CAN THE OECD MNE GUIDELINES PROMOTE RESPONSIBLE CORPORATE BEHAVIOUR? AN ANALYSIS OF P&O’S PROPOSED PORT IN DAHANU, INDIA

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SUMMARY

P&O (Australia), a subsidiary of P&O (UK), has been negotiating an agreement with the State Government of Maharashtra in India to construct a mega-industrial port at Vadhavan in Dahanu Taluka, a legally protected, ecologically fragile area.

The port would have established a 50-year, unregulated monopoly in the area, and was unlikely to create significant employment in the area. Instead the port would have permanently destroyed the region’s natural resource base, which sustains the livelihoods of thousands of fishers, farmers and indigenous people. Dockers in Mumbai (Bombay) were also concerned about job losses.

The Dahanu coast is the least disturbed part of India’s north-western coast and the port would have adversely affected both marine and terrestrial biodiversity in the area as well as undermined sustainable development in the region. Port construction could not have proceeded unless key legislation and directives from the Supreme Court of India protecting Dahanu’s environment, economy and people had been reversed.

WWF believes that P&O’s actions in connection with the port project breached several elements of the OECD Guidelines on Multinational Enterprises. But despite numerous representations to the UK Contact Point, WWF was unable to persuade the Contact Point to accept its claims against P&O or raise the case to CIME for clarification.

Meanwhile, P&O has recently announced its withdrawal from the project in Dahanu for other reasons. The problems encountered in trying to apply the Guidelines to P&O’s proposed port clearly illustrate some of the specific weaknesses of the Guidelines, such as lack of clarity regarding their scope and application outside the OECD territory, as well as their limited usefulness in encouraging socially and environmentally responsible corporate behaviour. There is need for the Guidelines Review process to address these deficiencies if the Guidelines are to become a genuinely meaningful set of principles and a useful tool in promoting socially and environmentally responsible investment by OECD MNEs.

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1. INTRODUCTION

1.1 WWF-UK believes that P&O’s proposal to build an industrial port at Vadhavan in Dahanu Taluka breached several elements of the OECD Guidelines on Multinational Enterprises (MNEs). WWF was aware of the difficulties in applying the Guidelines to areas outside the OECD, but decided to test their effectiveness in encouraging socially and environmentally responsible corporate behaviour. This was considered to be especially important given discussions about the potential role of the guidelines in the proposed Multilateral Agreement on Investment (MAI).

Since December 1997, WWF has made several representations to the UK Contact Point at the Department of Trade & Industry (DTI) regarding P&O’s breaches of the Guidelines, as have some British MPs. It should be noted that none of the opponents to the project, including WWF, are opposed to the development of industrial ports in principle, but only to the siting of this particular port. While the DTI has always been receptive, they have thus far felt unable to take action against P&O for reasons that reflect some of the major shortcomings of the existing Guidelines. The problems encountered by WWF in trying to invoke the Guidelines are presented in this paper along with suggestions of how some of these shortcomings might be addressed in order to encourage higher social and environmental standards and promote sustainable development.

2. LOCATION OF THE PROPOSED PORT

2.1 Vadhavan, the proposed port site, is located in Dahanu Taluka in the State of Maharashtra, 120 km north of Mumbai (Bombay). Covering an area of 968 sq km and with over 45% forest cover, Dahanu is one of the last green belts along the heavily industrialised west coast of India. Dahanu’s coastline of 35 km is considered to be the least disturbed along the entire north-western coast of India and Vadhavan, the proposed port site, is the biologically richest part of Dahanu’s coast, including over 5 sq km of mangroves [1,2,3,4].

2.2 Dahanu’s economy revolves around its highly productive renewable natural resources. The major economic activities are fishing, horticulture, agriculture, animal husbandry and forestry and there is surplus employment available. Some 65% of Dahanu’s population of 300,000 belong to indigenous tribes, the most predominant being the Warli tribe, whose unique art and culture have become known internationally [1,5].

2.3 Dahanu’s environment, economy and indigenous people are protected by key legislation and land use plans developed as statutory requirements, namely:

- the Dahanu Notification 1991;
- the Coastal Regulation Zone (CRZ) Notification 1991;
- the Regional Plan for Dahanu; and
- the Coastal Zone Management Plan for Dahanu.

These laws and plans restrict changes in existing land use patterns and severely limit industrialisation of Dahanu. In particular, under the CRZ Notification, no construction is permitted in the intertidal area or within 500m of the High Tide Line along most of Dahanu’s coastline including Vadhavan (Annex 1).
2.4 In October 1996, the Supreme Court of India passed a landmark judgement, which further strengthened Dahanu's protected status (Annex 1). Because of concerns about the Maharashtra Government's failure to implement the laws governing Dahanu, the Supreme Court also ordered the constitution of an independent statutory body to oversee the implementation of these laws and the Court's additional directives. In December 1996, the Dahanu Taluka Environmental Protection Authority (DTEPA) was set up and mandated to safeguard Dahanu's ecofragile status (Annex 1).

3. BACKGROUND AND SCOPE OF P&O’S PROPOSED PROJECT

3.1 In December 1996, P&O Ports Australia bid to construct a port at Alewadi, an area 60 km from Dahanu. P&O were the sole bidders for the site, one of six sites tendered for private port development by the Government of Maharashtra. P&O, however, used a clause in the tender agreement to request a shift in the port site from Alewadi to Vadhavan [6], although Vadhavan had been rejected as a potential port site on technical, economic, environmental and legal grounds in a study commissioned by the Government [1].

