A SOFT LAW MECHANISM FOR CORPORATE RESPONSIBILITY: HOW THE UPDATED OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES PROMOTE BUSINESS FOR THE FUTURE

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I. INTRODUCTION

Over the past decade, international business and foreign direct investment have experienced far-reaching structural change. In response, the Organisation for Economic Co-operation and Development (OECD) released the update of its Guidelines for Multinational Enterprises (MNE Guidelines) in May 2011. Under the new MNE Guidelines, a total of forty-two countries have committed to stronger standards for corporate behavior. For the first time, an inter-governmental agreement has put forth guidelines on human rights abuse by corporate entities and responsibility for their sup-

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2. The OECD Guidelines for Multinational Enterprises (MNE Guidelines) are: recommendations addressed by governments to multinational enterprises. The [MNE] Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. . . . [C]ountries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore, matters covered by the Guidelines may also be the subject of national law and international commitments.

Id.

3. The thirty-four OECD countries: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States, Members and Partners, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/document/25/0,3746,en_36734052_36761800_36999961_1_1_1,00.html (last visited Nov. 9, 2011), plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania, MNE Guidelines, supra note 1, at 7 n.1.
ply chains. This Article provides an overview of several of the new features of the MNE Guidelines. It argues that the MNE Guidelines have demonstrated the potential for soft law to be as effective as hard law in changing corporate culture. Case law from the National Contact Points (NCPs)\(^4\) acts as evidence of the development and implementation of soft law norms within the context of the MNE Guidelines. The OECD, through soft law measures, has confirmed its influence and will continue to play a major role in developing stronger governance of multinational enterprises and other international economic activities. One of the highlights of the OECD’s work is that it is continually evolving and adapting to the growing needs of a global marketplace. Through its latest update of the MNE Guidelines, the OECD affirms its commitment to addressing tomorrow’s challenges.

Part II of the Article provides an analytical look at the nature of Multinational Enterprises (MNEs) and the cross section of surrounding issues encompassed by public international law and corporate responsibility. Part III focuses on the influence of the OECD as an international economic organization on corporate responsibility and outlines the background of the update of the MNE Guidelines. Part IV highlights several prominent features of the update of the MNE Guidelines and identifies remaining issues of scope and institutional framework for the future. The process of the update shows how the MNE Guidelines act as a soft law mechanism that is effective in improving global corporate behavior.

II. THE NATURE OF MULTINATIONAL ENTERPRISES WITHIN PUBLIC INTERNATIONAL LAW

The protection and promotion of individual human rights are core functions of public law recognized by most international agreements as a duty on states. Due to the fact that MNEs have a substantial influence on local communities, they should arguably have more responsibility in upholding high levels of environmental

\(^4\) The MNE Guidelines explain the role of the National Contact Points (NCPs), as follows:

The role of . . . NCPs is to further the effectiveness of the [MNE] Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence . . . . An NCP can consist of senior representatives from one or more Ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organizations and other non-governmental organizations may also be included.

*MNE Guidelines, supra* note 1, at 71.
and social accountability. Furthermore, “[t]he business community shares responsibility for restoring growth and trust in markets.” An evaluation and analysis of corporate behavior of MNEs begs the question “whether voluntary self-regulation by firms through corporate social responsibility can [truly] operate as an effective channel for transnational norm implementation.” “To the extent that these private sector standard-setting and benchmarking activities are effective, questions loom regarding their ability to reflect choices congruent with the public values underlying the private commitments.” When dealing with multifaceted issues intertwined between the public and private sector, it helps to step back and take a global approach.

When MNEs assume responsibility in relation to individual rights, they act as private actors promoting public law norms through voluntary activity. Additionally, MNEs “have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between economic, environmental and social objectives.” In this way, corporate responsibility activity by MNEs not only overlaps with the subjects of public law, but also connects directly with the norms of public international law. Instead of countries mandating corporate behavior through a top-down legislative approach, MNEs can actually act as the catalyst for countries to attain public goals because MNEs operate within several countries and seek to operate on a level playing field across their markets. For example, several corporate responsibility codes and reports explicitly reference instruments drawn from public international law. The MNE Guidelines and the U.N. Global Compact incorporate principles drawn directly from public international law. Thus, international

