Nearly the entire structure of the WTO is binding on member countries due to a robust Dispute Settlement Mechanism (DSM). The conditionality structures of the IMF and World Bank also offer a significant amount of binding in their dealings with those countries partaking of their grant and lending services. Given the far-reaching impacts of FDI on multiple aspects of development processes (human rights, employment and wages, competition, education and training, technology development, balance of payments, health, the environment, culture, and politics), it would seem reasonable to expect binding, *de minimis* governance system for MNE behavior. Although the 2011 Guidelines are an improvement upon previous versions, they are

not good enough. The reasonable expectation for robust global governance of MNEs has not yet been fulfilled.

Endnotes

[1] See, for example, Chapter 22 of Reinert (2012). The most recent version of the OECD Guidelines for Multinational, to be discussed below, stated: "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 minimize the difficulties to which their various operations may give rise" (OECD, 2011, p. 15).

[2] Recognizing this, Anderson (2009-2010) stated that "although international trade law developed and matured, multilateral foreign direct investment law stagnated" (p. 2). Ruggie (2008) also pointed out what he called "governance gaps" in the area of international business.

[3] See Chapter 1 of Dell (1990).

[4] See Chapter 1 of Dell (1990) and Bair (2015).

[5] See Sagafi-Nejad (2009). This also resulted in the Center for Transnational Corporations being transferred to UNCTAD.

[6] UNCTAD also reported that: "Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favored-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state."

[7] This reflected pressure from OECD member countries and MNEs themselves. Reflecting this non-binding nature, Murray (2001) referred to the 1976 Guidelines as "abstentionist."

[8] These included Argentina, Brazil, Egypt, Estonia, Latvia, Lithuania, Peru, and Romania. Estonia became an OECD member in 2010.

[9] See, for example, Bowman (2006) on potential indigenous use of the NCP.

[10] See mneguidelines.oecd.org/database/.

[11] The OECD (2010) reported that a significant number of NCPs promoted the Risk Awareness Tool.

[12] The non-OECD countries currently part of the Guidelines are Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

[13] See, for example, Santner (2011).

[14] As seen in the Appendix, human rights are now also included in Guideline 5.

[15] See, for example, Robinson (2014). This is made possible by Article 5 of the OECD Convention that allows the OECD Council to "take decisions which, except as otherwise provided, *shall be binding* on all the Members" (emphasis added). OECD Legal Instruments state that "Council Decisions are legally binding on all those Member countries which do not abstain at the time they are adopted. While they are not international treaties, they do entail the same kind of legal obligations as those subscribed to under international treaties. Members are obliged to implement Decisions and they must take the measures necessary for such implementation." Further, the 2000/2011 Council Decision on the Guidelines includes four "Decisions" on the NCPs that all use the world "shall." This leads us to conclude that there is a binding aspect of the NCP mechanism.

[16] Robinson (2014) was blunt in this regard, stating that "simply put, the current reality is that the NCP system is in poor shape" (p. 72) and "the 2011 update to the MNE Guidelines… does not seem to have had laid any more of a foundation for a more cohesive and competent NCP activity in the future, nor for a general decrease in maladministration" (p. 73).

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Appendix: The 2000 and 2011 OECD Guidelines Compared

Number	*2000 Version*	*2011 Version*	*Comment*
1	Contribute to economic, social and environmental progress with a view to achieving sustainable development.	Contribute to economic, environmental and social progress with a view to achieving sustainable development.	Essentially the same.
2	Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.	Respect the internationally recognized human rights of those affected by their activities.	The 2011 version recognizes human rights consideration independent of host-country obligations.
3	Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.	Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.	No change.
4	Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.	Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.	No change.
5	Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labor, taxation, financial incentives, or other issues.	Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labor, taxation, financial incentives, or other issues.	The 2011 version includes human rights.
6	Support and uphold good corporate governance principles and develop and apply good corporate governance practices.	Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.	Corporate governance principles extend throughout enterprise groups.

Number	*2000 Version*	*2011 Version*	*Comment*
7	Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.	Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.	No change.
8	Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programs.	Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programs.	A slightly increased focus on the workers of MNEs.
9	Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.	Refrain from discriminatory or disciplinary action against workers who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.	Essentially the same.
10	Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.	Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.	Risk-based due diligence is given a great deal more emphasis.
11		Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.	Calls upon MNEs to take a more active role in support of the Guidelines.

Number	*2000 Version*	*2011 Version*	*Comment*
12		Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.	Extends responsibility beyond the MNE itself to business partners.
13		In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.	Extends responsibility beyond the MNE itself to business partners.
14		Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.	Calls upon MNEs to take a more active role in support of the Guidelines.
15	Abstain from any improper involvement in local political activities.	Abstain from any improper involvement in local political activities.	No change.