3.2 P&O’s justifications for requesting a shift to Vadhavan appear to have been primarily related to maximising the company’s profits, with little genuine consideration of the potential social and environmental costs of their proposed investment, or indeed its legality [6]. These included significantly reduced dredging, construction and breakwater costs because of the site’s natural features, in particular the presence of a 12 sq. km rock shelf in the intertidal zone on which the port could be constructed and which offered unlimited potential for future expansion.

An added attraction was the possibility of shipping coal from Australia to supply a nearby thermal power station; although the latter had been instructed by the Supreme Court to switch from coal to gas at the earliest opportunity.

3.3 Despite Dahanu’s special protected status, in February 1997, the Government of Maharashtra conditionally accepted P&O’s proposal to build an all-weather 8-berth international port at Vadhavan, with capacity to expand on demand to 30 berths capable of handling 300 million tonnes of cargo [6]. This was to be India’s first fully private port and when completed would have been one of the world’s largest ports. Phase I of the project was to include facilities for delivering oil, coal and cement, functions that are currently banned under the Dahanu Regional Plan [1,6,7]. The Government’s conditions included that P&O submit a detailed feasibility report to the Government within 6 months and obtain the necessary environmental clearances from the federal government [7].

3.4 Under the extremely favourable terms of Maharashtra’s Private Ports Policy, P&O were to receive:

- a 50-year concession on a Build-Own-Operate-and Transfer policy;
- complete freedom to set port tariffs unlike other Indian ports;
- the ability to arrange labour practices outside existing dock labour schemes which operated at other Indian ports [6].
P&O insisted on having a monopoly on new port development along the coast from Mumbai to Gujarat [8]. The State government also agreed to acquire all land required for new roads and railways behalf of P&O [6]. As this would take place under the Indian Land Acquisition Act, P&O would not have to pay commercial rates for land [1].

4. THE LEGALITY OF THE PORT DEVELOPMENT

4.1 The question of the legality of the port development is of paramount importance, given the precedent this can set for future investment by MNEs outside the OECD area. That a UK-based MNE could even consider establishing an industrial port in an area such as Dahanu raises serious ethical concerns. It was clear to opponents of the project that the port could not be established without overturning several laws and Supreme Court orders. It is also clear that from the outset P&O Australia were at least aware of the contentious legal situation and potential risks of the project:

“Before any development can take place at Vadhavan, the State Government will require to change the Regional Development Plan for the area to reflect the port. The State Government plans to take up this change shortly. A risk factor in this regard is opposition from environmental pressure groups.” [6: p.6]

4.2 In fact, the State Government would have found it difficult to bring about this change given the Supreme Court ruling of 1996 which took decisions about Dahanu out of their direct control [Annex 1]. It is therefore worrying that P&O are reported to have lobbied the government to amend the Regional Plan even though company policy does not allow lobbying of sovereign governments to change their laws. Before P&O’s feasibility studies had been completed, P&O had written to the Maharashtra Maritime Board requesting changes which would have required the Indian authorities to act in contempt of Supreme Court orders:

“...it is of utmost importance that Vadhwan Port is shown on the Regional Development Plan. We had spoken to the Honourable Chief Minister Shri Manohar Joshi in this regard and he had assured us that as he holds charge of the Urban Development Portfolio he will ensure this is done. We now request you to urgently write to the Principal Secretary Urban Development, Mr Nalinakshan, advising him to incorporate this change in the Regional Development Plan of Dahanu Taluka.” [9; note: P&O’s emphasis]

4.3 Furthermore, P&O’s Regional Manager in India has stated publicly that P&O would support denotification of Dahanu and industrialisation of the region as it is more efficient for industries to be located near ports [10]. When asked about the problem of obtaining environmental clearances, his response was eloquent: “Whether the Indians like it or not, it [the port] is required” P&O have also been trying to argue that such a mega-port is not an industry but a service and therefore legal, although this runs contrary to spirit of the laws protecting Dahanu.

5. SOCIAL, ENVIRONMENTAL & ECONOMIC IMPLICATIONS OF THE PROJECT

5.1 As early as November 1997, the BBC’s Newsnight programme revealed that a socio-economic study commissioned by P&O was deeply critical of the port
project. The results of the study indicated that the port would destroy the livelihoods of over 30,000 fishers and their families and would cause irrevocable environmental damage. Not surprisingly, the survey found that only 11% of the population were in favour of the port [11].

5.2 A more recent study has stated that:

“A port of such magnitude with its extensive infrastructural linkages and the resultant spread of ancillary industries would severely affect existing livelihood patterns, production levels and systems.”[1]

The study reveals that the port would adversely affect 27% of Dahanu’s land area and 38% of its population distributed across numerous villages and hamlets. The village of Vadhavan with a population of over 2,000 would be completely destroyed and thousands of people would be ultimately displaced. The fishing, agricultural and livestock sectors of the economy would be severely and permanently affected, and the food security of vulnerable sections of the population, particularly the indigenous tribes, would be seriously impacted. The port would create limited employment opportunities for local people, merely some 1,300 skilled and unskilled jobs during the 36-month construction phase. Thereafter, most jobs would be limited and of a technical nature.