8. Id. at 199.
9. See id. at 151.
10. MNE Guidelines, supra note 1, at 14.
11. See Cahn & Gambino, supra note 5, at 656.
13. Org. for Econ. Co-operation & Dev., Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility, in ANNUAL REPORT ON THE OECD GUIDELINES FOR
law should encourage not just MNEs, but also the countries themselves to undertake public goals.\textsuperscript{14} Guidelines such as these can exert pressure to improve governance and the investment climate multilaterally—through the MNEs which then transfers to the countries or vice versa.\textsuperscript{15} This pressure can be categorized as being derived from two different sources. One strategy relies on external actors who may promulgate mandatory or voluntary\textsuperscript{16} standards, while the second strategy depends on internal actors, such as non-governmental organizations (NGOs), voter influence, or pressure through the legal system.\textsuperscript{17}

Through external pressure, international NGOs, development banks, and other multilateral institutions can influence governments and other institutions within countries.\textsuperscript{18} External pressure from intergovernmental organizations can also be very effective in achieving public goals. On the other hand, internal pressure can be derived from national civil society organizations, indigenous groups, and individuals. In response, MNEs have “directly engaged with consumers and NGOs through meetings, publicity campaigns, or other types of actions.”\textsuperscript{19} However, “[t]he external and internal strategies must be integrated, particularly given the difficulties of enforcing both international law and voluntary guidelines from outside the country.”\textsuperscript{20}

A respect for high standards of business conduct has led to enhanced growth in many MNEs.\textsuperscript{21} Thus, many MNEs view it as common practice—and good business sense—to adopt voluntary codes of conduct and corporate responsibility, in which the industry itself engages in self-policing, and adopts its own internal guidelines.\textsuperscript{22} However, the level of enforcement may be questionable. In their study of Environmental Protection Agency self-policing programs, Jodi Short and Michael Toffel found that enterprises are more likely to self-report when they expect that there will be conse-

\begin{thebibliography}{9}
\bibitem{14} Cahn & Gambino, \textit{supra} note 5, at 656.
\bibitem{15} \textit{Id.}
\bibitem{16} The MNE Guidelines represent the case of an external actor promulgating voluntary standards.
\bibitem{17} Cahn & Gambino, \textit{supra} note 5, at 663.
\bibitem{18} \textit{Id.}
\bibitem{19} \textit{Id.} at 665.
\bibitem{20} \textit{Id.} at 663–64.
\bibitem{21} \textit{MNE Guidelines, supra} note 1, at 14.
\bibitem{22} Public opinion and peer pressure are two policy reasons that MNEs seek to implement internal codes of conduct.
\end{thebibliography}
quences for non-compliance. Recognizing that binding international law with enforcement provisions and disclosure requirements would be most effective in this area, Naomi Cahn and Anthony Gambino suggest the utility of monitoring by watch groups, NGOs or industry self-regulatory organizations. Nonetheless, international law with enforcement provisions has been slow to evolve for numerous reasons. Since 1976, the OECD has sought to fill these gaps in international law through actively bringing together governments and business to reach consensus on several principles of responsible business conduct through the MNE Guidelines, and has remained dedicated to keeping these principles relevant and adaptable to the current business climate.

III. THE OECD’S INFLUENCE ON CORPORATE RESPONSIBILITY

As an international economic organization, the OECD is uniquely suited to tackle cross-cutting issues. The OECD plays a “supranational” role through managing international economic
interdependence through “informal policy cross-check[s], [ ] mechanism[s] to identify international best practices, and [avenues] for governments to evaluate their own results.”28 As an enhancement to national governance practices and international corporate behavior, the OECD offers legitimate added value to the global marketplace. Despite the fact that its intergovernmental mode of decision-making through a consensus based approach does not apply formal pressure on its members or on administrative law as a whole, the OECD’s work product has amounted to a number of principles, guidelines, and practices that in operation promote and define good governance.29

Most notably, the OECD has developed three principle sets of norms relevant to MNEs that have developed into international benchmarks for policy makers and corporations alike30: the OECD Principles of Corporate Governance,31 the Guidelines on Corporate Governance of State-Owned Enterprises,32 and the MNE Guidelines. This Article will only focus on the MNE Guidelines, but it is important to understand the structure of the MNE Guidelines within the OECD policy framework. The MNE Guidelines constitute one element of the 1976 OECD Declaration on International Investment and Multinational Enterprises (OECD Declara-


28. Id. at 1547.

29. See id. at 1541.


31. See generally ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE (2004) (with a focus on publicly traded companies, the OECD Principles of Corporate Governance, adopted in 1999 and revised in 2004, provide specific guidance for policymakers, regulators, and other market participants in order to improve legal, institutional, and regulatory frameworks that underpin corporate governance).

A Soft Mechanism for Corporate Responsibility

Each of the elements of the OECD Declaration is underpinned by a decision by the OECD Council on follow-up procedures.