5.3 Several studies confirm the ecological importance of Dahanu’s coast, particularly the proposed port site at Vadhavan with its unique combination of a large intertidal zone, rock shelf and mangroves [1,2,3,4,]. The Dahanu coast is considered to be one of the richest fishing grounds in the Gulf of Cambay (an area between Mumbai and Diu), which is reported to support some 2 million people [1]. The intertidal zone is known be critical to the biological productivity and richness of offshore marine areas. Dahanu has an exceptionally large intertidal zone, which is also important for migratory birds. The highly endangered Olive Ridley turtle (Lepidochelys olivacea) is also known to nest here occasionally. Dahanu retains significant patches of mangroves, which are especially threatened along India’s western coast. The mangroves here are relatively less polluted than elsewhere along the coast and show tremendous potential for regeneration, which could help stabilise coastal erosion. Vadhavan has over 5 sq. km of mangroves comprising the endangered Avicennia marina species, while its rock shelf is one of the largest on the north-western coast and is the most important source of lobsters, prawns and crabs in Dahanu. The combination of mangroves and rock shelf at Vadhavan provide an important nursery for developing crustacean, molluscan and fish larvae, including commercially important species.

5.4 The above studies conclude that the proposed port would cause permanent and irreversible damage to Dahanu’s rich coastal and marine environment, which could affect the entire Gulf of Cambay. The rock shelf and mangroves at Vadhavan would be destroyed, thereby reducing marine biodiversity along the entire north-western coast. This in turn would adversely affect fishing. According to one study, it would be impossible to recreate the complex micro-ecosystems that exist here through compensatory measures. The proposed port is also likely to directly and indirectly reduce air and water quality [1: p 220].

5.5 In the light of the above studies, it is interesting to note that P&O’s original justifications for shifting to Vadhavan also included environmental arguments.
P&O had argued that as the port will be created in the intertidal zone, “the only land that will be required will be for road and rail access. The Vadhavan development will actually create up to 450 ha of new land [i.e. through land fill from blasting the rock shelf] for the port and related services” and “As almost no land is being acquired for the port, existing flora and fauna will not be disturbed”[8].

5.6 P&O’s Rapid Marine Environmental Impact Assessment (EIA) recognises the ecological importance of the rockshelf and mangroves in stabilising the coast and sustaining the rich off-shore fishing grounds [12]. Their study also recognises that some amount of pollution and loss of biodiversity is inevitable as a result of the port, although the report states that precise levels cannot be estimated without further data. P&O’s Rapid Terrestrial Environmental Impact Assessment contains contradictory information about the likely impacts of the port [13]. The information contained in both reports is inadequate, particularly in the latter, which also contains serious errors, omissions and contradictions [1: Chapter 8; 14]. It should be noted that none of P&O’s reports are readily available for public scrutiny as P&O has signed a confidentiality clause with the Government of Maharashtra [15].

5.7 The proposed port development also has disturbing competition implications for the region because of the weak response to the Government’s tenders for private port development in Maharashtra. Had there been better response, the extremely favourable terms offered by the Government would have created few problems, because there would have been adequate competition, both for cargo and labour, between the different facilities. P&O’s insistence on having a monopoly on new port development along the coastline means that they will have a 50-year unregulated monopoly. Such unbalanced and uncontrolled development of vital infrastructure will result in higher port tariffs and lower growth than would occur under a more competitive regime.

5.8 Finally, both P&O’s technical and commercial justifications for selecting Vadhavan and the assumption that such a large industrial port is vital for India’s economic development have been questioned in a study, which evaluates data on sea traffic projections, the potential for modernising existing ports, and the role of other new ports that are planned in the region [1: Chapter 8].

6. P&O’S RESPONSE TO CONCERNS ABOUT THE PORT DEVELOPMENT & THE CURRENT STATUS OF THE PROJECT

6.1 There has been increasingly widespread opposition to the proposed port because of fears about its socio-economic and environmental implications (Annex 2). The People’s Alliance for Implementation of Law (PAIL), a coalition of individuals and groups representing local fishers, farmers, tribal people and environmentalists has been leading the opposition since 1997. PAIL has received considerable support from international groups including WWF-UK. Further support has come more recently from dockers in Mumbai.

6.2 P&O Australia and UK were initially willing to respond to PAIL’s letters and met with a delegation of NGOs in Australia to discuss concerns about the project. However, by the time WWF-UK had become involved in July 1997, P&O had stopped responding to letters from PAIL. It was not until after WWF and a sympathetic British MP wrote to P&O UK that P&O began responding to
PAIL’s letters again. P&O UK have always been co-operative and open to dialogue with opponents of the project which they initiated by inviting WWF to a meeting with the Managing Director of P&O Australia and other representatives of P&O UK, including their Environment Director. P&O UK also met with representatives of PAIL in the UK to further discuss their concerns [15,16].