“For over 35 years, [the MNE Guidelines] have occupied a unique space within the world of corporate social responsibility. . . . bring[ing] together labor, civil society, and business to create the broadest possible consensus behind them. [They are] truly the work of a global policy network in action.” At their core, the MNE Guidelines strive to “coordinate the law systems of states with the social norm systems of large corporate actors for the purpose of harmonizing behavior standards at the international level.”

One of the common aims of adhering governments is to encourage and promote the positive contributions that MNEs can make to economic, environmental, and social goals and to minimize the negative aspects of their operations.


34. There are four elements of the OECD Declaration on International Investment and Multinational Enterprises. The three decisions in addition to the MNE Guidelines include: (1) “National Treatment,” a voluntary undertaking by adhering countries “to accord to foreign-controlled enterprises operating in their territories treatment no less favorable than that accorded to domestic enterprises in like situations”; (2) “Conflicting Requirements,” an agreement by adhering countries to co-operate so as to avoid or minimize the imposition of conflicting requirements on MNEs; and (3) “International Investment Incentives and Disincentives,” a voluntary endeavor by adhering countries to make investment measures as transparent as possible. See Directorate for Fin., Fiscal and Enter. Affairs, supra note 33, at 2.

35. Hillary Rodham Clinton, Secretary of State, Remarks: Commemoration of the 50th Anniversary of the OECD on Guidelines for Multinational Enterprises (May 25, 2011).


37. MNE Guidelines, supra note 1, at 15.
The MNE Guidelines act as an outreach mechanism for working towards these shared goals through a consultative approach.\textsuperscript{38} Looking internally to the process, the update benefited from extensive consultations with multistakeholders: business, trade unions, NGOs, international organizations, as well as a broad range of OECD bodies and non-member countries.\textsuperscript{39} It is with this spirit that, at the fiftieth anniversary of the OECD Ministerial Council Meeting on May 25, 2011, the Ministers made the adoption of the update official.\textsuperscript{40}

IV. THE MNE GUIDELINES: AN EFFECTIVE SOFT LAW MECHANISM

The highlights of the update of the MNE Guidelines include a chapter on human rights, provisions on responsible supply chain management, elaborated guidance on implementation procedures, and clarity on the role of the OECD Secretariat.\textsuperscript{41} The OECD also updated nearly all of the existing chapters, including provisions on fair wages, combating the solicitation and extortion of bribes, and the promotion of sustainable consumption.\textsuperscript{42} These updates seek to tackle the strategic challenges raised by various stakeholders operating in today’s global marketplace. Each of the highlights is addressed in detail below.

One of the primary highlights of the MNE Guidelines includes a full chapter on human rights aspects in business. The 2000 version of the MNE Guidelines encouraged companies to respect human rights; the 2011 version recommends a risk-based due diligence procedure in order to identify and address human rights abuses and violations.\textsuperscript{43} The Commentary on Human Rights further explains practical applications to assist government officials.\textsuperscript{44} Specifically, the MNE Guidelines recommend, as follows, that MNEs should:

\begin{itemize}
\item \textsuperscript{38} See id.
\item \textsuperscript{40} Guidelines for Multinational Enterprises: About, supra note 26.
\item \textsuperscript{41} See generally MNE Guidelines, supra note 1, at 24, 25, 31–35, 65, 74.
\item \textsuperscript{42} See generally id. at 5.
\item \textsuperscript{43} Id. at 31.
\item \textsuperscript{44} See id. at 31–34.
\end{itemize}
Within the context of their own activities, avoid causing or con-
tributing to adverse human rights impacts and address such
impacts when they occur; Seek ways to prevent or mitigate
adverse human rights impacts that are directly linked to their
business operations, products or services by a business relation-
ship, even if they do not contribute to those impacts; Have a
policy commitment to respect human rights; Carry out human
rights due diligence as appropriate to their size, the nature and
context of operations and the severity of the risks of adverse
human rights impacts; Provide for or co-operate through legiti-
mate processes in the remediation of adverse human rights
impacts where they identify that they have caused or contrib-
uted to these impacts.45

This language is significant because it represents the first time that
business conduct is tied to human rights through an OECD instru-
ment. Furthermore, the provisions draw “upon the United Nations
Framework for Business and Human Rights ‘Protect, Respect and
Remedy’ and [are] in line with the Guiding Principles for its
Implementation.”46 Interested stakeholders can bring allegations
of breaches by MNEs to the adhering country’s NCP, but the spe-
cific instance giving rise to the damage can occur anywhere.47 The
MNE Guidelines also provide, as follows:

In all cases and irrespective of the country or specific context of
enterprises’ operations, reference should be made at a mini-
imum to the internationally recognised human rights expressed
in the International Bill of Human Rights, consisting of the Uni-
versal Declaration of Human Rights and the main instruments
through which it has been codified: the International Covenant
on Civil and Political Rights and the International Covenant on
Economic, Social and Cultural Rights, and to the principles con-
cerning fundamental rights set out in the 1998 International
Labour Organisation Declaration on Fundamental Principles
and Rights at Work.48

45. Id. at 31.
46. Id.
47. Id. at 81. The MNE Guidelines explain, as follows:
When issues arise from an enterprise’s activity that takes place in several adhering
countries or from the activity of a group of enterprises organised as consortium,
joint venture or other similar form, based in different adhering countries, the
NCPs involved should consult with a view to agreeing on which NCP will take the
lead in assisting the parties.
48. MNE Guidelines, supra note 1, at 32.
A second highlight is the MNE Guidelines’ progressive approach to responsible supply chain management in the context of corporate responsibility. In this vein, recommendations extend beyond a company’s own actions to those of its suppliers and others along the business relationship, forming a link of responsibility. The MNE Guidelines encourage MNEs to:

[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 . . . and [to] account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.]

In line with following the supply chain, if an NCP determines that there is a violation, complicity with that action can also be deemed a violation leading to liability. However, this recommendation “is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship,” which will help to maintain incentives for good behavior.

Third, the MNE Guidelines clarify and strengthen the enforcement and implementation procedures. “The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.” While there is no enforcement or sanctions, the decision is publicly available, which can significantly affect stakeholders. The procedural guidance on mediation for NCPs also now includes clear indications on suggested timelines, handling parallel proceedings, and reaching conclusions in the process depending on the decision of the NCP.

Finally, the MNE Guidelines now specifically recognize the role of the OECD Secretariat in assisting NCPs in fulfilling their tasks in

49. *Id.* at 20.
50. *See id.* at 24 (“In the context of its supply chain, if the enterprise identifies a risk of causing an adverse impact, then it should take the necessary steps to cease or prevent that impact.”). In practice, failure to so can be deemed to be a violation. *Id.*
51. *Id.* at 20.
52. *Id.* at 18.
53. *Id.* at 73.
54. *Id.* at 83 (“When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.”).
55. *See id.* at 84–85.
assisting companies resolve issues with their stakeholders. The Secretariat will “facilitate peer learning activities, including voluntary peer evaluations, as well as capacity building and training, in particular for NCPs of new adhering countries, on the implementation procedures of the Guidelines such as promotion and the facilitation of conciliation and mediation.” The Investment Committee will also commit to providing more resources and tools to assist NCPs. For example, the OECD Risk Awareness Tool for MNEs in Weak Governance Zones developed by the OECD Investment Committee has been particularly effective in addressing economic and social issues in an evolving landscape. Finally, “the Investment Committee shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the [MNE] Guidelines and the experience gained in their application.”

Furthermore, it is interesting to observe the depth and breadth of the scope and application of the update of the MNE Guidelines. Undoubtedly, the promotion of responsible business conduct depends on active engagement with all stakeholders, no matter their size. The MNE Guidelines state, as follows:

 Governments wish to encourage the widest possible observance of the [MNE] Guidelines. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the [MNE] Guidelines nevertheless encourage them to observe the [MNE] Guidelines’ recommendations to the fullest extent possible.

Once understood that adhering countries have promised to strive to live up to their agreements and the MNE Guidelines apply to all MNEs operating within these countries, the question of outreach to emerging economies is raised as an essential key to obtaining a level playing field. Wider adherence to the MNE Guidelines is also a means to increase their relevance as a soft law mechanism that is effective in improving global corporate behavior and to generate broader societal support for open markets. As

56. See id. at 75.
57. Id.
59. MNE Guidelines, supra note 1, at 68.
60. Id. at 18.
61. See id. at 68–69.
more non-adhering governments are engaged in the process, the effects of the update will become clearer.62

From an institutional point of view, it is evident that the authors were mindful of the implementation of the MNE Guidelines and its relation to other OECD instruments. For example, paragraph twenty-seven of the Terms of Reference regarding the update provides, as follows:

The relationship between the [MNE] Guidelines and the [OECD] Declaration should be considered. In this context, the interest of adhering countries in non-adhering countries coming closer to the values, principles and standards of the instruments included in the [OECD] Declaration, in particular the [MNE] Guidelines, and eventually adhering to these instruments, and the pros and cons of allowing selective adherence to the [MNE] Guidelines – or other individual instruments presently incorporated into the [OECD] Declaration – should be discussed. It is recognized that any final decision on the question of selective adherence to individual instruments now encompassed in the [OECD] Declaration requires consideration of questions beyond those related exclusively to the [MNE] Guidelines. This fact will have implications for how a final decision would be made on any recommendation to alter or amend the [OECD] Declaration in this respect.63

Such language indicates that questions still remain as to how the updated version of the MNE Guidelines will fit into the broader OECD policy framework relevant to MNEs, but the Working Party of the OECD Investment Committee remains vigilant in its endeavors to promote the utility of the update and the Directorate for Legal Affairs stands ready to provide counsel on the most appropriate institutional approach.