6.3 In communications with concerned parties, P&O UK have consistently maintained that:

- they are merely responding to an invitation from the Government of Maharashtra to conduct feasibility studies for a port at Vadhavan;

- they have made no commitment to construct a port at Vadhavan and that they do not yet know whether a) a port at Vadhavan will be viable; b) whether the Government of Maharashtra will wish to proceed with the project after considering the results of the feasibility studies c) whether the Government of Maharashtra will wish P&O to be involved of the development proceeds;

- they will not break the law in any way and that they take their environmental commitments very seriously. [15, 16, 17]

6.4 In communications with P&O, WWF and others have repeatedly pointed out that:

- the government of Maharashtra is bound by the laws governing Dahanu;

- even if P&O have been advised by the Government of Maharashtra that the proposed port will not contravene laws or Supreme Court orders, given the weight of evidence to the contrary they cannot absolve themselves from their corporate responsibility to independently determine the legality of their proposal;

- P&O must accept full responsibility for shifting the port site from Alewadi to a legally protected ecologically fragile site, as no site in Dahanu was offered by the Government. Even if the government has accepted P&O’s bid, this must be placed in the context of the enormous economic incentive P&O’s proposal represents for the Government given the overall weak response to Maharashtra’s plans for private port development;

- although conducting feasibility studies for a major port development may not in itself contravene existing laws, they clearly go against the spirit of these laws as does the argument that such a huge port constitutes a service and not an industry;

- P&O’s actions on the ground in India do not correspond with their professed level of commitment to the project in statements to WWF and others in the UK;

- P&O’s portrayal of the Government of Maharashtra’s commitment to the project also does not correspond with the Government’s actions and statements which have always been staunchly in favour of the port;

- if P&O wait long enough, there will be no need to break any laws, as these may well be amended to allow the development of the port [15,16,17].
6.5 P&O had hoped to sign the final agreement to construct the port in December 1997, but their feasibility studies were delayed. The reports of the rapid EIAS were completed by the end of April 1998 but the full feasibility studies were only due to be completed in November. Meanwhile, in September 1998, the DTEPA met to determine the legality of the proposed port, apparently at the insistence of P&O. As a result, he DTEPA issued a 12-page order, which concluded that the proposed port is “wholly impermissible” and “illegal” (Annex 1). Subsequently, WWF and others again called upon P&O to withdraw from the project at Vadhavan. As this paper was being finalised, P&O Australia announced their withdrawal from the project on 12th November 1998. They will continue to be involved with port development elsewhere in India, including Maharashtra. P&O UK have now confirmed this. P&O have cited concerns about raising the necessary finance and the uncertainties arising from the DTEPA’s ruling as some of the reasons for their withdrawal. It is hoped that social and environmental concerns contributed to this decision, although P&O have not explicitly stated this.

However, it is clear that WWF’s attempts to apply the OECD Guidelines in this case have played no part in their decision. Therefore, despite P&O’s withdrawal, WWF’s analysis of the effectiveness of the Guidelines in this case remains relevant.

7. BREACHES OF OECD GUIDELINES

7.1 WWF believes that P&O’s actions breached several elements of the OECD Guidelines relating to competition, employment, industrial relations and particularly environmental practices. Although we were aware of the difficulties in applying the guidelines outside the OECD territory, we argued that the guidelines were applicable to P&O, because operational decisions during the pre-establishment phase of the port development are being made in both the UK and Australia. In our correspondence with the Department of Trade & Industry, we also drew attention to paragraph 3 in the “Introduction to the Guidelines”:

“Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the Organisation, international co-operation in this field should extend to all States. Member countries will give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make, and by minimising and resolving the problems which may arise in connection with their activities”.

The proposed port project ran contrary to both the spirit of the above statement and to its specific recommendations as the project would have adversely affected the welfare and living standards of thousands of fishers, farmers and indigenous people [1,11].
7.2 The specific breaches of the Guidelines are outlined below:

1. General Policies

“1.2. In particular, give due consideration to those countries’ aims and priorities with regard to economic and social progress, including ... the protection of the environment”

By supporting denotification of Dahanu and seeking to build a mega-industrial port inside the protected coastal zone despite the existence of other unprotected port sites which are suitable for development, P&O rejected the aims and priorities of the area [10].

“1.9. Abstain from any improper involvement in local political activities”

P&O’s representatives in India exerted pressure to have the Dahanu Regional Plan amended to allow a port [9]. In December 1997, apparently concerned by the level of local opposition, P&O discussed the matter with Mr Bal Thackeray, who holds no elected post but is the self-appointed ‘Remote Control’ of Maharashtra and leader of the ruling Shiv Sena Party [18]. In WWF’s view this constitutes improper involvement in local political issues.

4. Competition

“Enterprises should...

4.1. Refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example: a/ Anti-competitive acquisitions...

4.3. Refrain from participating in or otherwise purposefully strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition....”

P&O’s insistence on monopoly port development rights in the region would have adversely affected competition, and thus constituted a restrictive agreement under the terms of the Guidelines [8].

7. Employment and Industrial Relations

“7.4. Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country”

By accepting a derogation from the existing dock labour scheme P&O intended to operate to lower standards than comparable Indian employers [6].

9. Environmental Protection

“Enterprises should, within the framework of laws, regulations, and administrative practices in the countries in which they operate, ... take due account of the need to
By supporting changes in this area’s protected status P&O did not take due account of the need to protect the environment [8,9,10].

By proposing to construct the port on the rock shelf in the intertidal zone P&O would have adversely affected the marine resources that sustain the livelihoods and diets of thousands of fishers, farmers and indigenous people [1,2,3,11,12].

P&O’s activities would have been expected to significantly reduce air and water quality as a result of shipping hazardous substances, coal and oil; increased vehicular traffic by road and rail; and increased industrialisation of Dahanu as a direct consequence of the establishment of the port. This was likely to create health problems for the local population, as has already happened in industrialised areas neighbouring Dahanu [1,11].

Dahanu is already prone to severe coastal erosion, which would have been exacerbated by the port [1,4,12].

The net impact of a mega-industrial port and its associated infrastructure would be to reduce biodiversity levels in Dahanu [1, 2, 3,4, 12, 13].

“The impact of the proposed port on the environment (including indigenous natural resources) is foreseeable and had been assessed in a study commissioned by P&O. P&O had failed to take this information into account in their decision making, but instead had sold equity in the project; registered the Vadhavan Private Ports Ltd Company to implement the project; and submitted a 1,300 page port plan to the Government by April 1997 [1,12].

P&O’s feasibility studies were delayed by a year. Despite repeated extensions from the DTEPA to enable P&O to complete these studies, P&O chose not to submit their comprehensive environmental impact assessment to the DTEPA, which was supposed to determine the environmental permissibility of the project [19]. Only the results of their rapid EIAs were submitted and these were considered to be inadequate [1,14]. Furthermore, P&O’s socio-economic study had been completed by November 1997, the final report had yet to be submitted to the DTEPA by August 1998. Therefore, P&O cannot be deemed to have provided adequate and timely information to the competent authorities.
8. THE UK GOVERNMENT’S RESPONSE TO REPRESENTATIONS BY WWF AND BRITISH MPS REGARDING P&O’S BREACHES OF THE GUIDELINES

8.1 WWF-UK first expressed its concerns regarding the proposed port development to the UK Government in November 1997. In December 1997, we wrote to the UK Contact Point for the MNE Guidelines at the Department of Trade & Industry (DTI), enclosing a paper with details of the proposed port development and the areas of the Guidelines which we believed to have been breached by P&O (Annex 3). We stressed that we were not opposed to the development of industrial ports in principle, but only against the siting of such a port in Dahanu. We mentioned the laws and Supreme Court orders protecting Dahanu’s environment, economy and culture, particularly of its indigenous people. We highlighted the adverse environmental, social and economic implications of P&O’s proposal, including the damning results of P&O’s socio-economic study. Additional representations were made during 1998 by both WWF and some British MPs (Annex 3).

8.2 The DTI has always responded promptly to these representations and been very supportive of general principles (Annex 3). They have stressed their commitment to sustainable development; acknowledged the need to regulate the activities of MNEs; emphasised the importance of ensuring that the MAI encourages ‘good corporate behaviour’ with respect to both the environment and sustainable development; and expressed the hope that the OECD Guidelines would be closely associated with the then proposed MAI. The DTI contacted P&O as well as the Australian Contact Point to discuss the alleged breaches. It is not clear whether any additional information was obtained to assess the situation.

8.3 However, the DTI’s overall response has been extremely disappointing and brings into question the effectiveness of the Guidelines in promoting corporate behaviour in line with the principles to which the DTI claims to be committed. The DTI has repeatedly maintained that there has been no obvious breach of the Guidelines by P&O. Furthermore, whilst the DTI has been reluctant to accept or examine the specific issues raised by WWF and others, they have been swift to accept P&O’s statements at face value. Thus, in a letter to WWF the DTI concluded that:

“In our view, P&O have been co-operating fully with the Indian authorities in their examination of suitable sites for the port construction and have been acting in good faith in conducting the feasibility study. We believe that nothing that P&O have done to date can be deemed to be contrary to the Guidelines recommendations relating to, for example, regional development, the protection of the environment or involvement in local political activities.”

8.4 The reasons given at various times by the DTI for their inability to take action on the points raised by WWF and others have included:

- the proposed port development is a private commercial venture between the Government of Maharashtra & P&O and is not funded by the British government and therefore it might be more appropriate for WWF to communicate its views to the Indian authorities;

- there is a certain delicacy in the British Government getting involved because the activities are taking place in a non-OECD country giving rise to
questions of sovereignty and undue interference by the British Government;

as P&O has so far only been conducting feasibility studies in response to an invitation from the Government of Maharashtra, their actions cannot be deemed to have breached the Guidelines;

while the OECD Guidelines do apply to the pre-project planning phase, there is lack of clarity about the scope and the applicability of the guidelines outside the OECD territory and, on a more practical level, the absence of a Contact Point in India makes it difficult to investigate the case fully;

no representation on this issue has been made to the Australian Contact Point;

P&O’s activities do not appear to contradict the economic development goals of the State or National Government of India;

the DTI is not aware of significant opposition to the port; and

the Indian authorities at both national and state-level have given no indication of being in any way dissatisfied with P&O’s conduct.

8.5 In response to the DTI’s comments, WWF have argued that independently of the views of the Indian authorities, both P&O and the UK Government have a responsibility to ensure that the behaviour of MNEs in developing countries does not undermine sustainable development. WWF is confused about the relevance of the guidelines to the feasibility stage of investments, as the DTI seems to have provided conflicting answers to our queries.

WWF have also repeatedly provided evidence of:

- the illegality of the proposed port and of lobbying by P&O to change the laws governing Dahanu;

- the adverse social, environmental and economic consequences of the proposed port development;

- the magnitude of local opposition to the port;

- inconsistencies between P&O’s actions and statements in India and the UK; and

- the fact that P&O’s actions and statements in India did not correspond with those of a company that is merely interested in the theoretical feasibility of constructing a port at Vadhavan.