In practice, the MNE Guidelines imply an evolution in public international law in which private MNEs are encouraged to undertake sovereign responsibilities. Interestingly, because the develop-

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62. Bilateral consultations between the Chair of the Working Party of the OECD Investment Committee and non-adhering G20 governments, including China, India, Indonesia, Saudi Arabia, and South Africa, have further developed the process. See Terms of Reference, supra note 39, at 8. Additionally, accession by Russia is under negotiation.

The Russian Federation is engaged in a process of accession to the Organisation and, for this purpose, adherence to OECD instruments, including the OECD Declaration on International Investment and Multinational Enterprises and its Guidelines for Multinational Enterprises. The general policy has been that the Russian Federation as an accession country should be invited to the same Investment Committee and Working Party meeting discussions that the other accession countries are permitted to attend in their capacity as adherents to the OECD Declaration.

Id. at 8 n.11.

63. Id. at 7.
ment and issuance of the MNE Guidelines is a country driven and a multi-stakeholder process, this consensus has the potential to lead to national legislation as the countries involved have each directly contributed to the creation of the Guidelines. Implementation of the MNE Guidelines is determined irrespective of the hard law within the country since they are not legally binding and operate within their own reference. The influence of an international soft law mechanism such as the MNE Guidelines on national hard law is undeniable when domestic legislators have adopted the recommendations through enforceable law.

A few emerging cases under the MNE Guidelines have demonstrated the utility of operationalizing a soft law mechanism that can mimic hard law enforcement outside a state’s jurisdiction. The OECD summarized Rights and Accountability in Development (RAID) v. DAS Air, as follows:

For the first time in any specific instance, the [U.K.] NCP concluded that DAS Air breached the human rights provision by flying into a conflict zone in contravention of international civil aviation regulations. DAS Air was also found to have failed to undertake due diligence with regard to its supply chain; the company’s contention that it did not know the source of the minerals it was transporting was rejected given its ‘intimate understanding of the situation and the conflict.’

Larry Catá Backer analyzed the U.K. NCP procedures applied and found, as follows:

The rules do not contemplate the application of the law of either the place were [sic] the purported breaches occurred or the law of the place where the undertaking has its headquarters or is chartered. Neither do the rules impose other rules or procedures that mimic judicial or administrative proceedings with legal effect. . . . [I]t is precisely because these proceedings are administrative and not binding that this sort of flexibility is possible. [In this way,] any NCP [can use] a ‘rules framework’ detached from municipal law.

In Global Witness v. Afrimex, the U.K. NCP found that “Afrimex failed to contribute to the sustainable development in the region; to respect human rights; or to influence business partners and suppliers to adhere to the [MNE] Guidelines.” Additionally, the U.K. NCP cited the OECD Risk Awareness Tool for MNEs in Weak Governance Zones as a basis for its recommendations.

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67. Id. at 14.
these cases may or may not be a bellwether for decisions to come, they do represent the potential legal implications of a soft law mechanism applied through a multistakeholder approach. It is with this global reach that the MNE Guidelines can seek to raise the bar of corporate governance and level the playing field for MNEs while promoting global standards of human rights and sustainable development.

V. CONCLUSION

International law has become increasingly complex as the plethora of actors has become more diverse and the interconnectedness of economic dependence more apparent. “The activities of [MNEs], through international trade and investment, have strengthened and deepened the ties that join the countries and regions of the world.”68 Supranational governance has blurred the lines between the public and the private sector.

While hard law continues to be the most prominent means to regulate corporate behavior, the update of the MNE Guidelines has demonstrated the effectiveness of soft law implementation of international norms through a multistakeholder approach. The MNE Guidelines “will help the private sector grow their businesses responsibly by promoting human rights and boosting social development around the world.”69 To stay at the forefront of public international law and remain an influential player in global economic governance, the OECD will remain committed to improving its guidelines and other country-owned instruments that seek to promote better policies that in turn foster better lives.

68. MNE Guidelines, supra note 1.

69. New OECD Guidelines to Protect Human Rights and Social Development, supra note 6 (quoting OECD Secretary-General Angel Gurría).