8.6 At no point have the DTI addressed the following specific concerns raised by WWF and others:

- the ethics of a UK-based MNE selecting a legally protected area for development, when this site had not originally been tendered and when six alternative, less damaging sites were available;

- the enormous economic incentives this project presented to the Government of Maharashtra and the consequent pressures this may have placed on the Government to pursue it;
- evidence of lobbying by P&O for changes in the laws of a sovereign nation
  the negative environmental, social and economic consequences of the project;
- the high level of local opposition to the project;
- the contention that the project would undermine sustainable development in
  the region;
- the fact that P&O would undermine competition by insisting on monopoly
  rights; and
- the fact that P&O would operate to lower labour standards than in other
  Indian ports.

8.7 The DTI has rejected the above allegations *en masse* without providing any
grounds for doing so other than accepting P&O’s statements uncritically. In
their latest response to a detailed representation by a British MP, the DTI has
re-iterated that “…there is no obvious breach of the Guidelines here, and no
action that HMG can usefully take.” However, they do add that:

“International co-operation would imply the need for discussions with Indian
authorities or bodies and there has been no approach from India to enter into
discussion on the issues at stake.”

Finally, they reaffirmed their commitment to making the Guidelines effective and
raised a very significant point:

“This Government is committed to ensuring that the OECD Guidelines become
respected as a meaningful set of principles by all parties concerned in their
application. We … hope that [the] role of the Guidelines in corporate behaviour
will be significantly enhanced, with improved mechanisms for ensuring
implementation and observance. We recognise however that as voluntary
Guidelines, the Government is limited in the options of censure it has at its
disposal even if it were possible and justified to pursue a case such as this to
its fullest extent.”

8.8 The DTI’s response begs the following questions:

How does the UK Government propose to regulate the activities of MNEs
or demonstrate its commitment to sustainable development if it feels
unable to intervene in purely commercial ventures of UK-based MNEs?

As no major decision can be taken on the port development without
approval from P&O UK, surely the UK Contact Point should take
precedence over the Australian Contact Point? Furthermore, having made
a representation to the UK Contact Point calling upon them to work with
their counterpart in Australia, it was not evident to WWF that a separate
representation to the Australian Contact Point was required.

On what basis did the DTI accept P&O’s statement that they had made no
commitment to construct a port at Vadhavan and that in any case such a
port would be in line with Maharashtra’s and India’s economic and
development goals? What information was taken into consideration in
making this decision? Can India’s economic goals be considered in
isolation of other national commitments and priorities such as the Convention on Biological Diversity?

Why did the DTI appear to be relatively unperturbed about the environmental implications of the proposed port project and more persuaded by P&O’s commercial arguments?

Why was greater importance attached to the lack of complaints by Indian authorities than to the tremendous local opposition from other stakeholders, despite the UK Government’s statements on the important role of civil society in achieving sustainable development? Given the magnitude of local opposition to the port, it is disappointing that the DTI has only commented on the absence of complaints from the Indian authorities.

Does the DTI’s reference to the need for discussions with Indian “authorities or bodies” include non-governmental organisations or groups such as the People’s Alliance for Implementation of Law?

While it is clear that sovereign governments have the right to amend their laws following the correct procedures, this was not the situation in Dahanu. Why was there so little concern about the legal issues surrounding the proposed port development?

9. LIMITATIONS OF THE GUIDELINES IN THE P&O/DAHANU CASE & SUGGESTED CHANGES

9.1 WWF’s failure to convince the DTI of P&O’s breaches of the Guidelines and to take appropriate action clearly illustrates the difficulties of applying the Guidelines as “a meaningful set of principles”. Furthermore, the DTI have indicated that in any case the voluntary nature of the Guidelines would have made it difficult for the DTI to take any serious action against P&O. The Guidelines cannot therefore be considered to be a useful tool for ensuring corporate compliance with social and environmental standards and promoting sustainable development.

9.2 The general problems encountered in establishing a case against P&O included the lack of clarity over the scope and applicability of the Guidelines outside the OECD territory, and the lack of clarity over the role and potential actions of the UK and Australian Contact Points. The biggest specific weaknesses of the Guidelines were as follows.

9.3 Although there were serious differences of opinion between key stakeholders regarding the costs and benefits of the proposed port, there was no mechanism available for communicating these views (with supporting evidence), particularly of the local communities, to the Contact Point. This task would have been simplified if UK diplomatic staff in India, especially those charged with trade and investment promotion, were able to act as an arm of the UK Contact Point.

There was also the implication that only the views of the Indian authorities would be acceptable to the DTI. In countries that are experiencing political instability such as India, the policies and actions of each passing government are not necessarily consistent, nor do they necessarily reflect the views of the
The problem of conflicts between different government sectors is well known. In these complex political and economic situations it may be difficult for an individual Contact Point located in an OECD country to determine whether a particular investment is indeed appropriate for that country’s environmental and developmental aims and priorities. It therefore seems vitally important that there is an accepted way in which the opinions of other key stakeholders – or different sections of civil society – can play a part in guiding the activities of MNEs in non-OECD countries.

9.4 It is also essential that the Guidelines specify procedures for mediating between different stakeholders when there are serious differences of view and for evaluating the evidence submitted by different groups. Given WWF’s experience, there may be need to specify what constitutes ‘sufficient evidence’. Guidance is also needed on the relative importance of different dimensions of an investment. For example, in the Dahanu case, the commercial aspects seemed to carry more weight than the legal, social, environmental or ‘sustainable development’ aspects.

9.5 Specifically, the Guidelines should make it mandatory for MNEs to abide by the laws in the countries in which they are investing and specify sanctions for failure to do so or for exerting pressure on sovereign governments to lower social and environmental standards to accommodate investments. A disturbing precedent would have been set for future developments by MNEs in non-OECD states had the laws and Supreme Court directives been amended to accommodate P&O’s project, particularly for areas that are not as well protected as Dahanu.

In some bilateral investment agreements (BITs) - for example, the People’s Republic of China - investor protection and other treaty rights are removed for investments which do not conform to national laws and development plans. Amendments to existing OECD BITs to include such clauses more universally would give a strong incentive for good investor behaviour [20].

9.6 There is also need for greater detail and clarity regarding environmental and social standards perhaps by specifying governing principles, procedures and mandatory minimum standards. For example, when evaluating the suitability of a project, it should be necessary to place it in the context of a country’s international and national environmental commitments and priorities as well as its economic development goals. Similarly, there should be greater transparency regarding the social and environmental impacts of potential investment. For example, is it sufficient that P&O’s Social and Environmental Impact Assessments and other feasibility studies were to be evaluated only by the Indian authorities? Who is to determine the adequacy of such studies and ensure that conflicting evidence from other sources is taken into account?

9.7 Finally, there are human rights issues, which need to be addressed in the Guidelines. There is need for greater clarity on what constitutes ‘sustainable development’ and who is to decide on the most appropriate form of development for an area. For example, the vast majority of the population in the port development area did not wish to have this kind of development thrust upon them and there is no doubt that the port would have ultimately destroyed the lifestyle and culture of the area’s indigenous people.

9.8 In summary, the experience of the above case suggests that during the review of the Guidelines there is need to:
- clarify the scope and applicability of the Guidelines outside the OECD territory, and the potential to use diplomatic staff from the investor’s home country to facilitate investigations of individual breaches;

- clarify the role of the Contact Point and the actions to be taken when investigating alleged breaches of the Guidelines;

- agree sanctions and other measures available to the Contact Point to address proven breaches of the Guidelines;

- develop mechanisms for non-OECD citizens or groups to invoke the Guidelines effectively;

- develop mechanisms for mediation of disputes between key stakeholders;

- include mandatory safeguards against pressure from MNEs to lobby for the reduction of social and environmental standards;

- include mandatory provisions regarding minimum legal, environmental and social standards to be observed which could be linked to existing BITs; such as abiding by existing standards specified by law in the country of investment.
REFERENCES


15. “Summary of Principal Matters Discussed at a Meeting between P&O and WWF-UK in relation to the Port Feasibility Study at Vadhavan, Dahanu Taluka, Thane District, Maharashtra State, 2 December 1997”. Note prepared by P&O UK and agreed by WWF-UK.


17. Various letters between P&O UK and PAIL, WWF and several British MPs in 1997 and 1998.


19. Order issued by the Dahanu Taluka Environmental Protection Authority on 19th September 1998.


ANNEX 1 LAWS & DIRECTIVES GOVERNING DAHANU

1. The Dahanu Notification, 1991

The whole of Dahanu Taluka was declared as “ecologically fragile” under the Dahanu Notification issued on 20th June 1991 by the Ministry of Environment & Forests under the provisions of the Indian Environment Protection Act, 1986. Only two other areas in India have been designated as ecologically fragile under the Environment Protection Act. Apart from ecological factors, an important consideration in awarding this status to Dahanu was its large indigenous (tribal) population who make up 65% of the total population.

The Notification required the Government of Maharashtra to prepare a Regional Plan for Dahanu based on existing land use patterns, clearly demarcating green areas, tribal areas and other environmentally sensitive areas. All land use changes in such areas were prohibited. The notification specifies the kinds of industries that are permitted and restricts industrial development within Dahanu to a maximum total area of 500 acres (200 ha) in locations to be specified in the Regional Plan. All industrial units were to be located at sites that are environmentally acceptable and a buffer zone of 25 km was to be kept free of industries around the outer periphery of Dahanu Taluka.

Unfortunately, the Notification only provides an illustrative list of banned industries and does not mention port development, but it is clear from the kinds of industries that are permitted or banned that a mega industrial port could not be permissible.

2. The Regional Plan for Dahanu

A Regional Plan for Dahanu was eventually prepared by the Government of Maharashtra in 1996. The objectives of the Plan are:

- to curb agricultural activities and to permit the same within specified areas;
- to ensure that the scenic beauty and the coastline is not spoilt;
to maintain the ecological balance in Dahanu Taluka.

3. The Coastal Regulation Zone Act & the Coastal Zone Management Plan

In 1996, Dahanu’s coast (barring Bordi) was given the highest level of protection possible under the Indian Coastal Regulation Zone Notification of 1991 when it was classified as CRZ-I (i) in the Coastal Zone Management Plan prepared by the Government of Maharashtra. The following conditions apply to CRZ-I areas:

- no new construction within 500 metres of the high tide line;
- no construction activity in the intertidal area (i.e. the area between the Low Tide Line and the High Tide Line) except facilities for carrying treated effluents and waste water discharges into the sea, facilities for carrying sea water for cooling purposes, oil, gas and similar pipelines and facilities essential for activities permitted under the CRZ notification.

4. The Involvement of the Supreme Court of India & NEERI’s Recommendations

The Government of Maharashtra’s actions have not always conformed with the requirements of the laws governing Dahanu. As a result, in 1994, a writ petition was filed in the Supreme Court of India by the Dahanu Taluka Environmental Welfare Association and others seeking, inter alia, the proper implementation of the Dahanu Notification.

Subsequently, the Supreme Court repeatedly upheld Dahanu’s special environmental, economic and cultural status through a series of orders and directives. In 1996, the Supreme Court directed the National Environmental Engineering Research Institute (NEERI) to examine the Dahanu Regional Plan and, amongst other things, verify its conformity to the Dahanu and CRZ Notifications, assess its environmental viability, offer suggestions to protect the ecology of Dahanu and identify permissible types of industries. In October 1996, a landmark judgement was passed in which the Supreme Court:

- upheld the Dahanu Notification of 1991 once again;
- ordered preservation of the indigenous culture of Dahanu;
- directed that the preferred economic activities in Dahanu are mariculture, silviculture, agriculture and horticulture as recommended by NEERI;
- ordered the Government of Maharashtra to implement the Regional Plan for Dahanu, subject to the Dahanu and CRZ Notifications, along with NEERI’s recommendations;
- ordered that the Precautionary Principle and the Polluter Pays Principle be applied to Dahanu;
- directed the Ministry of Environment & Forests to constitute an independent statutory body to monitor the protection of Dahanu’s eco-fragile status.

5. The DTEPA

In compliance with the Supreme Court orders, the Dahanu Taluka Environment Protection Authority was established in December 1996 by the Ministry of Environment & Forests. The Authority comprises a committee of civilian experts. The Authority has been fully empowered by the Supreme Court to fulfil its mandate,
which includes ensuring implementation of the laws governing Dahanu as well as compliance with all relevant orders of the Supreme Court and the Bombay High Court.

In November 1997, the Ministry of Environment & Forests referred P&O’s proposal to construct a port in Dahanu to the Authority for examination. Since then, the DTEPA has held a series of hearings during which both P&O and opponents to the port have had the opportunity to argue their respective cases and submit supporting evidence.

Finally, on 19th September 1998, the DTEPA issued a 12-page order that had been passed unanimously by its 11 members. Many of the points that had been made repeatedly by opponents to the project were upheld in this order, which concluded that construction of a port in Dahanu is prohibited under the Dahanu Notification, the Coastal Zone Regulation Notification as applied to Dahanu and various Supreme Court orders.

The Authority also states that although the word ‘industry’ is not defined in the Dahanu Notification, that “such a vast port, will obviously fall within the ambit and scope of the word ‘industry’”. The Authority confirms that the Dahanu Regional Plan can only be modified in conformity with the provisions of the above two notifications and related Supreme Court orders. The Authority stresses the binding nature of Supreme Court directives and concludes that “as the position stands today, the construction of such a Mega Port at Vadhavan is wholly impermissible and, therefore, will be illegal.”
ANNEX 2: SUMMARY OF LOCAL OPPOSITION TO THE PORT PROJECT

On 17th February 1997, P&O Ports Australia was awarded a letter of intent by the Government of Maharashtra to construct an all-weather modern port at Vadhavan in Dahanu Taluka. Within a week, the Dahanu Taluka Environmental Welfare Association (DTEWA) had filed a complaint with the Ministry of Environment & Forests, stating that the proposed port would violate the Dahanu Notification, the CRZ Notification and Supreme Court orders. (DTEWA is a local NGO with over ten years experience of working on environmental issues in the area.) DTEWA also filed a complaint with the Dahanu Taluka Environment Protection Authority (DTEPA).

In May 1997, thirteen non-governmental groups representing over 50,000 local fishers, indigenous people and environmentalists formed the People’s Alliance for Implementation of the Law, Thane (PAIL) to oppose the proposed construction.

In November 1997, the draft of P&O’s own socio-economic study found that only 11 percent of people in the project-affected area supported the proposed construction.

Also in 1997, a resolution was passed by Dahanu Taluka, representing all 174 villages of the region and a national-level resolution was passed by the “All India Farmers Congress” opposing P&O’s proposed port.

In January 1998, a large boat rally with over 200 boats was held by local fishers led by the Convenor of the National Fishworkers Forum, Mr Thomas Kocherry.

In January 1998, a resolution was passed by 20,000 indigenous people from the State of Maharashtra and three neighbouring states at the annual conference of the Adivasi Ekta Parishad, a forum of organisations representing the region’s indigenous people. Another resolution was passed at the same time against the enforced ‘development’ of indigenous (“tribal”) regions including dams, highways, industrialization, and urbanization.

In April 1998, dockers from the ports at Mumbai and the fishers from the entire coast of Maharashtra organised a protest against P&O’s proposed port at Dahanu. The National Fishworkers Federation again supported the demonstration.

In April 1998, the ‘Hindu Business Line’ reported that The All-India Port & Dock Workers’ Federation threatened P&O Australia Ports Pty Ltd with action world-wide, through the International Transport Workers Federation (ITF), if it did not give up its plans for the port at Vadhavan, Dahanu.

In August 1997, a protest meeting was organised at Vadhavan on Indian Independence Day which was attended by local villagers, representatives of the dockers unions from Mumbai and local environmentalists.